

MEETING AGENDA

***UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE***

**Matheson Courthouse
450 South State Street
Council Room (N301)
February 5, 2019
5:15 p.m. to 6:45 p.m.**

Mr. John Lund, Presiding
Light dinner will be served

<p><u>MEMBER PRESENT</u> Hon. Matthew Bates Ms. Tenielle Brown Ms. Deborah Bulkeley Ms. Nicole Salazar-Hall Mr. Mathew Hansen Mr. Ed Havas Mr. Chris Hogle Mr. John Lund Hon Linda Jones Hon. David Mortensen Mr. Terry Rooney Ms. Lacey Singleton Ms. Michalyn Steele Hon. Vernice Trease Ms. Teresa Welch Mr. Dallas Young Mr. Adam Alba Ms. Jacey Skinner</p>	<p><u>GUESTS PRESENT</u> Representative Lowry Snow</p>
<p><u>MEMBERS EXCUSED</u></p>	<p><u>STAFF PRESENT</u> Ms. Cathy Dupont Ms. Nancy Merrill</p>

1. Welcome & Approval of Minutes (1/8/19) (*attached*).....*John Lund*

2. Victim Advocate Privilege (*attached*).....*John Lund*
3. Rule 804 (*attached*).....*Lacey Singleton and Subcommittee*
4. Rule 106 (*attached*).....*Teresa Welch, Judge Mortensen*
5. Rule 617.....*Linda Jones and Subcommittee*
6. Other Business.....*John Lund*

TAB 1

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE**

MEETING MINUTES

Tuesday– January 8, 2019

5:15 p.m.

Council Room

Mr. John Lund, Presiding

<p><u>MEMBER PRESENT</u> Adam Alba Hon. Matthew Bates Deborah Bulkeley Mathew Hansen Chris Hogle John Lund Hon. David Mortensen Lacey Singleton Hon. Vernice Trease Teresa Welch Dallas Young Ed Havas</p>	<p><u>GUESTS PRESENT</u> Representative Lowry Snow Patricia Owen, Legislative Research</p>
<p><u>MEMBERS EXCUSED</u> Judge Jones Michalyn Steele Jacey Skinner Terry Rooney Nicole Salazar-Hall Tenielle Brown</p>	<p><u>STAFF PRESENT</u> Cathy Dupont Nancy Merrill Richard Schwermer</p>

1. WELCOME AND APPROVAL OF MINUTES: (Mr. John Lund)

Mr. Lund welcomed everyone to the meeting.

The following amendment was made to the minutes:

-Item 6 State vs Sanchez, add the following sentence at the end of paragraph 1, “The court also asked the Rules Committee to address whether Rule 106 applies to transcribed oral statements

that are used extensively at trial but not actually introduced into evidence, in other words, what are the necessary and significant conditions of introducing a recorded statement under rule 106.”

Motion: *Including the amendment, there was a motion to approve the minutes from the Evidence Advisory Committee on October 23, 2018. The motion was seconded. The motion carried unanimously.*

2. Victim Advocate Privilege:

Representative Lowry Snow reviewed background information on the victim advocate bill and the proposed Rule of Evidence. He informed the Evidence Advisory Committee that a legislative task force studied the victim advocate issue during the summer and fall interim period. After extensive research, the task force recommended HJR 3 and HB 53 which were included in the Committee materials.

Representative Snow communicated that the purpose of the proposed bill and the resolution is to create a privilege under the Rules of Evidence for the confidential communications between a victim who has been subject to violent crimes and the victim advocate who is providing services to the victim.

The Committee discussed the process for amending Rules of Evidence and asked Representative Snow questions about the proposed privilege. John Lund offered to revise the rule and bring it back to the Committee for further discussion at the February meeting. In addition, the Committee asked Representative Snow to come to the next meeting in February so that he can provide input to the Evidence Advisory Committee.

Motion: *Judge Mortensen made a motion to work with Representative Snow to draft language for the proposed victim advocate rule. Judge Bates seconded the motion. The motion passed.*

3. Review of Comments to Proposed Rule 617:

The Committee discussed the numerous comments to Rule 617 and agreed to review the comments, address the functionality issues and present the policy issues to the Supreme Court for their input.

Motion: *Judge Mortensen moved for the Rule 617 Subcommittee to: review the comments; provide a brief summary of the policy objections and debate; identify any constructive suggestions for improvement to the rule; identify for the Committee, the functionality questions that the Evidence Advisory Committee did not address in their previous research of Rule 617; and consider adding to the comment to explain the intent of the rule, keeping in mind that the Supreme Court would like to keep comments brief. Adam Alba seconded the motion. The motion passed.*

4. Rules 504 and 1101:

Cathy Dupont requested that the Committee review the drafts of Rule 504 and Rule 1101 before the rules go to the Supreme Court for approval.

- The Committee made the following correction to Rule 504: delete the language “in the state.” in the definitions section of the rule, at the end of line (5) (b).

Motion: Judge Mortensen made a motion to have Cathy Dupont send Rule 504, as edited, to the Supreme Court for approval. Chris Hogle seconded the motion. The motion passed.

- The Committee discussed Rule 1101 and made the following punctuality correction, in Subsection (3), replace the period with a colon after the word “proceedings.”

Motion: Judge Bates made a motion to approve Rule 1101, as edited, and to send it to the Supreme Court for approval. Chris Hogle seconded the motion. The motion passed.

5. State v. Sanchez Discussion:

Teresa Welch discussed her research on Rule 106 with the Committee. The two questions are whether the rule is a timing rule or a trumping rule, and the necessary and sufficient conditions of putting Rule 106 into play. The jurisdictions are split on the questions. Currently, there is case law for both sides. After further discussion about the meaning of Rule 106, the Committee agreed Rule 106 is a timing rule at minimum.

Motion: Judge Mortensen made a motion that Teresa Welch and Judge Mortensen will draft a short version of Rule 106 with a privilege backstop; to discuss at the next meeting and to present to the Supreme Court for their feedback. Dallas Young seconded the motion. The motion passed.

6. Other Business

The Committee agreed to discuss Rule 804 Subcommittee’s work at the next meeting.

John acknowledged Rick Schwermer’s work on the Committee and thanked him for his contributions.

Next Meeting: February 5, 2018
5:15 p.m.
AOC, Council Room

TAB 2

1 **JOINT RESOLUTION ADOPTING PRIVILEGE UNDER**
2 **RULES OF EVIDENCE**

3 2019 GENERAL SESSION
4 STATE OF UTAH

5 **Chief Sponsor: V. Lowry Snow**

6 Senate Sponsor: Todd Weiler



8 **LONG TITLE**

9 **Committee Note:**

10 The Victim Advocate Confidentiality Task Force recommended this bill.

11 **General Description:**

12 This joint resolution adopts a privilege under the rules of evidence related to
13 communications of victims.

14 **Highlighted Provisions:**

15 This resolution:

- 16 ▶ defines terms;
- 17 ▶ states the privilege and who may claim the privilege; and
- 18 ▶ provides for exceptions from the privilege.

19 **Special Clauses:**

20 None

21 **Utah Rules of Evidence Affected:**

22 ENACTS:

23 **Rule 512**, Utah Rules of Evidence



25 *Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each*
26 *of the two houses voting in favor thereof:*

27 As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend

28 rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of
29 all members of both houses of the Legislature:

30 Section 1. **Rule 512**, Utah Rules of Evidence is enacted to read:

31 **Rule 512. Victim Communications.**

32 **(a) Definitions.**

33 ~~(a) (1) "Communication" means the same as that term is defined in UCA § 77-38-403.~~

34 ~~(a) (2)-(1)"Criminal justice system victim advocate" means the same as that term is~~
35 ~~defined in UCA § 77-38-403.~~

36 ~~(a) (3)-(2)"Non-government organization victim advocate" means the same as that term is~~
37 ~~defined in UCA § 77-38-403.~~

38 ~~(a) (4)-(3)"Victim" means an individual defined as a victim in UCA § 77-38-403.~~

3839 ~~(a)(4) "Victim advocate" means either a criminal justice system advocate or a non-government~~
~~organization victim advocate as those terms are defined in UCA 77-38-403.~~

3940 ~~(a) (5) "Victim advocate communications" means communications, as that term is defined in UCA 77-~~
~~38-403, between a victim~~

4041 ~~and a victim advocate that are intended to be confidential.~~

4142 ~~(a) (6) "Victim advocate" means the same as that term is defined in UCA § 77-38-403.~~

4243 **(b) Statement of the Privilege.** A victim communicating with a victim advocate has a
4344 privilege during the victim's life to refuse to disclose and to prevent any other person from
4445 disclosing victim advocate communications.

4546 **(c) Who May Claim the Privilege.** The privilege may be claimed by the victim
4647 engaged in victim advocate communications, or the guardian or conservator of the victim
4748 engaged in victim advocate communications. An individual who is a victim advocate at the
4849 time of the victim advocate communications is presumed to have authority during the life of
4950 the victim to claim the privilege on behalf of the victim.

5051 **(d) Exceptions.** ~~A~~ No privilege ~~does not~~ exists under paragraph (b):

5152 (d) (1) when the victim provides written, informed, and voluntary consent for disclosure of a victim
advocate communication that is:

5253 (d) (1) (A) reasonably time limited;

5354 (d) (1) (B) obtained after discussion with the victim regarding why the information might be shared,
5455 who would have access to the information, and what information could be shared under the
5556 release;

5657 (d) (1) (C) descriptive of the information that the victim authorizes to be shared and
5758 with whom; and

5859 (d) (1) (D) specifies the duration for which the information may be shared;

5960 (d) (2) when the victim is a minor and the nongovernment organization victim
 6061 Advocate reasonably believes it is in the best interest of the victim to disclose the confidential
 6162 communication to the victim's parents or legal guardians;
 6263 (d) (3) when the victim is a minor and the minor's parents or guardians have consented
 63 to disclosure of the victim advocate communication and provided ~~the~~ written consent in compliance with
outlined
 64 ~~in~~ Subsection (d)(1);
 65 (d) (4) for victim advocate communication that is required to be disclosed under Title
 66 62A, Chapter 4a, Child and Family Services, or Section [62A-3-305](#);
 67 (d) (5) for victim advocate communication that is evidence of a victim being in clear
 68 and immediate danger to the victim's self or others;
 69 (d) (6) for victim advocate communication that is evidence that the victim has
 70 committed a crime, plans to commit a crime, or intends to conceal a crime;
 71 (d) (7) ~~if the~~ for victim advocate communication ~~is~~ with a criminal justice system victim
 72 advocate, which that person must disclose to a prosecutor under UCA 78-38-406(3), ~~the third person to which~~
~~the victim advocate communication is provided is a~~
 7372 ~~government entity that possesses a role or responsibility within the criminal justice system;~~
 7473 (d) (8) if the victim advocate communication is with a criminal justice system victim
 75 advocate, when a court determines, after ~~notice to~~ the victim has been notified and afforded an opportunity to be
heard and through an ~~and the right to be heard as to the~~
 74 ~~prejudicial effect as part of the~~ in camera review, that
 76• (d)(8)(A) the probative value of the victim advocate
 7775 communication substantially outweighs the prejudicial effect from the admission of the evidence on either the
victim or the relationship between the
 7876 criminal justice system victim advocate and the victim; or
 79 ~~(d) (9) if the victim advocate communication is with a criminal justice system victim~~
 77 ~~advocate, when a court determines, after in camera review,~~
 80• (d)(8)(B) that the communication is
 8178 exculpatory evidence, including impeachment evidence.

1 **VICTIM COMMUNICATIONS AMENDMENTS**

2 2019 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: V. Lowry Snow**

5 Senate Sponsor: Todd Weiler

7 **LONG TITLE**

8 **Committee Note:**

9 The Victim Advocate Confidentiality Task Force recommended this bill.

10 **General Description:**

11 This bill enacts provisions related to victim communications.

12 **Highlighted Provisions:**

13 This bill:

14 ► enacts the Privileged Communications with Victim Advocates Act, including:

- 15 • providing a purpose statement;
- 16 • defining terms;
- 17 • outlining the scope of the part;
- 18 • providing for privilege for communications;
- 19 • addressing government records; and
- 20 • requiring certain notices;

21 ► addresses examination of victim advocate; and

22 ► makes technical changes.

23 **Money Appropriated in this Bill:**

24 None

25 **Other Special Clauses:**

26 None

27 **Utah Code Sections Affected:**

28 AMENDS:

29 **78B-1-137**, as renumbered and amended by Laws of Utah 2008, Chapter 3

30 ENACTS:

31 **77-38-401**, Utah Code Annotated 1953

32 **77-38-402**, Utah Code Annotated 1953

33 **77-38-403**, Utah Code Annotated 1953

34 **77-38-404**, Utah Code Annotated 1953

35 **77-38-405**, Utah Code Annotated 1953

36 **77-38-406**, Utah Code Annotated 1953

37

38 *Be it enacted by the Legislature of the state of Utah:*

39 Section 1. Section **77-38-401** is enacted to read:

40 **Part 4. Privileged Communications with Victim Advocates Act.**

41 **77-38-401. Title.**

42 This part is known as the "Privileged Communications with Victim Advocates Act."

43 Section 2. Section **77-38-402** is enacted to read:

44 **77-38-402. Purpose.**

45 It is the purpose of this part to enhance and promote the mental, physical, and emotional
46 recovery of victims by restricting the circumstances under which communications with the
47 victim may be disclosed.

48 Section 3. Section **77-38-403** is enacted to read:

49 **77-38-403. Definitions.**

50 As used in this part:

51 (1) (a) "Advocacy services" means assistance provided that supports, supplements,
52 intervenes, or links a victim or a victim's family with appropriate resources and services to
53 address the wide range of potential impacts of being victimized.

54 (b) "Advocacy services" do not include the practice of mental health therapy as defined 55
in Section [58-60-102](#).

56 (2) "Advocacy services provider" means an entity that has the primary focus of
57 providing advocacy services in general or with specialization to a specific crime type or
58 specific type of victimization.

59 (3) "Communication" means the giving of information by a victim to a victim
60 advocate, and includes a record created or maintained as a result of providing the information.

61 (4) "Criminal justice system victim advocate" means an individual who:

62 (a) is employed or authorized to volunteer by a government agency that possesses a
63 role or responsibility within the criminal justice system;

64 (b) has as a primary responsibility addressing the mental, physical, or emotional
65 recovery of victims;

66 (c) completes a minimum 40 hours of trauma-informed training:

67 (i) in crisis response, the effects of crime and trauma on victims, victim advocacy
68 services and ethics, informed consent, and this part regarding privileged communication; and

69 (ii) that have been approved or provided by the Utah Office for Victims of Crime; and

70 (d) is under the supervision of the director or director's designee of the government
71 agency.

72 (5) "Nongovernment organization victim advocate" means an individual who:

73 (a) is employed or authorized to volunteer by an nongovernment organization advocacy
74 services provider;

75 (b) has as a primary responsibility addressing the mental, physical, or emotional
76 recovery of victims;

77 (c) has a minimum 40 hours of trauma-informed training:

78 (i) in assisting victims specific to the specialization or focus of the nongovernment
79 organization advocacy services provider and includes this part regarding privileged
80 communication; and

81 (ii) (A) that have been approved or provided by the Utah Office for Victims of Crime;
82 or

83 (B) that meets other minimally equivalent standards set forth by the nongovernment
84 organization advocacy services provider; and

85 (d) is under the supervision of the director or the director's designee of the
86 nongovernment organization advocacy services provider.

87 (6) "Record" means a book, letter, document, paper, map, plan, photograph, file, card,
88 tape, recording, electronic data, or other documentary material regardless of physical form or
89 characteristics.

90 (7) "Victim" means:
 91 (a) a "victim of a crime" as defined in Section [77-38-2](#);
 92 (b) an individual who is a victim of domestic violence as defined in Section [77-36-1](#); or
 93 (c) an individual who is a victim of dating violence as defined in Section [78B-7-402](#).

94 (8) "Victim advocate" means:
 95 (a) a criminal justice system victim advocate;
 96 (b) a nongovernment organization victim advocate; or
 97 (c) an individual who is employed or authorized to volunteer by a public or private
 98 entity and is designated by the Utah Office for Victims of Crime as having the specific purpose
 99 of providing advocacy services to or for the clients of that entity.

100 Section 4. Section **77-38-404** is enacted to read:

101 77-38-404. Scope of part.

102 This part governs the disclosure of communications to a victim advocate, except that:

103 (1) if Title 53B, Chapter 28, Part 2, Confidential Communications for Institutional
 104 Advocacy Services Act, applies, that part governs; and

105 (2) if Part 2, Confidential Communications for Sexual Assault Act, applies, that part
 106 governs.

107 Section 5. Section **77-38-405** is enacted to read:

108 77-38-405. Disclosure of communication given to a nongovernment organization
109 victim advocate.

110 ~~In accordance with the Utah Rules of Evidence, a~~ A nongovernment organization victim
 111 advocate may not disclose communications with a victim, including communications in a
 112 group therapy session, except to the extent allowed by the Utah Rules of Evidence.

113 Section 6. Section **77-38-406** is enacted to read:

114 77-38-406. Disclosure of communications given to a criminal justice system victim
115 advocate.

116 (1) ~~(a) In accordance with the Utah Rules of Evidence, a~~ A criminal justice system victim
 117 advocate may not disclose communications with a victim, including communications in a
 118 group therapy session, except ~~to the extent allowed by the Utah Rules of Evidence;~~

119 (i) that the criminal justice system victim advocate shall provide the communications
 120 to a prosecutor who is responsible for determining whether the communications are

121120 exculpatory or go to the credibility of a witness; or

122121 (ii) to the extent allowed by the Utah Rules of Evidence.

123122 (b) If a prosecutor determines that the communication is exculpatory or goes to the

124123 credibility of a witness, after giving notice to the victim and the defense attorney and an

125124 opportunity to be heard as part of the in camera process, the prosecutor will present the

126125 communication to the court for in camera review pursuant to the Utah Rules of Evidence.

127126 (2) A record that contains information from a communication between a criminal

128127 justice system victim advocate and a victim may not be disclosed under Title 63G, Chapter 2,

129128 Government Records Access and Management Act, to the extent that it includes the

130129 information about the communication.

131130 (3) A criminal justice system victim advocate, as soon as reasonably possible, shall

132131 notify a victim:

133132 (a) in writing that communications with the criminal justice system victim advocate

134133 may be disclosed to a prosecutor and that a statement relating to the incident that forms the

135134 basis for criminal charges or goes to the credibility of a witness may also be disclosed to the

136135 defense attorney; and

137136 (b) of the name, location, and contact information of one or more nongovernment

138137 organization advocacy services providers specializing in the victim's service needs, when a

139138 nongovernment organization advocacy services provider exists and is known to the criminal

140139 justice system victim advocate.

141140 Section 7. Section **78B-1-137** is amended to read:

142141 **78B-1-137. Witnesses -- Privileged communications.**

143142 There are particular relations in which it is the policy of the law to encourage

144143 confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in

145144 the following cases:

146145 (1) (a) Neither a wife nor a husband may either during the marriage or afterwards be,

147146 without the consent of the other, examined as to any communication made by one to the other

148147 during the marriage.

149 (b) This exception does not apply:

150 (i) to a civil action or proceeding by one spouse against the other;

151 (ii) to a criminal action or proceeding for a crime committed by one spouse against the

152 other;

153 (iii) to the crime of deserting or neglecting to support a spouse or child;

154 (iv) to any civil or criminal proceeding for abuse or neglect committed against the child
155 of either spouse; or

156 (v) if otherwise specifically provided by law.

157 (2) An attorney cannot, without the consent of the client, be examined as to any
158 communication made by the client to the attorney or any advice given regarding the
159 communication in the course of the professional employment. An attorney's secretary,
160 stenographer, or clerk cannot be examined, without the consent of the attorney, concerning any
161 fact, the knowledge of which has been acquired as an employee.

162 (3) A member of the clergy or priest cannot, without the consent of the person making
163 the confession, be examined as to any confession made to either of them in their professional
164 character in the course of discipline enjoined by the church to which they belong.

165 (4) A physician or surgeon cannot, without the consent of the patient, be examined in a
166 civil action as to any information acquired in attending the patient which was necessary to
167 enable the physician or surgeon to prescribe or act for the patient. However, this privilege shall
168 be waived by the patient in an action in which the patient places the patient's medical condition
169 at issue as an element or factor of the claim or defense. Under those circumstances, a physician
170 or surgeon who has prescribed for or treated that patient for the medical condition at issue may
171 provide information, interviews, reports, records, statements, memoranda, or other data relating
172 to the patient's medical condition and treatment which are placed at issue.

173 (5) A public officer cannot be examined as to communications made in official
174 confidence when the public interests would suffer by the disclosure.

175 (6) (a) A sexual assault counselor as defined in Section 77-38-203 cannot, without the
176 consent of the victim, be examined in a civil or criminal proceeding as to any confidential
177 communication as defined in Section 77-38-203 made by the victim.

178 (b) A victim advocate as defined in Section 77-38-403 cannot, without the consent of
179 the victim, be examined in a civil or criminal proceeding as to a communication that is a
180 privileged communication under the Utah Rules of Evidence, unless the victim advocate is
181 examined in camera to determine whether a communication is privileged under the Utah Rules
182 of Evidence.

TAB 3

RULE 804 CASE LAW

STATE LAW:

The following states do not have the “similar motive to develop” language.

1. Alabama 804 (b)(1) (1) *Former Testimony*. Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-examination, and (D) in litigation in which the issues and parties were substantially the same as in the present cause.
 - a. *“The videotaped testimony of the victim, which was recorded during a preliminary hearing, was properly admitted at trial, as the victim, who was hospitalized at the time of the hearing, was unavailable to testify. The appellant argues that the use of the videotape denied him of his right to fully cross-examine the victim. However, the record indicates that the appellant was represented by counsel at the preliminary hearing and that counsel was made aware that the testimony might be used at a future date during the appellant’s trial. During the preliminary hearing, the appellant’s counsel objected to any future use of the video tape because it would violate the appellant’s Sixth Amendment right to confront witnesses. “In order that the testimony of a witness, given on a formal trial or proceeding, may be admissible, it is essential that the party against whom it is offered was given an opportunity to cross-examine the witness during the former trial or proceeding....“It is not essential that the party actually cross-examine the witness at the formal trial or proceeding. His failure to exercise the right when afforded the opportunity does not exclude the former testimony....“If the tribunal, on the former hearing, improperly restricted the right of the party to cross-examine, the former testimony of the witness clearly is inadmissible.*902 “In the trial of a defendant for a crime, the testimony of a now-unavailable witness, given on a former trial of the defendant on the same charge, is not admissible upon the offer of the State in the present trial if the defendant was not represented by counsel on the former trial and if the defendant did not effectively waive his constitutional rights to the assistance of counsel on the former trial.” C. Gamble, McElroy’s Alabama Evidence § 245.07(5) (3d ed. 1977). The record indicates that, before the jury venire was qualified in the appellant’s trial, a hearing was held in the trial judge’s chambers in which the prosecutor indicated that the defense counsel had previously stated that he would stipulate to the fact that the victim was “unavailable” as that term is defined under the law, based on a letter provided from the victim’s physician. The prosecutor stated that the defense counsel stipulated that the witness was unavailable “such that testimony from a prior proceeding which meets all the requirements under the opportunity to cross-examine” would be admissible in place of the victim’s trial testimony. The prosecutor*

stated that if the appellant had changed his mind, she wanted the victim's physician to be subpoenaed to testify so that the trial court could determine whether or not the victim was unavailable. Defense counsel replied that he unquestionably had stipulated to the fact that the victim was unavailable to testify because he was in the hospital, but defense counsel objected to the introduction of the videotape from the preliminary hearing on the grounds that if the examination had been conducted during a jury trial, he might have asked other questions or cross-examined in another manner. Defense counsel acknowledged that the prosecutor had telephoned him, prior to videotaping the victim's testimony at the preliminary hearing, and that defense counsel had consented to the taping. However, defense counsel argued that he did not consent to its use at a future time. Other jurisdictions have held videotaped testimony of an unavailable witness in a criminal trial admissible under certain "exceptional" circumstances: where the witness is unavailable; where the videotape is made under the supervision of the proper judicial authority and with the defendant present; where the defendant is given his fair rights to cross-examine the witness; and where the videotape is sufficiently clear that the jury is able to observe the witness's demeanor. State v. Jeffries, 55 N.Car.App. 269, 285 S.E.2d 307, app. den., 305 N.C. 398, 290 S.E.2d 367 (1982). See also People v. Wilson, 112 A.D.2d 746, 492 N.Y.S.2d 242, app. den., 66 N.Y.2d 768, 497 N.Y.S.2d 1043, 488 N.E.2d 129 (1985). In the present case, there is no question that the victim was unavailable to testify at trial. Moreover, there is no question that the testimony was taken at a preliminary hearing before a district judge, and that the victim was testifying under oath. A transcript of the victim's prior testimony is included in the record on appeal and shows that the victim was extensively cross-examined by the appellant's counsel. Therefore, the videotape was properly admitted into evidence. Ready v. State, 574 So. 2d 894, 901–02 (Ala. Crim. App. 1990)

2. Virginia 804 (b)(1):

- a. "In *Longshore*, the Virginia Supreme Court reiterated that preliminary hearing testimony of an unavailable witness was admissible provided: (1) that the witness is presently unavailable; (2) that the prior testimony of the witness was given under oath (or in a form of affirmation that is legally sufficient); (3) that the prior testimony was accurately recorded or that the person who seeks to relate the testimony of the unavailable witness can state the subject matter of the unavailable witness's testimony with clarity and in detail; and (4) that the party against whom the prior testimony is offered was present, and represented by counsel, at the preliminary hearing and was afforded the opportunity of cross-examination when the witness testified at the preliminary hearing. *380 260 Va. at 3–4, 530 S.E.2d at 146 (citing *Shifflett v. Commonwealth*, 218 Va. 25, 28, 235 S.E.2d 316, 318 (1977); *Fisher v. Commonwealth*, 217 Va. 808, 812–13, 232

S.E.2d 798, 801–02 (1977)). Morgan v. Com., 50 Va. App. 369, 379–80, 650 S.E.2d 541, 546 (2007).

3. Nevada:

- a. *“The Confrontation Clause of the Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. In accordance with that right, prior testimony from a witness unavailable at trial is admissible only if the defendant had “a prior opportunity for cross-examination.” Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In Chavez v. State, we held “that a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him pursuant to Crawford.” 125 Nev. 328, 337, 213 P.3d 476, 482 (2009). “The adequacy of the opportunity to confront will be decided on a case-by-case basis, turning upon the discovery available to the defendant at the time and the manner in which the magistrate judge allows the cross-examination to proceed.” Id. Applying that test to the facts in Chavez, in which a victim of sexual assaults died after testifying at a preliminary hearing but before trial, we noted that “nearly all the discovery was complete” at the time of the hearing, “and the magistrate judge allowed Chavez unrestricted opportunity to confront [the witness] on all the pertinent issues.” Id. at 341, 213 P.3d at 485–86. We therefore concluded that admitting the witness's testimony at trial did not violate Chavez's Confrontation Clause rights. See id. at 341–42, 213 P.3d at 486. State v. Eighth Judicial Dist. Court in & for Cty. of Clark, 412 P.3d 18, 21 (Nev. 2018)*
- b. *“We recognize that this court has previously indicated that three conditions must be met before testimony from a preliminary hearing may be used at a criminal trial: “first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial.” Hernandez v. State, 124 Nev. 639, 645, 188 P.3d 1126, 1130 (2008) (quoting Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970)); see also Grant v. State, 117 Nev. 427, 432, 24 P.3d 761, 764 (2001); Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777–78 (1997); Aesoph v. State, 102 Nev. 316, 320, 721 P.2d 379, 381–82 (1986). All of these cases derive from Drummond, in which we tried to reconcile dicta from two United States Supreme Court cases decided in the 1960s. 86 Nev. at 7, 462 P.2d at 1014. But neither Drummond nor the cases cited above addressed the issue of whether an opportunity to cross-examine suffices when no actual cross-examination occurred. See Grant, 117 Nev. at 432 n.5, 24 P.3d at 764 n.5 (“[W]hether mere opportunity is sufficient has not been addressed since in most cases, the witness was actually cross-examined.”). Therefore, because those cases did not turn on whether an opportunity to cross-examine is sufficient for confrontation purposes, statements addressing that issue are noncontrolling dicta. See Armenta–Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (declining to apply the doctrine of stare decisis to statements from a prior opinion that “went beyond*

answering the limited question that was before the court”). We see no reason to adhere to that dicta when the Supreme Court has since clarified that prior testimony from a witness unavailable at trial is admissible as long as the defendant had “a prior opportunity for cross-examination.”¹ Crawford, 541 U.S. at 68, 124 S.Ct. 1354 (emphasis added). State v. Eighth Judicial Dist. Court in & for Cty. of Clark, 412 P.3d 18, 22 (Nev. 2018)

FEDERAL LAW:

There aren't many federal cases that have addressed the issue in the context of Rule 804 only. In fact, they almost all appear to conflate the Confrontation Clause issues with Rule 804. And they always admit the testimony or affirm the admission of the testimony. Below are some examples:

- *U.S. v. Carneglia*, 256 F.R.D. 366 (E.D. N.Y. 2009) (holding that victim's testimony at preliminary hearing on state charges against the defendant was admissible at federal trial, even though the rules and procedures between the proceedings were "slightly different," because the defendant had a "substantial interest in challenging" the testimony at the preliminary hearing).
- *U.S. v. Hargrove*, 382 Fed. Appx. 765 (10th Cir. 2010) (affirming admission of testimony from state preliminary hearing in federal criminal trial because "the motive at a preliminary hearing is sufficiently similar to the motive at trial"). One problem with this case, though, is that it conflates the Confrontation Clause analysis with Rule 804 analysis.
- *U.S. v. Avants*, 367 F.3d 433 (6th Cir. 2004) (affirming admission of testimony from state preliminary hearing in federal criminal trial because the defendant's motive in both cases was to discredit the witness). This case also conflates the Confrontation Clause with Rule 804.

TAB 4

1 **Rule 106. Remainder of or related writings or recorded statements.**

2 (a) If a party introduces all or part of a writing or recorded statement, an adverse party
3 may require the introduction, at that time, of any other part—or any other writing or
4 recorded statement--necessary to qualify, explain, or place into context the portion
5 already introduced, even if the remainder is otherwise inadmissible under these rules.

6 (b) Exceptions: If the introduction of the remainder is inadmissible under an Article V
7 privilege, both the initial statement and the remainder shall be excluded.