

TELLING THE WHOLE TRUTH BEHIND THE MIC: APPLYING THE RULES OF EVIDENCE TO TRUE CRIME PODCASTS

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INTRODUCTION

America has an obsession with true crime. Although tales of guilt and innocence have fascinated people for centuries, the genre is more accessible than ever with podcasts, audiobooks, and television channels that are entirely dedicated to crime and the courtroom.²

True crime podcasts rank among the top-downloaded podcasts on Apple's iTunes.³ The genre has caught the attention of not only amateur sleuths, but police officers and lawyers, as well.⁴ For example, in 2018, a California Police Department created its own podcast to bring awareness to a case that detectives had trouble cracking.⁵ Officers were able to track down the suspect within months of the podcast's run.⁶

Another real-world example ended up in the Supreme Court.⁷ Season two of *In the Dark* covered the story of Curtis Flowers, a man who was "tried six times for the same crime."⁸ The podcast brought considerable public attention to Flowers' case.⁹ Eventually, the Supreme Court overturned his conviction and all charges against Mr. Flowers have since been dropped.¹⁰

True crime podcasts generally adhere to two different structures. As one reporter put it: "Some reinvestigate cases with reams of original research or interviews. Others resemble Wikipedia-esque retellings."¹¹ Some podcasts focus on a different case each episode, giving listeners the highlights from the investigation or court proceedings.¹² Other podcasts, like *In the Dark*, focus on a single case for an entire season, allowing the hosts to provide a deeper analysis of the facts and evidence.¹³ However, it is this analysis of the "evidence" that can lead to problems.

True crime is a genre that generates strong emotions. According to some social scientists, deaths and disappearances pique a natural curiosity surrounding tragedy.¹⁴

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² See David Costello, *Un-Making a Murderer: New True Crime Sensationalism and the Criminal Justice System*, 55 AM. CRIM. L. REV. ONLINE 77, 78–82 (2018).

³ See Brad Hill, *Apple's Most-Downloaded Podcasts of 2018*, RAIN NEWS (Dec. 6, 2018), <https://rainnews.com/apples-most-downloaded-podcasts-of-2018/> [<https://perma.cc/9HSV-MCWD>].

⁴ Paige Hymson, *Play Next: What a True-Crime Podcast Meant for a Real-World Investigation*, L.A. TIMES (Aug. 13, 2019, 6:00 AM), <https://www.latimes.com/california/story/2019-08-12/play-next-this-police-department-made-a-podcast-to-find-a-fugitive-it-helped> [<https://perma.cc/SA3G-P8G5>].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019); Nicholas Bogel-Burroughs, *After 6 Murder Trials and Nearly 24 Years, Charges Dropped Against Curtis Flowers*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/04/us/after-6-murder-trials-and-nearly-24-years-charges-dropped-against-curtis-flowers.html> [<https://perma.cc/8PFB-2L44>].

¹¹ Derrick Bryson Taylor & Christine Hauser, *Popular 'Crime Junkie' Podcast Removes Episodes After Plagiarism Accusation*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/business/media/crime-junkie-podcast-plagiarism.html> [<https://perma.cc/SH2S-JP2Q>].

¹² See, e.g., CRIME JUNKIE, <https://crimejunkiepodcast.com/> [<https://perma.cc/EQV9-GZVZ>]; MORBID: A TRUE CRIME PODCAST, <https://www.morbidpodcast.com/> [<https://perma.cc/3QA3-CFPB>]; GENERATION WHY PODCAST, <https://genwhypod.com/> [<https://perma.cc/CX84-S2YV>].

¹³ APM REPORTS, <https://features.apmreports.org/in-the-dark/season-two/> [<https://perma.cc/95YD-GJEM>]; see also Alissa Zhu, *How an Investigative Podcast Helped Free Curtis Flowers*, CLARION LEDGER (Sept. 10, 2020, 5:00 AM), <https://www.clarionledger.com/story/news/2020/09/10/how-investigative-podcast-in-dark-helped-free-curtis-flowers/5747054002/> [<https://perma.cc/VWY4-4Y2S>] (explaining the intense investigation into Flowers' case).

¹⁴ Sarah Watts, *What One Researcher Discovered About America's True Crime Obsession*, FORBES (Feb. 28, 2019, 5:31 PM), <https://www.forbes.com/sites/sarahwatts/2019/02/28/what-one-researcher-discovered-about-americas-true-crime-obsession/#180940c35e6e> [<https://perma.cc/K3UP-DA8T>].

Other studies suggest that consuming true crime “is one way we can feel prepared, and perhaps even comforted.”¹⁵ Because of the heightened emotions at play, hosts and authors focus on telling the best story, but sometimes, “in the author’s quest to make the topic more interesting, facts may become lost or may be fabricated entirely.”¹⁶ One popular true crime podcast, *My Favorite Murder*, even has a weekly segment entitled “Corrections Corner” during which the hosts take time to correct facts they got wrong on the previous episode.¹⁷

Not only do hosts take liberties with the facts of cases, it is often hard to recognize exactly where the facts are coming from. Although some shows attempt to acknowledge their sources, hosts can fall short. One podcast even removed several episodes from streaming platforms after the hosts faced plagiarism accusations.¹⁸ When the focus is on telling the most sensational story, it can be tempting for podcasters to be lax on referencing sources, especially “when producers develop a following and feel they ‘constantly have to feed the beast.’”¹⁹

Podcast hosts also give off a false air of trustworthiness. A listener might assume that because someone makes money producing episodes, they are an expert in the field. Podcast hosts also often refer to “authorities” or “officials” while talking about crimes without naming a particular authority.²⁰ The podcast host is attempting to back up what they are saying without needing to be held accountable by a specific member of law enforcement.

Another issue regarding facts and evidence is that podcast hosts can say whatever they want without many repercussions. Unlike prosecutors, podcasters are not subject to any limitations on how they present evidence.²¹ Sometimes, podcasts present a mountain of “evidence” and then ask why investigators did not catch the right suspect.²² However, much of the “evidence” presented by the host would not be admissible in court.²³

Not all podcasts are up front about misinformation, so listeners assume that they are being exposed to the entire picture, but listeners might not be aware of the limitations placed on police officers and attorneys. This can be dangerous: “A major issue with the media is that ‘coverage of crime and punishment is notoriously inaccurate and . . . biased toward sensationalized accounts.’”²⁴

In this Note I argue that true crime podcasts have great influence on how the public views the criminal justice system. I further argue that podcast hosts need to be aware that there is a difference between information that can point to guilt and information that can be presented to a trier of fact. In Part I of this Note I will explain theories behind the importance of the Federal Rules of Evidence. In Part II, I will apply the Federal Rules of Evidence to popular true crime podcast episodes. I will focus on three different rules that are commonly disregarded by podcast hosts. First, I will apply the propensity limitations. Second, I will focus on the rule regarding opinion testimony by lay witnesses. Finally, I will discuss the general bar against hearsay and how information can be admitted through one of the various exceptions. Part III of this Note will focus on how podcasts can help further criminal law understanding among the general public and in the legal field. I will argue that hosts

¹⁵ *Id.*

¹⁶ Costello, *supra* note 2, at 95.

¹⁷ Jen Thompson, “*My Favorite Murder*”: *Women Creating Community in Crime*, GOLIN (Mar. 18, 2021), <https://golin.com/2021/03/18/my-favorite-murder-women-creating-community-in-crime/> [<https://perma.cc/RA72-EWKN>].

¹⁸ Taylor & Hauser, *supra* note 11.

¹⁹ *Id.*

²⁰ Dean A. Strang, *Beyond Guilt or Innocence: Larger Issues that Making a Murderer Invite Us to Consider*, 49 TEX. TECH. L. REV. 891, 898 (2017).

²¹ Megan Boorsma, *The Whole Truth: The Implications of America’s True Crime Obsession*, 9 ELON L. REV. 209, 223 (2017).

²² *Episode 154: DNA Dad*, MY FAVORITE MURDER, at 1:04:48 (Jan. 3, 2019), <https://myfavoritemurder.com/154-dna-dad/> [<https://perma.cc/C8D8-VX8W>] (discussing deathbed statements that indicated a suspect as well as previous statements from the victim before the murder that may not be admissible in court).

²³ Boorsma, *supra* note 21.

²⁴ *Id.* at 214 (quoting Justin T. Pickett et al., *Public (Mis)Understanding of Crime Policy: The Effects of Criminal Justice Experience and Media Reliance*, 26 CRIM. JUST. POL’Y REV. 500, 501 (2015)).

have an ethical responsibility to ensure that their audiences are aware of the evidentiary discrepancies.

I. THE REASONS FOR THE RULES OF EVIDENCE

Rules of evidence are essential to the workings of the criminal justice system. The necessity is seen across jurisdictions, regardless of which version of the rules is in place. Although the necessity of uniformity is a general concept, scholars have reached different conclusions on the exact reasoning of the rules.²⁵ On one hand, the rules are seen as a mechanism to bypass confusing or irrelevant information and get the jury to the truth.²⁶ However, some scholars believe evidentiary rules are actually meant to promote public acceptance of jury decisions.²⁷

The public acceptance theory depends on the particular evidence and rule in question. For example, Charles Nesson argues that hearsay rules are meant to promote confidence in juries.²⁸ Nesson says that hearsay rules “prevent jurors from basing a verdict on the statement of an out-of-court declarant who might later recant the statement and discredit the verdict.”²⁹ The rules allow the public to assume that juries are hearing only reliable information.³⁰

Nesson’s theory on the function of evidence rules has been applied to the popular podcast *Serial*, which questions the validity of Adnan Sayed’s murder conviction.³¹ Paul Berman looks at Nesson’s differentiation between direct and circumstantial evidence.³² The case against Sayed was built on eyewitness testimony.³³ Berman says that based on Nesson’s logic, the public is more likely to accept the jury’s decision to convict, because the jury members are the ones who heard the testimony and decided that the witnesses were credible.³⁴ Berman argues that it is only after members of the public hear statements that would violate evidence rules that the credibility of witnesses is called into question, even though these out-of-court statements often lack credibility.³⁵

The rules of evidence are not only meant to promote the finding of the truth, but also to allow the public to maintain confidence in the court system.³⁶ The functions are both practical and theoretical. Sometimes podcasts can undercut both.

II. RULES COMMONLY VIOLATED BY PODCASTS

Podcasts, unlike trials, are forms of entertainment. Podcasting is a business that relies on download numbers and crowdsourcing websites to operate.³⁷ Therefore, the pressure is on to keep listenership up and make sure new audience members are contributing to advertising revenue. Because of this, legality takes a backseat to good storytelling. In this section, I will elaborate on some of the most common Federal Rules of Evidence that are broken in the name of narrative: the bar against using character evidence to prove propensity, the bar on lay persons offering expert opinions, and the general bar on hearsay.

²⁵ Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1369 (1985).

²⁶ *See id.* at 1368–69.

²⁷ *Id.*

²⁸ *Id.* at 1372.

²⁹ *Id.* at 1373.

³⁰ *Id.*

³¹ Paul Schiff Berman et al., *A Law Faculty Listens to Serial*, 48 CONN. L. REV. 1593, 1633 (2016).

³² *Id.* at 1634.

³³ *Id.*

³⁴ *Id.*

³⁵ *See id.* at 1635.

³⁶ Nesson, *supra* note 25, at 1368.

³⁷ Todd Spangler, *Spotify Launches Podcast Streaming Ad Insertion and Measurement*, VARIETY (Jan. 8, 2020, 8:00 AM), <https://variety.com/2020/digital/news/spotify-podcast-dynamic-streaming-ad-insertion-measurement-1203459830/> [<https://perma.cc/8T6N-9BZH>]; Roger Kay, *Crowdsourcing Drives Podcast Quality*, FORBES (Jan. 13, 2014, 10:19 AM), <https://www.forbes.com/sites/rogerkay/2014/01/13/crowdsourcing-drives-podcast-quality/?sh=396b4003473d> [<https://perma.cc/62GV-DDSY>].

A. *Being a Bad Person Doesn't Make You Guilty*

The premise of Rule 404 is simple: having questionable character does not necessarily make it more likely that you are a criminal.³⁸ Rule 404 says that evidence of a person's character cannot be used to "prove that on a particular occasion the person acted in accordance with the character or trait."³⁹ There are exceptions to the rule, most notably in 404(b).⁴⁰ Under Rule 404(b), evidence of crimes or other prior acts cannot be used as character evidence to prove someone committed a crime.⁴¹ However, such evidence is admissible if it is evidence of motive, knowledge, or absence of mistake.⁴² In order to determine if prior acts are admissible, courts generally balance the probative value of the information with the prejudicial impact.⁴³ Even relevant information should be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice."⁴⁴

The issue in the podcasting world is that no balancing is ever done. Because background information is important to effective storytelling, prior acts and crimes of suspects are often included in a case narrative. However, if you follow the logic of the rules, this background information, that can provide a holistic view of the suspect, would not be helpful in a court of law, unless it fits into one of the exceptions outlined in Rule 404(b)(2). Although it does provide listeners with a more complete view of the suspect, this practice does not explain anything about a crime, unless it encompasses one of the exceptions outlined in Rule 404(b)(2).

In *A Killing on the Cape*, an ABC podcast about the case of Christa Worthington, the intricacies of Rule 404(b) are exemplified.⁴⁵ Worthington was murdered in Cape Cod in 2002.⁴⁶ Although a man is currently serving three life sentences for the crime, questions about his guilt remain.⁴⁷ One of the other suspects in the case is Elizabeth Porter, the girlfriend of Christa Worthington's father.⁴⁸ During the podcast, the ABC contributor brings up Porter's history with prostitution and heroin use.⁴⁹ If this podcast was subject to the Federal Rules of Evidence Rule 404(a) general bar against

³⁸ See FED. R. EVID. 404.

³⁹ FED. R. EVID. 404(a)(1).

⁴⁰ FED. R. EVID. 404(b).

⁴¹ *Id.*

⁴² FED. R. EVID. 404(b)(2).

⁴³ *United States v. Lattner*, 385 F.3d 947, 955 (6th Cir. 2004) (establishing a three-part test for Rule 404(b) evidence that looks at the likelihood the prior act happened, whether the evidence goes to one of the exceptions outlined in Rule 404(b)(2), and how the probative value of the evidence related to prejudicial impact).

⁴⁴ *Huddleston v. United States*, 485 U.S. 681, 687 (1988) (quoting FED. R. EVID. 403).

⁴⁵ See generally David Sloan et al., *A Killing on the Cape*, ABC, <https://abcnews.go.com/2020/deepdive/a-killing-on-the-cape-50254778> [<https://perma.cc/L849-5YC7>] (discussing inadmissible character evidence of a suspect).

⁴⁶ *Id.*

⁴⁷ See *id.*

⁴⁸ *A Killing on the Cape: More Leads, More Dead Ends*, ABC NEWS, at 22:00 (Nov. 7, 2017), <https://www.stitcher.com/podcast/abc-news/a-killing-on-the-cape/e/52234591> [<https://perma.cc/649U-8FZB>].

⁴⁹ *Id.* at 22:40.

character evidence to prove propensity, this information about Porter would not be admissible.⁵⁰

However, the podcast host goes on to mention that Christa Worthington was “quite upset” about the relationship because of Porter’s past, a fact that could possibly trigger a Rule 404(b) exception.⁵¹ Because of Porter’s history, Christa Worthington did not want her to date her father, giving Porter a reason to want to get rid of Christa.⁵² Proving motive is one of the exceptions listed under Rule 404(b).⁵³ A judge could find that the probative value of this information would outweigh the prejudicial impact.⁵⁴ The purpose in admitting the evidence here would not be to say that Porter was more likely to commit the crime because she had a history of drug abuse, but that she was more likely to commit the crime because of how her drug abuse influenced her relationship with the victim.

Not all podcasts contain information that follows the relationship between sections (a) and (b) of Rule 404. Oftentimes, hosts bring up information that would not be admissible at all under the propensity bar. Take for instance the *My Favorite Murder* episode covering serial killer Richard Chase.⁵⁵ One of the hosts began the episode by introducing Chase’s rough upbringing.⁵⁶ She talked about how Chase had issues with bed wetting, arson, and cruelty to animals when he was a child.⁵⁷ She mentioned that this is known as the “McDonald triad,” which is falsely believed to be a direct link between certain behaviors in children and violent tendencies once those children reach adulthood.⁵⁸ This theory has not been backed up by statistics, which the host quickly noted.⁵⁹ Since there is no scientific connection between these three actions and any of the exceptions outlined in Rule 404(b)(2), this evidence would not be admissible in court.⁶⁰

B. *If You are Going to Act Like an Expert, Be One*

In a case it does not matter how much evidence you have if a jury does not believe it. This is especially true for complicated forensic evidence.⁶¹ Evidence involving

⁵⁰ FED. R. EVID. 404(a)(1).

⁵¹ *A Killing on the Cape: More Leads, More Dead Ends*, *supra* note 48, at 22:30.

⁵² *Id.* at 26:50.

⁵³ FED. R. EVID. 404(b).

⁵⁴ FED. R. EVID. 403.

⁵⁵ *Episode 10: Murderous TENDencies*, MY FAVORITE MURDER, at 48:00 (Apr. 1, 2016), <https://www.stitcher.com/show/my-favorite-murder-with-karen-kilgariff-and-georgia-hardstark/episode/10-murderous-tendencies-200174474> [<https://perma.cc/3AQ3-NET8>].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 48:20.

⁵⁹ *Id.*; Karen Franklin, *Homicidal Triad: Predictor of Violence or Urban Myth?*, PSYCHOL. TODAY (May 2, 2012), <https://www.psychologytoday.com/us/blog/witness/201205/homicidal-triad-predictor-violence-or-urban-myth> [<https://perma.cc/2FNR-YZDZ>].

⁶⁰ FED. R. EVID. 404(b)(2) (including exceptions such as “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident”).

⁶¹ See Kimberly Schweitzer & Narina Nunez, *What Evidence Matters to Jurors? The Prevalence and Importance of Different Homicide Trial Evidence to Mock Jurors*, 25 PSYCHIATRY, PSYCHOL. & L. 437, 444 (2018).

scientific techniques can be extremely helpful for a jury.⁶² However, misuse of that same evidence can lead to wrongful convictions, which in turn lead to a breakdown of the public acceptance of the criminal justice system.⁶³ Hiring the right expert to explain nuanced principles to a jury can make or break a case.⁶⁴

The Federal Rules of Evidence account for the need of expert testimony in Rule 701. This rule says that if someone is not testifying as an expert then their opinion testimony must be limited to what the witness has perceived and information that would actually help the fact-finder.⁶⁵ Most importantly, opinions offered by a lay witness must “not be based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”⁶⁶ Therefore, the rule does not “distinguish between expert and lay witnesses, but rather between expert and lay testimony.”⁶⁷ Essentially the difference is that people without a specialty can testify to things that come from “reasoning familiar in everyday life,” whereas expert testimony “results from a process of reasoning which can be mastered only by specialists in the field.”⁶⁸

The issue with the podcasting platform is that hosts come from a variety of backgrounds. Although some podcasts are created by journalists, or those who work in law enforcement, many hosts are simply people who have a true crime fascination.⁶⁹ Because podcast hosts are often the people presenting the information, they need to be mindful about how they frame complicated topics such as forensics. Unfortunately, not all podcasts frame the intricacies of these sciences as they should.

One example is the *Wine and Crime* podcast’s episode on blood spatter analysis.⁷⁰ During the first segment of the episode, one of the hosts attempts to go over the basics for blood spatter analysis.⁷¹ She mentions the different types of blood stains and how they are made.⁷² Later in the episode the hosts touch on how blood spatter analysis impacted specific cases.⁷³ Because the hosts do not have any formal training in blood spatter analysis,⁷⁴ a listener must trust that the hosts are relying on the right information. However, the podcast does mention how many different areas

⁶² *Id.*

⁶³ Berman et al., *supra* note 31, at 1639 (arguing that forensic evidence can lead to unwanted results if not broken down in an acceptable way).

⁶⁴ See Rabia Chaudry, *Undiscovered: Five Legal Lessons from the Case of Adnan Syed*, 48 TEX. TECH. L. REV. 363, 370–71 (2016) (arguing that the case discussed in the *Serial* podcast could have had a different outcome with the addition of even just one expert).

⁶⁵ FED. R. EVID. 701(a), (b).

⁶⁶ FED. R. EVID. 701(c).

⁶⁷ FED. R. EVID. 701 (advisory committee’s note on 2000 amendments).

⁶⁸ *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992) (citation omitted).

⁶⁹ Two of the most-downloaded true crime podcasts are hosted by a pair of women who are interested in true crime but have no formal training in law or law enforcement. See *About My Favorite Murder*, MY FAVORITE MURDER, <https://myfavoritemurder.com/about> [<https://perma.cc/9TTE-VZ2S>]; *About Us*, CRIME JUNKIE, <https://crimejunkiepodcast.com/about-us/> [<https://perma.cc/UE93-J383>].

⁷⁰ *Ep10: Blood Spatter*, WINE & CRIME PODCAST (Apr. 5, 2017), https://wineandcrimepodcast.com/show_episodes/ep10-blood-spatter/ [<https://perma.cc/N56Z-E5KV>].

⁷¹ *Id.* at 10:30.

⁷² *Id.* at 10:10.

⁷³ *Id.* at 1:07:00.

⁷⁴ *About Wine & Crime*, WINE AND CRIME PODCAST, <https://wineandcrimepodcast.com/about/> [<https://perma.cc/43G8-RW42>].

of study must be mastered to be considered an expert in blood spatter analysis.⁷⁵ Although this fact is discussed, the hosts do not make any connection between an expert's opinion and the facts as they themselves are presenting them.⁷⁶

A common way for podcasts to avoid the danger of misleading listeners is to go directly to the source and interview those who work in specific scientific or professional fields. *My Favorite Murder*, which is usually hosted by two amateur true crime observers, turned to a law enforcement officer for help in explaining the arrest in the infamous Golden State Killer case.⁷⁷ The case was open for nearly forty years until law enforcement agents used a genealogy website to trace D.N.A. from one of the crime scenes to the suspect, ultimately leading to an arrest.⁷⁸

The hosts of *My Favorite Murder* knew that the familial gene technique was an investigative tool that their listeners were confused and concerned about, so they invited one of the investigators on the case to explain the tactic.⁷⁹ The investigator, Paul Holes, explained how law enforcement officials used D.N.A. to locate the familial branch of the suspect and how that information led to the arrest.⁸⁰ Holes also addressed the confidentiality concerns regarding the use of family members to aid in identifying suspects.⁸¹ Because a person with specialized training on using D.N.A. evidence to perform a criminal investigation is the person explaining the procedure to the audience, the information is more credible. Not only that, but Holes is the sort of witness that would be able to testify to this information in court under Rule 702.⁸²

It is important for podcast hosts to acknowledge that being extremely interested in a topic does not equate with being an expert in the field. Explaining highly convoluted, scientific areas without any formal training can lead to the spread of misinformation, which is why the limitations imposed by Rule 701 are so important.

C. Hearsay is Rampant

Hearsay and its thirty-one exceptions, arguably the most complicated section within the Federal Rules of Evidence, is the most obvious issue with true crime podcasts. By nature, every single word uttered in a podcast could be categorized as hearsay.⁸³ The rule places a general bar on any out-of-court statements made “to prove the truth of the matter asserted.”⁸⁴ Essentially, “the hearsay rule requires that people testify directly to what they saw or heard rather than repeating information

⁷⁵ *Ep10: Blood Spatter*, *supra* note 70, at 37:50.

⁷⁶ *See id.*

⁷⁷ MFM Show, *My Favorite Murder – 122 – Surprise! It’s Paul Holes*, YOUTUBE (May 24, 2018), <https://www.youtube.com/watch?v=55omfgKDvTc> [https://perma.cc/N8J7-M472].

⁷⁸ Laurel Wamsley, *After Arrest of Suspected Golden State Killer, Details of His Life Emerge*, NPR (Apr. 26, 2018, 3:51 PM), <https://www.npr.org/sections/thetwo-way/2018/04/26/606060349/after-arrest-of-suspected-golden-state-killer-details-of-his-life-emerge> [https://perma.cc/XHV3-W5EZ].

⁷⁹ *See* MFM Show, *supra* note 77, at 55:30.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² FED. R. EVID. 702 (listing acceptable expert witnesses as people with “specialized knowledge” and opinions based “on sufficient facts or data” rooted in “reliable principles and methods”).

⁸³ FED. R. EVID. 801(c)(1).

⁸⁴ FED. R. EVID. 801(c).

from others.”⁸⁵ The general policy justification behind the rule is simple: the credibility of firsthand accounts are more credible than secondhand accounts.⁸⁶ Aside from interviews with victims or suspects, most of the information provided in podcasts are secondhand accounts. Even still, the rare interviews with eyewitnesses are considered hearsay because they are uttered outside of a court of law.⁸⁷

Serial, the podcast that many people believe launched the nation’s true crime podcast obsession,⁸⁸ is ripe with hearsay issues:

The *Serial* podcast does not take place in court. It is therefore no surprise that hearsay is as rampant in the podcast as it is in the world outside the courtroom. Koenig asks almost everyone she interviews to talk about what they heard from other people. To give one example, Jay’s friend Chris’s sole contribution to the podcast is to talk about what Jay told him about how Adnan forced him to help bury Hae.⁸⁹

Another example of hearsay evidence is in Episode 4 of *Serial*.⁹⁰ Sarah Koeing, the show’s host, plays a recording of a police interview with a witness named Jenn Pusateri.⁹¹ Pusateri describes how Adnan Syed allegedly killed Hae Min Lee.⁹² However, Pusateri herself did not witness any of this. She was simply telling a police officer what a man named Jay had told her.⁹³ The information coming from Pusateri could be potentially damning for a murder suspect, but Koeing had no way of knowing if it was true.

Podcasts, as discussed previously, are a form of entertainment. One of the many tactics used by hosts to make their episodes more gripping and engaging is the use of 911 calls.⁹⁴ These calls bring emotion, urgency, and authenticity to stories. However, these calls are technically statements made out of a courtroom and can be categorized as hearsay, especially if the calls are being used to prove a fact included in the substance of the phone conversation.⁹⁵

Sometimes podcasts will dedicate entire episodes to analyzing 911 calls.⁹⁶ For example, the podcast *Cold Case Murder Mysteries* played and analyzed a 911 call from a high-profile murder investigation in North Carolina.⁹⁷ The call was placed in the middle of the night by Michael Peterson, the main suspect in the murder of his

⁸⁵ Berman et al., *supra* note 31, at 1635.

⁸⁶ DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* 444 (4th ed. 2018).

⁸⁷ See FED. R. EVID. 801(c).

⁸⁸ See Tony Jeff, *Crowdsourcing Justice*, 35 *MISS. C.L. REV.* 365, 366 (2017).

⁸⁹ Berman et al., *supra* note 31, at 1635.

⁹⁰ See *Episode 4: Inconsistencies*, *SERIAL*, at 7:47 (2014), <https://serialpodcast.org/season-one/4/inconsistencies> [<https://perma.cc/VCE8-4DBN>].

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See, e.g., *911 Calls Podcast with The Operator*, 11:59 MEDIA, <https://www.1159media.com/911-calls> [<https://perma.cc/5K6K-YWD9>] (dedicating an entire podcast to analyzing 911 calls).

⁹⁵ See FED. R. EVID. 801(c).

⁹⁶ *Episode 141: Analyzing the 911 Calls – The Staircase*, *STITCHER* (Aug. 29, 2018), <https://www.stitcher.com/podcast/wonderly/real-crime-profile/e/55998180?autoplay=true> [<https://perma.cc/SJ87-F8DF>].

⁹⁷ *The Staircase Murder – E004*, *COLD CASE MURDER MYSTERIES*, at 0:01, <https://www.coldcasemurdermysteries.com/e004-the-staircase-murder> [<https://perma.cc/SZ4E-QUJ8>].

wife, Kathleen.⁹⁸ In this episode, the disturbing call is played at the beginning of the episode.⁹⁹ The podcast host then analyzes the call as an indicator of Peterson’s guilt or innocence.¹⁰⁰ However, under the general hearsay ban, the call would not be admissible unless it met one of the explicit exceptions in Rule 803.

Although 911 calls are technically out-of-court statements, there are a couple of exceptions that an attorney could use to admit these phone conversations into evidence. In the case of the Michael Peterson phone call, an attorney could argue that the conversation is admissible under the “excited utterance” exception.¹⁰¹ In order for a statement to be classified as an “excited utterance” the statement must be about a startling event and “made while the declarant was under the stress of excitement that it caused.”¹⁰² The 911 call made by Michael Peterson would likely fall into this exception. This, of course, depends on whether you believe his attorney’s timeline of events. If Peterson made the call directly after finding his wife lying at the foot of the stairs, it is likely he made the call while still under the “stress of excitement” of the discovery.¹⁰³ The urgency and emotion in Peterson’s voice also suggests that he was upset when he called the dispatcher.¹⁰⁴ Therefore, an attorney in this case would likely convince a judge to admit the 911 call.

Emergency calls could also fall under the “present sense impressions” exception.¹⁰⁵ This exception to the hearsay bar applies to any “statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.”¹⁰⁶ Essentially, the exception admits a play-by-play of events as a person sees them. Peterson’s call, being used as another example, would likely not fall under this exception. Peterson’s entire defense strategy hinged on the fact that he did not directly perceive his wife falling down the stairs.¹⁰⁷ Peterson claimed he found her after she had already fallen.¹⁰⁸ Therefore, Peterson’s call, that would probably be admitted under Rule 803(2), would probably not be admitted under Rule 803(1). Though there are multiple ways to get 911 calls admitted, many podcast hosts treat these conversations as if they are automatically something a jury would hear.¹⁰⁹ This offers another example of how the Federal Rules of Evidence can be misconstrued.

The hearsay portion of the Federal Rules of Evidence are meant to promote the use of firsthand accounts to avoid credibility questions.¹¹⁰ Podcasts are by nature

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ FED. R. EVID. 803(2).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See *The Staircase Murder – E004*, *supra* note 97.

¹⁰⁵ FED. R. EVID. 803(1).

¹⁰⁶ *Id.*

¹⁰⁷ Rebecca Reisner, *Michael Peterson: An Update*, FORENSIC FILES NOW, <https://forensicfilesnow.com/index.php/2019/09/26/michael-peterson-an-update/comment-page-1/> [<https://perma.cc/W4G9-KV8G>].

¹⁰⁸ *Id.*

¹⁰⁹ See *The Staircase Murder – E004*, *supra* at note 97 (discussing a 911 call and a subsequent trial without explaining the relationship between the two).

¹¹⁰ Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1788 (1980).

secondhand accounts outside the courtroom. Therefore, all podcasts are hearsay. There are many instances where podcast hosts talk about hearsay issues as if they are automatically admissible, such as with emergency calls.¹¹¹ Ideally, podcast hosts would dissect the problems with hearsay evidence and demonstrate to listeners why the it is less credible.

III. PODCASTING POTENTIAL

It is true that sometimes podcast producers and hosts do not do enough to ensure that their audiences are learning about proper court procedures. However, there are instances where podcasts can be a great educational tool for the average listener. Some podcasts offer accurate portrayals of criminal procedure. One example is the podcast *Bardstown*.¹¹² This podcast is produced by two women; one is a journalist from Louisville, Kentucky.¹¹³ The podcast includes narration and interviews centered around unsolved deaths in Bardstown, Kentucky.¹¹⁴ One episode described the search of a farm property that was possibly connected to one of the five deaths in town.¹¹⁵ The owner of the farm invoked her Fifth Amendment right against self-incrimination.¹¹⁶ The podcast host then delved into the meaning of the Fifth Amendment and the implications it could have on the investigation.¹¹⁷

Other podcasts actually attack admissibility issues head-on. The podcast *Shallow Graves* covers a cold case surrounding a missing college student from Florida and a potential serial killer.¹¹⁸ In the first episode of the podcast the host discussed an early crime committed by the main suspect.¹¹⁹ In this particular investigation, the only evidence left at the scene was in the form of a footprint.¹²⁰ The host discussed how the police were confident who the print belonged to, but that if they did not follow the correct procedure, the footprint would not be admissible in court.¹²¹ The host discussed the difference between having a suspect's consent for a search and seeking a search warrant.¹²² To further enlighten listeners on the subject, she interviewed an investigator on the case and asked him to discuss the factors he weighed when

¹¹¹ See *Episode 4: Inconsistencies*, *supra* note 90, at 1:00.

¹¹² *Bardstown*, VAULT STUDIOS, www.bardstownpodcast.com [<https://perma.cc/C936-APVT>].

¹¹³ Jackelyn Jorgensen et al., *The making of the Bardstown podcast*, FIRST COAST NEWS (Aug. 27, 2019, 6:50 PM), <https://www.firstcoastnews.com/article/news/local/the-making-of-the-bardstown-podcast/417-b16b8c85-0cfd-4d72-b6be-49fd3dcc59ad#:~:text=Shay%20McAlister%20is%20an%20investigative,the%20new%20podcast%20Bardstown> [<https://perma.cc/ZCV9-ZBKV>].

¹¹⁴ *Id.*

¹¹⁵ *Bardstown: Prime Suspect*, *supra* note 112, at 13:00.

¹¹⁶ *Id.*

¹¹⁷ See *id.*

¹¹⁸ See *Linda*, SHALLOW GRAVES (Feb. 20, 2020), <https://podcasts.apple.com/us/podcast/linda/id1497630439?i=1000466281242> [<https://perma.cc/6ZDQ-PBNS>].

¹¹⁹ *Id.* at 20:00.

¹²⁰ *Id.*

¹²¹ *Id.* at 25:00.

¹²² *Id.*

deciding whether consent or a search warrant should be sought.¹²³ Later on, the host explained how a motion to suppress works and the implications a suppression ruling can have on a trial.¹²⁴ *Shallow Graves* is another great example of how criminal investigations should go, how evidence is admitted at court, and the restraints placed on law enforcement officers as they gather pieces of evidence. It focuses on a specific evidentiary issue and breaks it down so that the listener can follow along.¹²⁵

Not only are podcasts educating the general public about criminal investigations and court proceedings, but they can also inspire important conversations about socioeconomic issues. For example, Karen Kilgariff and Georgia Hardstark from *My Favorite Murder* made headlines after a listener complained to them about the use of the term “prostitute.”¹²⁶ During one of their episodes they apologized for using the term and acknowledged that it could be perceived as offensive.¹²⁷ The hosts clarified that they would refer to these women as “sex workers” instead of “prostitutes.”¹²⁸ Hardstark said, “we have a platform that we can announce these things and so we’re lucky and we should do it.”¹²⁹

Podcasts can also educate law students or those in the legal field. A few scholars argued that the popularity of *Serial* provides an opportunity for educators to introduce new ideas in the legal classroom.¹³⁰ They believe that bingeable forms of entertainment, like podcasts, can put legal analysis “into twenty-first-century problems of language, narrative form, authenticity, and audiences.”¹³¹ *Serial* and other podcasts like it can enhance a legal learning experience because they are all about doubt, wanting more, and ultimately not knowing the concrete answer.¹³² Further, “[q]uestioning the reason for and function of desire for closure in law and its pursuit of justice, connected with its role as popular entertainment, enriches classroom discussions about the common law, jurisprudence, ethical advocacy, legal storytelling, and legal institutional competencies.”¹³³

It is also important to note that the information and investigations being fueled by the podcasting world are having real-world implications inside the courtroom. As previously mentioned, the Supreme Court has overturned a conviction that was

¹²³ *Id.*

¹²⁴ *Id.* at 36:36.

¹²⁵ *Id.*

¹²⁶ Becky Hughes, *My Favorite Murder Podcasters Karen Kilgariff and Georgia Hardstark on Their Famous Friendship, Love of True Crime and More*, PARADE (May 28, 2019, 5:00 AM), <https://parade.com/884730/beckyhughes/my-favorite-murder-podcasters-karen-kilgariff-and-georgia-hardstark-on-their-famous-friendship-love-of-true-crime-and-more> [https://perma.cc/7B5Z-7BNS].

¹²⁷ *Episode 12: Our Bodies, Our Twelves*, MY FAVORITE MURDER, at 54:00, <https://www.iheart.com/podcast/268-my-favorite-murder-w-27911429/episode/12-our-bodies-our-twelves-28977250/> [https://perma.cc/SJ75-WMYX].

¹²⁸ *Id.* at 55:47.

¹²⁹ *Id.* at 56:50.

¹³⁰ Zahr K. Said & Jessica Silbey, *Narrative Topoi in the Digital Age*, 68 J. LEGAL EDUC. 103, 104, 107 (2018).

¹³¹ *Id.* at 104.

¹³² *Id.* at 106.

¹³³ *Id.* at 107.

highlighted by the podcast *In the Dark*.¹³⁴ Although the podcast might not have been the sole reason for the Supreme Court’s opinion, information brought to light by the host did show the flaws in the original trial.¹³⁵ *Serial* is another example—new evidence uncovered in the podcast was actually read into evidence during a post-conviction relief hearing for Adnan Syed.¹³⁶ There is potential for podcasts to be effective not only in educating the public and future lawyers, but also inside the courtroom.

CONCLUSION

The Federal Rules of Evidence are in place to make sure our courts run efficiently, get to the truth, and protect the public’s faith in the criminal justice system.¹³⁷ However, these rules are not at play in forms of mass media, like podcasts. It is true that thoughtful listeners and viewers can take into account the nuances of the criminal justice system without such guidance.¹³⁸ It is irresponsible for podcast hosts to assume that all listeners and viewers are going to be thoughtful during their own media consumption. This Note does not argue that podcasts need to stray away from true crime reporting or that podcasts should only be hosted by law enforcement officers. This Note does, however, argue that podcast hosts need to recognize the power they have in shaping the public’s view of criminal justice and how they often fall short. This is a great power with even greater responsibility. Podcasters need to be mindful about telling the truth, the whole truth, and nothing but the truth.

¹³⁴ Dan Mangan, *Curtis Flowers—Black Man Tried Six Times for Same Murders—Released on Bail After Supreme Court Reversed Case Detailed in Podcast*, CNBC (Dec. 16, 2019, 5:13 PM), <https://www.cnbc.com/2019/12/16/bail-set-for-curtis-flowers-in-murder-case-overturned-by-supreme-court.html> [<https://perma.cc/9AKF-7VRX>].

¹³⁵ *Id.*

¹³⁶ Jeff, *supra* note 88 at 365–66.

¹³⁷ Nesson, *supra* note 25.

¹³⁸ See Strang, *supra* note 20, at 891.