EXAM NUMBER ___

Evidence
Professor Seaman
Final Exam – Fall 2002

INSTRUCTIONS FOR PARTS II AND III

Part II consists of one essay question containing three subparts. *You should spend 80 minutes answering part II.*

Part III consists of two choices. You should answer **only one** of the questions in Part III. *You should spend 40 minutes answering Part III.*

If you are handwriting this exam, please answer each essay question in a separate bluebook, skip lines between writing, and write only on one side of each page. Please write legibly – if I cannot read your answer, I cannot give you credit for it.

Please write in ink, and begin your answer to Part III in a separate bluebook.

If you are typing, please double-space your answer, and begin your answer to part III on a new page.

If any facts are not given in Parts II or III that you think are necessary to answer the questions, please state the facts and explain their relevance. In scoring the exam, each part will be weighted in proportion to the time suggested for completing it.

If you begin to run out of time, but wish to note issues that you had planned to address, you may outline the remainder of your answer. You will receive partial credit for correct information provided in this way. Under no circumstances may you continue to write after the time allotment for the exam has ended.

PART II

Suggested time: 80 minutes (1 hour and 20 minutes)

Defendant Fred Flintstone is on trial for the rape and murder of his neighbor, Betty Rubble. He is being prosecuted in Bedrock state court. Bedrock is a fictional state in the U.S. that has adopted the Federal Rules of Evidence and follows federal decisional law on evidentiary issues, including privilege.

Early in the trial, certain facts were demonstrated by evidence offered without objection: Betty Rubble was found dead in her home on the evening of October 3, 2002. Her body was discovered by her husband, Barney, when he got home from work at approximately 6:00 p.m. Medical evidence showed that she had been killed with a blow to her head with a blunt object. The medical examiner determined that Betty had had sexual intercourse within 5 hours of the time that she was killed. According to expert testimony, DNA from the semen found on the victim matched that of the defendant.

The following additional evidence is proffered at trial:

(a) The prosecution proposes to call as a witness defendant's wife. She would testifiy that one night, approximately three weeks before Betty was killed, Fred had said to her as they were getting ready to go to sleep, "Wilma, if I do anything terrible, I hope you can find it in your heart to forgive me some day." According to Wilma's proffered testimony, Fred said this rather loudly, and she told him to be quiet so that he would not wake their 10 year old daughter, Pebbles, who was asleep in the next room. She would further testify that when Fred came home from work on the evening of October 3, he seemed "agitated," "uneasy," and "freaked out," and that he refused to eat dinner and went straight to bed.

Question II(a): Please discuss the objection(s), if any, *reasonably raised* and the proper ruling(s) to be made with respect to the proposed evidence in the preceding paragraph.

(b) The prosecution wishes to introduce a diary that was found in the nighttable drawer next to defendant's bed. The diary contains the following handwritten statements: "Secret lunch today with Schmoopie. Afraid BR getting suspicious;" "Great time today with Schmoopie. Yabba dabba doo!!" "Schmoopie upset – wants to break it off. So angry I could kill her!"

Barney Rubble, the victim's husband, testifies for the prosecution that he is familiar with defendant's handwriting from having seen him write grocery lists on one or two occasions, and that in his opinion the writing in the diary is defendant's. He further testifies that defendant often called him (Barney) by the nickname "B.R." On cross-examination, defense counsel asks Rubble the following question: "Isn't it true that you found out that defendant and your wife were in love and planning to run off together?" The witness answers, "No, my wife would never do that. I trusted her 100 percent."

Later, the defense calls Sam Soapstone, Rubble's close friend, who testifies that Rubble told him that he had found out that defendant and his wife were having an affair.

Question II(b): Please discuss the objection(s), if any, *reasonably raised* and the proper ruling(s) to be made with respect to the evidence in the preceding two paragraphs.

(c) Defendant takes the stand and testifies in his own defense. The substance of his direct testimony essentially is as follows: He and Betty Rubble had been having an affair for about a year before she was killed. He admits having seen her and having had sexual relations with her on the day of her death, but states that he had left her house at approximately 3:00 that afternoon and that she was alive when he left. He testifies that she had told him on that day, "Barney knows about us. I am going to tell him that I'm leaving him. I'm afraid he is going to kill me when I tell him."

On cross-examination, the prosecution seeks to question the defendant with respect to the following: (1) a prior accusation of date rape based on an incident that occurred when the defendant was in college, 21 years earlier. The alleged victim had lodged a complaint with the University police but then had withdrawn it and no further action had been taken against the defendant; (2) a juvenile adjudication in which the defendant had been convicted of a violent assault had been sentenced to two years in a juvenile detention facility; (3) an incident a few years earlier in which the defendant had gotten in an argument with a neighbor and threatened "to bash his head in."

Question II(c): Please discuss the objection(s), if any, *reasonably raised* and the proper ruling(s) to be made with respect to the issues raised in the preceding two paragraphs.

END OF PART II
TURN TO NEXT PAGE TO BEGIN PART III

PART III

Suggested time: 40 minutes

ANSWER EITHER III(A) OR III(B). DO NOT ANSWER BOTH QUESTIONS.

Note: There are many potentially "correct" answers to the following questions. I do not have a preconceived idea of what these essays should look like. If you feel more comfortable focusing on doctrine and the differences between the common law rules and the Federal Rules of Evidence, that will go a long way toward answering these questions. If you feel more comfortable focusing on the policy or philosophical aspects of the questions, that will also go a long way toward answering these questions. Some combination of the two approaches would be ideal.

Question III(A):

Professor McCormick speculated that "we may eventually see our hearsay canon restated in this fashion: a hearsay statement will be received if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances."

Jeremy Bentham, writing in the 19th Century, had an even more liberal proposal: all evidence should be admitted unless the judge finds that it is irrelevant or otherwise a waste of time.

Compare the above hearsay approaches to the scheme implemented by the Federal Rules of Evidence. In your answer, you should set forth and evaluate the theoretical and policy reasons supporting each approach, and then state which scheme you think is preferable, and why (reasons should go beyond ease of learning for law students!). Wherever possible, offer concrete examples to support your points.

Question III(B):

Expert testimony has become increasingly important in modern litigation. Courts and policy-makers have struggled to come up with ways to ensure the reliability of this evidence, to present it in a way that is helpful to the trier of fact, and to avoid usurpation of the traditional functions of the court and the jury.

Discuss the approach of Article VII of the Federal Rules of Evidence in light of the above objectives, and evaluate the effectiveness of the Federal Rules scheme as compared to the common law approach to expert testimony. Wherever possible, offer concrete examples to support your points.

END OF EXAM

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Question II(a)

The defendant can make an objection to Wilma's testimony on grounds of mariatal privilege. Both the testimonial and communications privilege are implicated in this fact pattern.

The defendant may not assert the testimonial privilege to prevent his wife from testifying. The witness spouse holds the testimonial privilege and can decide if they would like to testify against their spouse. Prior to the Trammel decision, either spouse could invoke the privilege, but under current law, only the witness spouse may invoke the privilege. In this case, Wilma is free to testify against Fred if she chooses. If she chose, she could invoke the privilege in this case because it is a criminal case in which the witness' spouse is the defendant, and the witness and defendant spouse are currently married.

Since Wilma did not invoke the testimonial privilege, she is free to testify about matter that are *not* confidences communicated during the marriage. Fred can object to any testimony that includes such confidences. This is the communications privilege and both spouses hold this privilege. Wilma's testimony about the statement made to Wilma when they were getting ready to go to sleep should be excluded if Fred objects on privilege grounds. The statement was made during the course of the marriage and can be considered a confidential communication. The statement would not be protected if it was made in the presence of a third party. The prosecuation may argue that the privilege does not apply since the statement was made in a loud voice while their daughter was asleep in the next room. The statement would not be protected ff made in the presence of a 10-

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year old child. However, the defendant could also make an arguement that the statement was not made in the child's presence since (a) she was in another room, and (b) she was asleep. why ruling?

If Fred invokes the communications privilege, the statement Fred made to Wilma should not be admitted. However, the communications privilege does not apply to observed actions that are not meant to be communications. For this reason, Wilma's testimony about Fred's mannerism, that he was agitated, uneasy and freaked out when he came home from work on Oct. 3 would be admissible. The prosecution could argue that Fred did not mean to assert anything by these actions so they were not privileged communications, they were merely observed actions outside the scope of the communications privilege. The defendant can probably not make a hearsay objection to this testimony either on the grounds that the defendant's actions were non-assertive, so not within the definition of hearsay.

The court should weigh the probative value and the unfair prejudice under Rule 403 before admitting Wilma's testimony about Fred's mannerisms on the evening of Oct. 3. The probative value of the statements is very high while the prejudice is low, so the testimony should be admitted.

Question II(b)

The defendant could object to introduction of the diary on the grounds that it is not properly authenticated or that it is hearsay.

On the issue of authentication, a piece of evidence is authenticated under Rule 901(a) if there is evidence sufficient to support a finding that the matter in question is what its proponent claims. The prosecution claims that the diary is Fred's diary. The diary can be authenticated by showing its distinctive characteristics such as contents and substance under Rule 901(b)(4). This was done by Barney's testimony that Fred often called him "B.R." and there was a reference to "B.R." in the diary. This evidence, taken in conjunction with the circumstance that the dieary was found in the nightable drawer next to Fred's bed serves to authenticate the diary. In addition, the diary can be authenticated by non-expert opinion on handwriting (Rule 901(b)(2)). Fred testified that he was familiar with Fred's handwriting before the litigation and that in his opinion the handwriting in the diary matched that of the defendant. Based on this evidence the court should overrule any objections to insufficient authentication and admit the diary. There can be no objection based on the best evidence rule because the diary is the original.

Since the diary is authenticated, and the best evidence, the next issue is whether the statements in the diary are inadmissible hearsay. The diary contains statements that are offered for the truth of the matter asserted, that Fred was having an affair and that he was upset with "Schmoopie" for wanting to break it off that he could kill her. The statements may come in as an admission of a party-opponent which are exempted from the hearsay definition under the federal rules. However, the defendant does not admit in the diary to having an affair with *Betty*. Fred merely admits that he was having an affair and that he was angry enough to want to kill his lover.

The court would have to weigh the probative value of these statements against the unfair prejudice under Rule 403. If the probative value is substantially outweighed by the

unfair prejudice, the statements should be excluded. The statements are highly prejudicial because they show that the defendant was having an affair with somebody and that he was angry with that person enough to want to kill them. The probative value is also high. The diary does not indicate who Fred was having an affair with, yet it did make a reference to somebody who could be Barney. This is a close call, but I would admit the statements.

The prosecution could object to the defense's questioning of Barney on cross-examination on grounds that it is a leading question or that it is outside the scope of the direct examination, but both objections should be overruled. Although it is a leading question, leading questions are permitted on cross-examination. Also, the question is probably outside the scope of the direct examination, however, the question deals the witness' perception or bias and is used for impeachment. Questions used for impeachment purposes are always permitted on cross-examination even if they are outside the scope of the direct examination. If the Barney knew about his wife's affair with the defendant, this would show bias and problems with perception. When the witness denies having known about the affair, the defense counsel sought to impeach his testimony by contradiction, but using extrinsic evidence to show that the witness did know about the affair so he was lying. The extrinsic evidence (testimony by Sam Soapstone) is permissible because the whether Barney heard about the affair is not a collateral matter. This is not a collateral matter because the defense would be permitted to show that the victim's husband knew about the affair even if it wasn't brought up for impeachment purposes. Barney's knowledge of the affair could go to show that Barney may have had a motive for killing Betty. Sam Soapstone's testimony is not hearsay

because it is not offerend for the truth of the matter asserted, it is offered to show the effect on the hearer. Whether or not it was true, it shows that Barney thought his wife and Fred were having an affair.

Question II(c)

Barney's testimony concerning Betty's statements must be analyzed under the hearsay rules. The first statement, "Barny knows about us," is hearsay and does not fall under any exception so it should be excluded. The second statement, "I'm going to tell him that I'm leaving him" is hearsay, but it is admissible under 803(3), the mental state exception. It is a statement of intent. A statement of a person's plan or intention is an expression of their then-existing mental state and can be used to show that the declarant did what they intended to do (Hillmon doctrine). The third statement, "I'm afraid he's going to kill me when I l him" is also hearsay, but this is also admissible under 803(3) because it shows the declarant's then-existing mental-state, that she was afraid. The second and thirde statements should be admitted.

The prosecution may not introduce evidence of the defendant's character on cross under Rule 404(a) because the defendant did not "open the door" for this type of testimony on direct. However, to impeach the defendant, the prosecution can ask about prior convictions and prior bad acts if they are probative of truthfulness. The question about the prior accusation of date rape may be admissible if the judge determines that it is probative of character for truthfulness. However, this evidence is probably not probative of truthfulness so it cannot come in under 608(b). Also, it is highly prejudicial. It is not a

prior conviction so it cannot come in under 609, and it cannot come in under 413 or 414 because this is not a criminal sexual assault case or criminal child molestation case.

Evidence of juvenile adjudications is generally not admissible under 609(d). The court has discretion to admit it for a witness other than the accused in the criminal case. Since it is being offered against the accused it should not come in. The evidence of the defendant's threatening to bash his neighbor's head in may only be inquired into if probative of truthfulness under 608(b). This incident would probably not be considered probative of truthfulness so it should not come in. It is not admissible under 404(a) because the defendant did not put his character for peacefulness in issue. It would potentially be admissible under 404(b) if it is used to show modus operandi. However, threatening to bash a person's head in and actually bashing a person's head in are not the same thing. This question would only be admissible under 404(b) if the defendant had actually killed or injured someone in the same manner in which the victim was killed.

Question III

Professor McCormick's statement seems to be a fair statement of how the rules of evidence are approached in the federal rules. See Blue Book

Question III

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II. A

The issue is whether the testimony by W is admissible. D will object that the entire testimony by the W is inadmissible. He will claim this on the basis of the adverse testimonial privfielge in confidential communications. These are both recognized by the federal common law of privilege. However, teh prosecution will be able to sufficiently object that the Hawkins rule (both defendant soupse and witness spouse can claim) is not applicable (since we are under jurisdiction that follows federal rules). The Supreme Court has ruled that in Trammel teh adverse testimonial privilege only belongs to teh spouse witness and hence a wiling spouse witness cannot be foreclosed from testifying against teh defendant. Hence, Wilma can testify.

However, F can object that even adverse testimony may be given by the wife, it may not concern confidential communications (confidential communications not at issue in Trammel). Hree he will argue that the statement if I do anything terrible, was in confidence. Teh marital privilege of confidential communications applies in criminal proceedings, both spouses are the holders, it only applies to communications that are to be confidential i.e. that are made with a reasonable expectation of privacy. Here F will argue that W cannot disclose teh if I do anything terrible statement since he is claiming teh privilege which he is permitted to do and the communication was meant to be confidential – he will argue that it was said in teh bedroom while daughter was asleep – communications in general will be kept confidential so long as there is a reasonable expectation of privacy. F will argue that this reasonable expectation of privacy was met by the f act that teh only 3rd person in teh house was the daughter adn she was supposed to be asleep in another room.

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However prosecution could assert that there was no reasonable expectation of privacy since teh dauther was in teh next room adn hence likely to hear. Assuming that this position prevails and the communication is not deemed confidential then, F can raise the argument of hearsay - that this is an out of court statement offered to rpove the truth of the matter asserted – i.e. that he hoped if he did do anything terrible that she would forgive him. However, under the federal rules the prosecution will argue that statements made by a arpty offered against that party are exempted from teh hearsay rule under 801.d – hence since F did say this then it may be brought in.

F could possibly make a relevance objection to the statement about doing something terrible – that it neither tends to prove or disprove anything b/c it was 3 weeks before. However this objection is easily overcome to the extent that all that relevancy requires is that it tend to prove of disprove in anyway – hence prosecution will argue that it tends to swho that he was thingking about doing something "terrible" AND WHEN someone thinks about something they are more likely to do it.

Teh last objection that F can raise about the statement is that it is unfairly prejudicial under 403. Under 403, evidence is to be excluded if the irsk of unfair prejudice substantially outweighs the probative value of the evidence. Here F will argue that this is unfair prejudice (tendency to suggest basis fo decision on improper basis, generally emotionally) – it just suggests to teh jury that F might have bad thoughts and hence t hey may punish him for that and it si really of little provabive value on teh issue of killing wife. There may be an argument here but 403 is highly weighted in favor of admissibility and so it is likely that since it was sem-close in time to death 3 weeks and

does show intent to do something bad – that maybe the probative value does outweight the risk.

F could make an objection to teh testimony about his behavior on teh night of October 3rd – probably any communications he made (if in confidence adn not in front of daughter) would be privileged. However, since Wilma is not foreclosed from giving adverse testimony under Trammel – she may testify to things other than communications (since the confidential communicatiosn only applies to communcications) – prosecutor will argue that F's general appearance that evening (uneasy, etc.) is not a communication but rather a general appearance that anyone could have observed. Aslo freak out is an action and not necessary acommunication – hence this should be admissible despite teh confidential marital communications privilege calimed by F. Similarly refusing to eat dinner is an action and not a communication.

Furthermore, W seems to have first hand knowledge as to everything to be testified to.

F will also object on teh basis that the testimony of uneasy and freak out and agitated is inadmissible lay opinion testimony. However, under 701 a lay witness is permitted to give testimony if rationally based in perception, is helfpult ot the trier of fact in determining a fact in issue or clarifying the wtiness's testimony and not based on specialized knowledge. Here, F could argue that W is required to give the rudimentary facts leading to her conclusions. However, unlike common law where strictly prohibited except where encecessary, opinions in federal court come in on helpfulness standard. Here it si not very easty ot explain why someone would look agitated (i.e. all the mannerisms) or uneasy. Furhtermore, freaked out – while this is vague and may be some

more specific facts could be given, it helps to clarify the teestimonyt that he was not behaving rationally at the time. Fuerthermore, even at common law these would have come in (irrational conduct of another, emotional appearance of another).

II.B

F will object to the diary as introduction into evidence as hs – adn as not authenticated.

Teh diary will be admissible so long as it is authenticated and the statements inside are hs exceptions or exempt from teh HS rule.

First the statements contained therein – assuming that teh diary is properly authenticated as F's then teh statements within are admissions offered against party opponent and exempt under 801.d – hence they can come in and htey are not barred by teh opinion or whether or not they have 1st hand knowledge (so F cannot object that statement of BR getting juealoous even if he did not know her or that they were past actions etc.) – so assuming authenticated not hs and can come itn. Furthermore an objection cannot be had on teh basis that these are opinions b/c admissions against party opponent is not bound by the prohibition of opinions – so his opinion that BR was suspicious is admissible – all of this may be admissted as substantive evidence.

F could also object on teh basis of relevance – we do not know who schmoopie is. However, this is a question of conditional relevance for the jury – if the prosecution offeres or promises to offer evidence that a reasonable jury could find that Schmoopie is betty it should be admitted – and hten it will up to the jury oto decide whether Schmoopei is really Bett.

Authentication of othe dairy - Under 901, all real evidence must be authenticated – there must be sufficient evidence fo teh reasonable jury to find that a adocument is what it purports to be. Under 901, a letter or document that is handwritten is sufficiently authenticated when a nonexpert lay person who acquires familiarity not in connection with litigation with the handwriting of the author testifies as to his opinion – Here Banry knows the handwriting of F from the grocery sotre and it was not in conection wiht litigation . Hence this should be ussifienct – furthermore Barney ash testified that F often called him B.R. this shows a distinctive way of speaking which in connection with recogniation of the handwriting should be sufficient.

Note: I am assuming using the original and hence Best evidence rule is ssatisfied – b/c they are attempting to prove teh contents of the document.

D could raise an bojection to the diary as unduly prejudicial under 403 – however this is unlikely to prevail – it is very probativfe – if it is F's since talks about affair etc. and thath he was very angry – this all very probative = also not clear that the prejudice would be unfair this is reliable evidence really – so it does suggests d's thoughts adn feelings this is nto like propensity inference.

Prosecution could raise an objection to the cross examination question as leading but these are permitted on cross. Prosecution will also object on basis of 412 introduction of sexual history of the person – 412 prohibits the intorudciton of any evidence that the victim engaged in sexual intercourse – however, this is necessary for the defense and probably would be unconstitutional not to allow in (see exception to 412 – allowed in if it is unconstitional any kind of evidence) . Furthermore F will argue that this goes to

impeachment – i.e. that barney has a motive to lie and can't bge trusted since he killed his wife. He will also argue that under 607 the credibility of a witness can be attacked at any time. Hence, he si merely showing that B may have a motive adn relationship with the victim that damages his credibility. F could aruge that he is merely authenticating – but agains 608 says that it can be attacked at any time.

Prosecution will object to S's statement on the basis of hs – hre out of court statement offered to rpove truth of the matter asserted- that B did know that his wife and he were having an affair – however, F will rebut that this is solely for impeachment and is not a hs purpose. Furthermore, F's atty had a good fiath beleif that he said something different so it was permissible.

Atty will also object that teh introduction of the prior inconsnetistent statement by S was improper. However under 613.a the examinaer is allowed to introduce extrinsic evidence of prior statements that are not collateral without disclosing to the witness the statemente before so long as they are able to rebut or explain (il.e. don't become unavailable). So as long as B remains avaialbel it is up to the prosecution to recall him to the stand adn not the defense – so this is permitted. Here B's denial of knowledge of the affair was material (since it goes to identity) furthermore, hence since not collateriall – he can impeach by contradiction by extrinsic evidence (the rule against impeachment by extrinsic evicdnce on collateral lmatters only pertains where the evidence not iundependetly relevant – teh defense can alwasy show the possibility that somebody else and nto the defendant killed teh victim) – here identity is material. However, the F should ask for a limiting instruction as to S's testimony under 1-5 since doesn't memet the requirements of 801.d (not under oath) – if doent' issue coudl be reversible error –

that iti should only be considered for impeachment and not for its substantive truth he realy knew was having affair.

Furthermore, Prosecution will rebut that under 412 – for crimes of sexual misconduct the sreputation and the allegations of sexual conduct are never admissible in a criminal proceeding. However, F will sufficiently rebut that not allowing this testimony in about the possible knowledge of B's knowledge of affair violates the constitutional right of D to present a sufficient defense – here the evidence is extremely relevant as ot identifity – and it is particularlay necessary in light of the fact that the semen was the defendant's and hence needs to be able to rebut otherwise logical inferences that he did kill and rape betty that come from the DNa evidence. He will argue that he needs to be able to show that it is possible that barney came, betty told him aboiut the affair, and then killed here b/c enragted. Olden suggeststst that where central to the defense conduct of the D must be let in if it would violate.

II. C.

First the evidence of the sex can come in under 412 b/c it states that there specificn instances of conduct of V with regard to D can come in with respect to consent – so this okay under 412. D admits to the intercourse and now is merely saying she consented furthermore it is a psecif instance – I am assuming that this affair would qualifyt and that he would testify when it began etc.

However, tthe prosecution will object to V's statements as hs. First will argue that the statment "barney know" there is no personal knowledge – adn it is offered to prove teh truth of the matter asserted – ie. That barney did now. F Could attetpt to argue then

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existing mental state but that prosecution will rebut that statements under this exception anre not permitted to use to rpvoe fact remembered or believed so this is not permissible – since would bproving ath Baraney knew. This probably should not come in since tending to show that Barney knows and that there is no exception The Iam going to tell him that I ma leaving however is permissible becomes under then exisstng mental state of intent – i.e. under the HIllomon doctrine can use statements of future intent to prove subsequent conduct – so could prove to show that betty tried to leav3e braney got mad and killed here.

Prosecution will object to last statement (I am afraid b/c I think he will kill) on the basis of attempting to impermissibly prove the subsequent conduct of 3rd party – under then exisitn mental state can't use to prove fact remembemreed or beieved – hence can't show that he was going to kill her. However F will argue that it mainly goes to her fear which does fit under then existin gmental state and hence does go – teh other statements should be admissible under Adkins v. Brett (as causes of teh mental state) so long as a limiting instruction is give nt aht they are suppossed to be addmisisble only on state of mind of ht edeclarant. This is a close call – if judge lets entire statement in shoudl be given a limiting instruction that only ggoes ot the V's state of mind and not that he really sould kill her – but this could also be too prejudicial – this coudl be excluded under 403 – the probative value is less since it sian hs statement and it is highly prejudicial to the prosecution since suggests a different D.

Prior Date rape: F will object that this violates 404bs ban on the use of past bad acts and other crimes to prove action n conformity therewith however the prosecution iwll

succesuffulyy relbut that R.413 lets any evidence tending to prove tat teh defendant commited a prior act of sexual misconduct on any matter relevant – shence allowed for propensity inference – doesn't matter that no proven onad only accusation rule and later withdrawn says any evidence – however, D will argue that even if admissible too prejudicial under 403 - 412 is subject to 403 the court coudl decide that it was very long ago, it was actually withdrawn, and that it was a very different situation (date rape as opposed to real rape)- hence this is a possibility,. However, prosecution will argue that it was congress' intent to allow this in since they have obviously found that sexual misconduct is qualitatively different than other crimes – for instance it could be argued that since it is not committed for ulterior motive but merely for the enjoyment that teh propensity inference is highly probative. Whether or not passes 403 is up to the judge and will be reviewed on abuse of discretion.

Teh juveniule adjudication is probably not admissible against the D to impeach – 609.c says that evidence of juvenile convictions are only admissible for impeachment when not of the accused and are necessary for the determination of guilty or innoncence and has to be a felony – here is a felony 0 but was for violent assault (felony) and hence not necessarily a needed to determine guilty or innocence- here totally unrelated. Here there is no evidence that the juvienile adjudication of violent assault is connected.

D will object to the argument as inadmissible character evidence under 404.b – shows bad character and not admissible for any other purposes such as motive etc. only for propensity. It only shows that he is violent and hence asking the jury to mnake a determination on hsi bad character alone.

Sample Answer #2
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(a) All of Wilma's statements fall under the spousal testimonial privilege. This privilege is valid only in criminal proceedings, so it is therefore valid in this prosecution. This privilege applies only if the spouses are still married, which they are, so this applies. However, the testifying spouse is the holder of the privilege, and can therefore waive the privilege if she so chooses. Therefore, Wilma can only be called to testify if she voluntarily waives her spousal testimonial privilege.

If she does waive this privilege, any statement she does make on the stand is still subject to the spousal confidential communications privilege. This privilege is applicible in both civil and criminal cases, so is therefore applicible in this prosecution. It applies only to statements made during the marriage, any of these statements are covered. Either spouse may assert this privilege and ususually both spouses must waive the privilege for the confidential communication to come in. Also, this privilege only applies to communications. Therefore, only Fred's statement to Wilma about doing something terrible would qualify; Wilma's observations of Fred would not be privileged as a confidential communication.

These privileges are deemed waived if a third party is present during the communication. It could be argued that the communicationn privilege was waived as the the statement because it was said loudly and the daughter was in the next room. However, most courts would be reluctant to deem the privilege waived by the presence of an infant child, especially in the situation where that child was asleep in the next room. There is no evidence that the child even heard the communication.

Also these privileges are deemed waived if they are made in planning or facilitating a crime. The argument could be made that the statement to Wilma was made while planning the crime. But most courts would be reluctant to find that this was an actual step in the planning of the crime. This statement in no way facilitated the crime of murder.

It could also be argued that the statement is hearsay. However, it can be argued that the statement is not offered for the truth of the matter asserted, but rather to show Fred's state of mind before the killing. Even if it is ruled hearsay, it would likely come in under the state of mind exception to show present intent. Therefore, no hearsay objection to this stataement would succeed.

Therefore, if Wilma waives her testimonial privilege, the court should allow the evidence of Fred's condition on the night of Oct. 3, but not the statement of Fred to Wilma before the killing.

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(b) It could be objected that the diary is not properly authenticated. Apparently, it is not readily identifiable as Fred's diary. Assuming that it is established that the chain of custody takes the diary from Fred's bedside dresser to the courtroom, the handwriting must be authenticated. It is perfectly acceptible for a lay witness to testify as the the authentificatioin of handwriting, so long as the witness is previously familiar with the handwriting in question. In this case, Barney only saw Fred's handwriting "one or two" times. Therefore, it is questionable whether Barney is sufficiently familiar with Fred's handwriting. However, the judge must only determine if there is some evidence that a reasonable jury could find that the item is what it is claimed to be. Barney's unfamiliarity would go to weight. Therefore, the diary is properly authenticated.

It could be objected that the statements in the diary are hearsay. It could be said that they are offered not to prove the truth of the statements, but rather to show Fred's state of mind. However, if not, parts of the statement may be excepted under the FRE. "So angry I could kill her" is arguably a present sense impression or even a statement of mental condition. The other statements don't qualify as present sense impressions because they were recorded after the underlying facts took place. Some statements (those associated with "yabba dabba doo!) may come in as an excited utterance, but this is unlikely since, again, they were recorded some time after the exciting event (the lunch). Past recollection recorded cannot be used because Fred will not testify that his memory is impaired or that the statements were accurate when made.

It could be objected that the diary entries are irrelevant because they refer only to Schmoopie and BR, and not to any party in the case. However, the evidence that Fred often called Barney BR is sufficient to get this evidence in and allows the jury to judge its weigh based on who Schmoopie might be. However, the judge might find that the probative value of the diary may be substantially outweighed by its unfair prejudice (if in fact Schmoopie is not Betty) or misleading the jury. But I think that Barney's testimony is sufficient to rule this out. The probative value may still be outweighed by these consideration, but the

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testimony, I believe, relieves it of being substantially outweighed. Therefore, the diary is likely to come in, subject to what was said above.

Prosecution could object to the question asked of Barney on cross because it is a compound question. However, it is arguable that the two part are not easily decernable, but are part of one general plan of Fred and Betty. Even if the objection is sustained, the quesiton can be read again as two seperate quesitons.

It could be objected that Sam's testimony is improper. The defense is trying to impeach Barney witha prior inconsistant statement. For this, a proper foundation must be laid. This was accomplished when defense asked Barney on cross whether he knew that his wife and Fred were having an affair. However, no extrinsic evidence is allowed if the inconsistancy is a collateral matter. But here, the fact that Fred and Betty were having an affair is certainly relevant to the issues in the case and therefore not a collateral matter. Therefore, t his statement is proper impeachment of Barney. However, the statement cannot be used substantively because it was not made under oath at a proceeding or deposition.

(c) It could be objected that the testimony of Betty's sex life with Fred is inadmissible under FRE 412. However, 412 specifically allows evidence of specific acts between the defendant and victim to show consent. Therefore, Fred could bring in these statements to help his rape case.

Betty's statement to Fred could be objected on hearsay grounds. It is possible that it could be offered to show the state of mind of Betty, but it is more likely that it is offered to the truth of the statements. It is inadmissible under the dying declaration exception because she was not aware of imminent death; it was quite a ways off in the future and she wasn't sure that she was going to die. It could possibly come in under the state of mind exception, but only part of the statement would qualify. "Barney knows about us" does not show state of mind. "I'm going to tell him" shows intent, so would fall under the exception. "I'm afraid" also falls under the exception. Therefore, most of the statement is likely to come in.

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The prior accusation of date rape could be objected to as improper. It is certainly improper on impeachment grounds. For impeachment by prior bad act, the act must be probative of truthfulness and date rape is ceratinly not. If offered as character evidence to show conformity, it is inadmissible, because character is not an element of this crime. It could be admitted for another purpose, but it does not really qualify as any other purpose. Besides, it is clear that any probative value it may have is substantially outweighed by the danger of unfair prejudice because it happened so long ago and the complaint was eventually dropped.

The juevenile adjudication is inadmissible because you cannot impeach a criminal defendant with this kind of testimony. Again, this would also have a danger of unfair prejudice since it was so long ago.

The cross pertaining to the argument would also be objectionable. It could not be used to impeach him because it is not probative of truthfulness. Again, it could not be used as character evidence because character is not in issue and it is not offered for any other purpose.

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