

EVIDENCE
Course Policies and Syllabus
MWF 2:00-2:50
Professor Sanders

SYLLABUS

Course Description: This course is about the rules governing the introduction and use of evidence in civil and criminal trials. More particularly, it is about the rules governing the testimony of witnesses, the introduction of evidence and out-of-court statements into evidence at trial, and the threshold standards determining the admissibility of all evidence. The course will concentrate on the Federal Rules of Evidence.

Grading.

11 Weekly Friday Quizzes (5 points each, cumulative)	55%
Final Exam (50 Multiple-Choice Questions)	25%
Daily Clicker Questions (33% Rule)	10%
Midterm - Motion in Limine	10%

Class Structure: Most of our class time will be spent applying the rules of evidence to various factual scenarios through clicker questions, class room exercises, and hypotheticals.

Contact Info: Office: 236D
E-Mail: docksanders@gmail.com

Office Hours: MWF: 3:00-5:45

Required Materials: Deborah Merritt and Ric Simmons, *Learning Evidence* (4th ed.); Turning Point License

Recommended Materials: Paul, C. Giannelli, *Understanding Evidence*, Fifth Edition, CAP Press, ISBN 978-1-5310-0989-2; Arthur Best, *Evidence: Examples and Explanations*. David L. Faigman, *The Federal Rules of Evidence Map*; Clifford Fishman, *A Student's Guide to Hearsay*, Fifth Edition, CAP Press, ISBN 978-1-5310-1272-4; Sydney Beckman, *A Short & Happy Guide to Evidence*, 1st Edition, West Academic Publishing, 9781683289371; Goode and Wellbron's, *Courtroom Evidence Handbook, 2019-2020* (Student Edition), West Academic Publishing, ISBN: 9781642427738.

For those really interested or who have greater need: Aviva Orenstein, *Acing Evidence*, 2nd Edition, West Academic Publishing, ISBN: 9781634606059; Michael H. Graham, *Exam Pro on Evidence (Objective)*, 6th Edition, West Academic Publishing, 9781640206786; Steven Goode, *Sum and Substance Audio on Evidence*, 5th Edition, West Academic Publishing; Ronald W. Eades, *Mastering Evidence*, CAP Press, ISBN 978-1-59460-261-0

TWEN. This class will use the TWEN webcourse. You must register for the TWEN Webcourse so you can receive emails from me. Once registered, you are responsible for logging on to TWEN to access scores, handouts, problems, quizzes, assignments, and announcements. Should you decide to delete the webcourse after the semester concludes, you should wait until receiving your final grade to do so. This is because you will receive emails from me including a score-confirmation spreadsheet and other grade-related inquiries after the semester concludes.

Assignments. An outline of tentative reading assignments (syllabus) is provided below. However, reading assignments for upcoming classes will be adjusted based on progress and need. Students should bring the required materials listed above and all handouts with them to class. You may also regularly be given questions, problems, quizzes, and other assignments to work on outside of class.

Attendance, Preparation and Participation. You should come to class on time and be prepared to discuss the assignments for that class. You will be quizzed frequently on reading assignments as well as on any prior material covered. This means, in preparation for each class, you should not only read the chapters, but you should study, understand, memorize and be able to apply the rules announced in each case. The use of the flash card system is recommended.

You should bring an internet accessible device to each class. Quizzes, hypotheticals and problem sets will be routinely given using the turning point software which requires internet access.

A failure to attend class regularly, or to be prepared in class, will adversely affect your grade. Students must miss no more than 5 classes over the course of the semester in order to receive credit for the course. Moreover, because quizzes will be given on a regular basis, missing classes also means missing quizzes. This will directly affect your grade.

In the event of an absence, any request to make up a quiz, exam or other assignment should be made only after an excuse is obtained from Dean Mouton in the Dean of Student's office.

Class Discussions. All students will be on call each and every class period. Each student should be prepared to be orally examined on the assigned cases, problems, and materials. Students should also be prepared to answer hypotheticals designed to test their understanding of the rules and rationales underlying the rules as well as to engage in court-room style debates with other students concerning the admissibility of evidence. Students who are called upon to debate rules or problem sets should stand up and remain standing until the completion of the exercise.

Each student is awarded four (4) passes that he or she may use at his or her discretion. Thereafter, half of a percentage point (.5) will be deducted from your final grade total for each instance of unreadiness. Instances comprising unreadiness include answering, "I don't know," as well as waiting more than 5 seconds to begin your response.

Clicker Questions. 10% of your grade will derive from your averaged performance on daily clicker questions. These questions will most frequently take the form of hypotheticals derived from examples in the text. If you maintain at least a 33% average on the questions tested, you will get complete credit. If you get less than 33% of all questions given correct, then you will only get credit for the percentage of the questions you actually get correct. For example, if your average is 30%, then will get 3 points, if 20% then 2 points, if 10 percent, 1 point. This average is based on the number of questions given as oppose to the number of questions you answer. In other words, a non-answer will register, for all intents and purposes, as an incorrect response. The average has been preadjusted to account for technical problems, absences and other issues that may cause you to not to register responses.

You are expected to get at least 45-60% of the questions you actually answer correct. Furthermore, you should, irrespective of technical difficulties and absences, be able to answer at least 80% of total questions given. So, for example, if you miss 20% of all questions due to

technical difficulties and absences and get 50% of the questions you do answer correct, your average would still be 40%, well above the 33% threshold. There should be anywhere between 190 and 230 questions in total which means you must register between 63 and 76 correct answers respectively to get full credit. I will periodically give you reports on your percentages to keep you a breast of the situation.

Technology. The use of laptops is limited to course-related activity. Other unauthorized uses will result in point deductions. Internet usage is not allowed during class for any purpose unless under the express direction of the professor. The audio or video recording of the lecture and/or class discussion is not allowed.

Professionalism. You are expected to treat your colleagues like you want to be treated. You are also expected to be respectful of the teaching process and to abstain from any activity that might detract from the learning environment, included but not limited to engaging in distracting side-conversations and not waiting to be acknowledged before you speak. You are expected to be in class on time and to remain in class throughout the class period, barring an emergency such as a restroom need.

READING ASSIGNMENTS (42 Classes Excluding Holidays)

CLASS INTRODUCTIONS (1 Class)

- **Personal Introductions**
- **Class Policies, Grading and Pedagogy**
- **My Cousin Vinny Intro to Evidence**

INTRO TO RULES OF EVIDENCE (1 Class) 8/21

- **Chapter 2: Types of Courtroom Evidence(Recommended)**
- **Chapter 3: Four W's of the Federal Rules of Evidence (Recommended)**
- **Chapter 4: Structure of a Trial (Recommended)**
- **Chapter 5: Raising and Resolving Evidentiary Objections (Required)**

PRE-QUIZ (1 Class) 8/23

R	I	C	H¹
Relevance & Prejudice	Impeachment	Character Evidence	Hearsay

I. RELEVANCE/PREJUDICE

RELEVANCE AND PREJUDICE: (3 classes) 8/28-8/30

¹ Most questions on an exam will involve one of these categories

- Relevance and Prejudice Pre-Quiz
- Chapter 6: Relevance
- Chapter 7: Prejudice, Confusion, or Waste of Time
- Chapter 8: Fitting the Rules Together
- PROBLEMS: 1.1, 1.2, 1.3, 1.6, 1.7

SPECIALIZED PREJUDICE RULES (2 class) 9/4-9/6

P	R	I	S	M²
<u>P</u> leas	<u>R</u> emedial Measures	<u>I</u> nsurance	<u>S</u> ettlement Offers	<u>M</u> edical Expense Offers

- Chapter 9: Subsequent Remedial Measures
- Chapter 10: Settlements and Offers to Compromise
- Chapter 11: Medical Expenses
- Chapter 12: Criminal Plea Bargaining
- Chapter 13: Liability Insurance

WITNESSES: (1 classes) 9/9

- Chapter 14: Putting a Witness on the Stand
- Chapter 15: Examining Witnesses
- Chapter 16: Refreshing a Witness's Memory

II. IMPEACHMENT

P.	I.	T.	Bull³
Perception	Inconsistency	Truthfulness	Bias

IMPEACHMENT: (2 classes) 9/11-9/13

- Chapter 17: Impeaching Witnesses
- Chapter 18: Use of Prior Statements to Impeach

IMPEACHMENT: (3 classes) 9/16-9/20

- Chapter 19: Exposing Untruthfulness on Cross-Examination
- PROBLEMS: 4.1, 4.2
- Chapter 20: Using Criminal Convictions to Impeach
- PROBLEMS: 4.3, 4.5
- Chapter 21: Reputation or Opinion Evidence
- Chapter 22: Cross-Examining the Character Witness
- PROBLEMS: 4.6, 4.7, 4.8

III. CHARACTER-RELATED EVIDENCE

CHARACTER EVIDENCE, PROPENSITY: (3 Classes) 9/23-9/27

² The 5 categories of specialized rules of prejudice

³ 4 reasons to impeach

- Chapter 25: Character Evidence and the Rules
- Chapter 26: Character Evidence as an Element of the Case

D'	N	I	C	E⁴
<u>D</u> efamation	<u>N</u> egligent Hiring, Supervision, Entrustment	<u>I</u> mmigration	<u>C</u> hild Custody	<u>E</u> ntrapment

R	O	C⁵
<u>R</u> eputation evidence	<u>O</u> pinion	<u>C</u> onduct (Specific Instances)

- Chapter 27: Using Character Evidence to Prove Propensity
- Chapter 28: Character Evidence to Show Propensity in Criminal Prosecutions
- Chapter 29: Method of Proving Propensity in Criminal Cases
- PROBLEMS: 3.15, 3.16

CHARACTER EVIDENCE, NON-PROPENSITY: (1 Class) 9/30

- Chapter 30: Crimes, Wrongs, or Other Acts

M	I	M	I	C	K⁶
Motive	Intent	Absence of Mistake	Identity	Common Plan	Knowledge

- PROBLEMS: 3.1, 3.3, 3.4, 3.7, 3.11
- Chapter 31: Habit Evidence

CHARACTER EVIDENCE, SEXUAL ASSAULT CASES: (1 class) 10/2

- Chapter 32: Rape Shield Law
- Chapter 33: Propensity in Sexual Assault Cases

IV. HEARSAY

HEARSAY RULE: (2 classes) 10/4-10/7

- Chapter 35: What Is Hearsay and Why Don't We Like It?
- Chapter 36: The "Truth of the Matter Asserted"
- Chapter 37: What Is a Statement?
- Chapter 38: Admissible Hearsay
- PROBLEMS: 7.1-7.10

⁴ Types of cases in which character is an issue

⁵ Evidence that may be offered when character is at issue

⁶ Evidence is not offered for propensity if offered for any of these purposes

B	R	I	B	E ⁷
<u>B</u> elief	<u>R</u> eason	<u>I</u> ntent	<u>B</u> ias	<u>E</u> motion

C	-	E	L	V	I	S ⁸
Capacity		Effect on Listener	Legally Operative Effect	Verbal Act	Impeachment	State of Mind

HEARSAY EXCEPTIONS: (1 Class) 10/9

- **Chapter 39: Hearsay Exemption: Prior Statements by Witnesses**
- PROBLEMS: 7.19, 7.20

V. HEARSAY EXCEPTIONS

B	A	D
Business Records	Admissions	Dying Declarations

S	P	L	A	T	S
Spontaneous Statements	Past Recollections Recorded	Learned Treatise	Against Interests Statements	Testimony, Former	State of Mind

P	A	P	P	I	M ⁹
Public Records	Ancient Documents	Prior Inconsistent Statements	Prior Consistent Statements	Identifications	Medical Diagnosis

HEARSAY EXCEPTIONS: (3 Classes) 10/11-10/16

- **Chapter 40: Hearsay Exceptions—Present Sense Impressions and Excited Utterances**
- PROBLEMS: 7.29, 7.30
- **Chapter 41: Hearsay Exception—State of Mind**
- PROBLEMS: 7.33
- **Chapter 42: Hearsay Exception—Medical Treatment**

HEARSAY EXCEPTIONS: (2 Classes) 10/18-10/21

- **Chapter 43: Hearsay Exception—Recorded Recollection**
- PROBLEMS: 7.38

⁷ Statement is not hearsay if offered for any of these purposes

⁸ Statement is not hearsay if offered for any of these purposes

⁹ Exceptions to the hearsay rule

- **Chapter 44: Rule 805—Hearsay Within Hearsay**

HEARSAY EXCEPTIONS: (1 Class) 10/23

- **Chapter 45: Hearsay Exception—Business Records**
- PROBLEMS: 7.39, 7.40

R	A	P	P¹⁰
<u>R</u> egularly conducted business activity	Made <u>A</u> t Time of Observation	Routine <u>P</u> ractice to make	<u>P</u> ersonal Knowledge of the Maker

HEARSAY EXCEPTIONS: (1 Class) 10/25

- **Chapter 46: Hearsay Exception—Public Records**

CATCH-UP DAY: (1 Class) 10/28

HEARSAY EXCEPTIONS (1 Class) 10/30

- **Chapter 47: Other 803 Exceptions**
- **Chapter 48: Rule 804 Introduction—What Is Unavailability?**

P	E	R	I	S	H¹¹
<u>P</u> rivilege	<u>E</u> xhaustion (of memory)	<u>R</u> efusal (to testify)	<u>I</u> nability (to procure witness' attendance)	<u>S</u> ick	<u>H</u> istory (dead)

- **Chapter 49: Hearsay Exception—Former Testimony**
- PROBLEMS: 7.22, 7.23

HEARSAY EXCEPTIONS (1 Class) 11/1

- **Chapter 50: Hearsay Exception—Dying Declarations**
- PROBLEMS: 7.28
- **Chapter 51: Hearsay Exception—Statement Against Interest**
- PROBLEMS: 7.24

HEARSAY EXCEPTIONS (1 Class) 11/4

- **Chapter 53: Hearsay Exemption—Statements by an Opposing Party**
- PROBLEMS: 7.11, 7.12, 7.13, 7.15, 7.16

HEARSAY EXCEPTIONS (1 Class) 11/6

¹⁰ Elements of business records exception

¹¹ Categories of unavailability

- Chapter 55: Hearsay Exemption—Statements of Coconspirators
- Chapter 57: Attacking Declarant’s Credibility

CATCH-UP DAY: (1 Class) 11/8

VI. CONFRONTATION

THE SIXTH AMENDMENT AND HEARSAY (2 classes) 11/11-11/13

- Chapter 58: The Sixth Amendment and Hearsay
PROBLEMS: 8.2, 8.3, 8.4, 8.5, 8.8, 8.9

VII. OPINION TESTIMONY

OPINION TESTIMONY: (3 classes) 11/15-11/20

- Chapter 60: Lay Opinions
- PROBLEMS: 9.1, 9.3
- Chapter 61: What Subjects Are Appropriate for Expert Testimony?
- Chapter 62: Qualifying Experts
- Chapter 63: Bases of Expert Opinion
- Chapter 64: Limits on Opinion and Expert Testimony
- PROBLEMS: 9.6, 9.7, 9.10, 9.12, 9.13

VIII. PRIVILEGES

PRIVILEGES AND REVIEW (1 class) 11/22

- Privileges

IX. AUTHENTICATION AND BEST EVIDENCE

AUTHENTICATION AND BEST EVIDENCE (1 class) 11/22

- Chapter 69: Authentication

N	O	N
<u>N</u> ewspapers/Periodicals	<u>O</u> fficial Publications	<u>N</u> otarized Documents

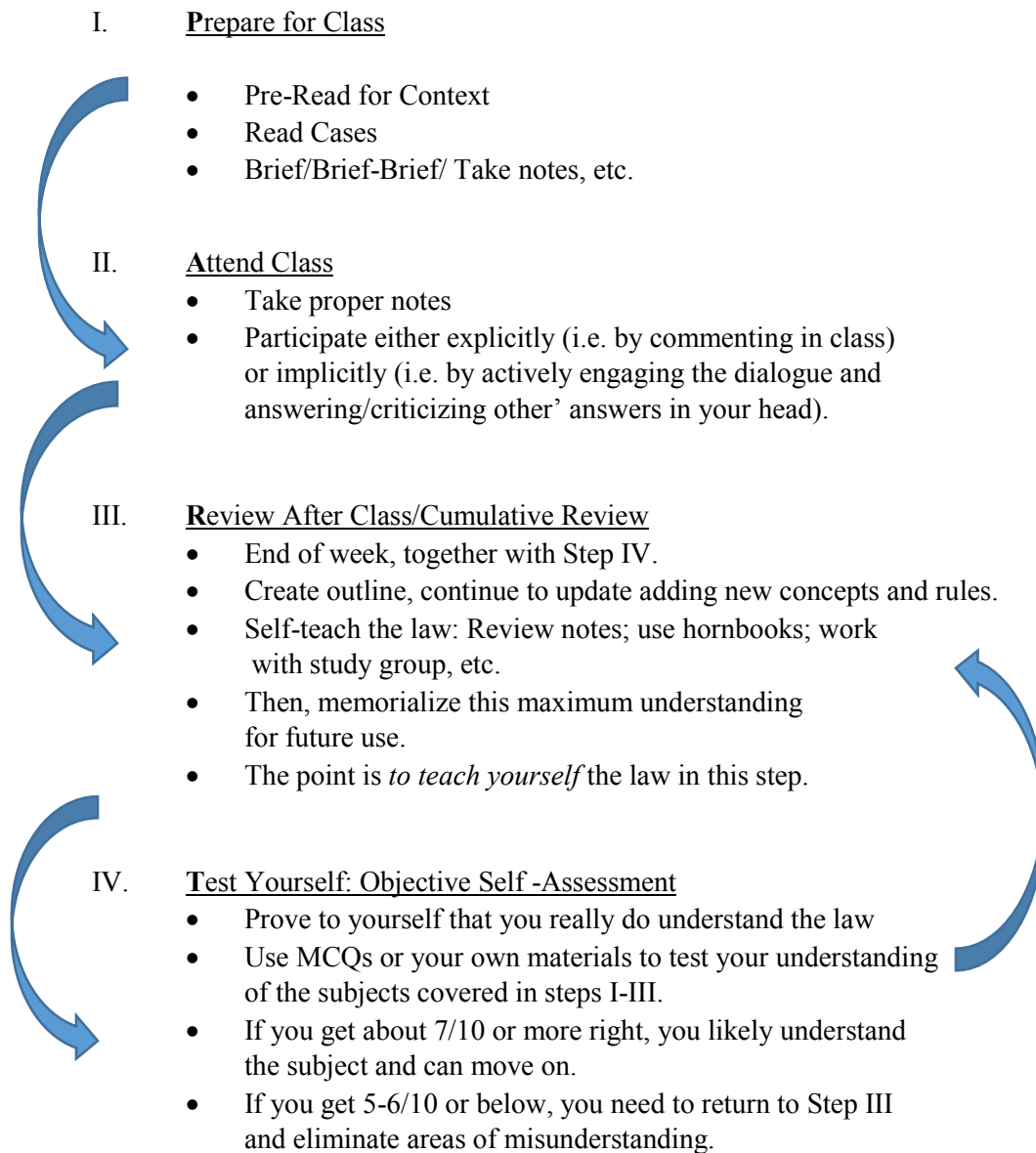
F	L	I	P	S ¹²
<u>F</u> oreign Public Records	<u>L</u> abeled Products	<u>I</u> negotiable Instruments	<u>P</u> ublic Records, Certified	Documents with government <u>S</u> eal

- Chapter 70: Best Evidence

¹² Self-authenticating documents

A	D	O	P	E ¹³
<u>A</u> dmitted by opposing party	<u>D</u> estroyed original document	<u>O</u> utside of the court's subpoena jurisdiction	<u>P</u> ublic Records	<u>E</u> xclusive Possession of Opposing Party

Four Step Study Method



¹³ Exceptions to the best evidence rule

ATTACKING EVIDENCE QUESTIONS

- What is the nature of the evidence and why is it being offered?
 - Is it **Character-Related Evidence** (404)?
 - Used to attack **credibility** (607, 608, 609)?
 - Is it **reputation or opinion evidence** introduced to attack the witness's character for truthfulness (608a)?
 - Is it **extrinsic (external) evidence** offered to prove **specific instances** of a witness's conduct (608b)?
 - Is the evidence offered on **cross-examination** in the form of questions inquiring into **specific instances** of conduct (608b)?
 - Is it in the form of a **criminal conviction** (609)?
 - Was the witness released or convicted (if there was no jail time) more than 10 years ago?
 - Does the conviction involve a crime of falsity?
 - Was the conviction for a felony not involving an element of falsity?
 - Offered against the D?
 - Offered against another witness?
 - Used as **substantive evidence** of guilt or liability (404(a)(1))?
 - Is character an **element** of case (405a)?
 - Is this a **criminal case** and does the “**mercy rule**” apply (404(a)(2))?
 - Is the D offering **reputation and opinion** evidence of his **own pertinent character trait** (404(a)(2)A)?
 - Is the D offering **reputation and opinion** evidence of the **victim's pertinent trait** (404(a)(2)B)?
 - Is the prosecution offering **reputation and opinion evidence** (or inquiring about **specific instances** of the **pertinent character trait**) of the **D's character** or the **victim's character** in rebuttal of **D's character evidence** (404(a)(2)(A)-B)?
 - Is it a **homicide case** and is the prosecutor offering evidence of the alleged **victim's trait** of **peacefulness** to **rebut** evidence that the **victim** was the **initial aggressor** (404(a)(2)C)?

- *Is the evidence a **crime, wrong, or other act** offered for non-propensity purposes such as identity, motive, knowledge, intent, opportunity or common plan or scheme (404b)?*
- *Is the evidence admissible as **Habit or Routine** to show that a person acted in conformity with habit or routine on a particular occasion (406)?*
- Is the evidence being used solely to **refresh the recollection** of a witness (612)?
- Is the evidence a writing or statement made outside of the current trial—introduced to **attack the credibility of a witness?**
 - *Does the evidence count as a **prior inconsistent statement** (613)?*
 - Is the evidence in the form of an **inquiry**?
 - Is the evidence **extrinsic (external)**?
 - Is the evidence offered to attack credibility regarding a **fact of consequence**?
 - Is the evidence offered to attack credibility regarding a **collateral matter (unimportant)**?
- Is the evidence a writing or statement made outside of the current trial—introduced to establish **motive, effect on listener, etc?**
- Is the evidence a writing or statement made outside of the current trial—introduced to establish the **truth of the statement's contents** (801(c), (802)?
 - *If so, does an exemption to the hearsay rule apply (801(d))?*
 - **Prior Statement** by declarant-witness who is subject to cross-examination (801(d)(1)?
 - **Prior inconsistent statement** given under penalty of perjury at a trial, hearing, or other proceeding.
 - **Prior consistent statement** offered to rebut an express or implied charge of recent fabrication or improper influence
 - **Identification**
 - **Statement** made or adopted by a **Party-Opponent** (801(d)(2)?
 - If not, does an exception apply that **doesn't** depend on the availability of the declarant? (803)
 - **Present Sense Impression** (803(1)?
 - Describing or explaining? Contemporaneous?
 - **Excited Utterance** (803)(2)?
 - Startling event? Made under Stress of excitement?
 - Then-existing **State of Mind** (803(3)?

- Emotional, sensory or physical condition?
- Introduced to prove fact remembered or believed?
- **Statement Made for Medical Diagnosis or Treatment** (803(4))?
 - Pertinent to diagnosis or treatment? Made by doctor to patient?
- **Recorded Recollection** (803(5))?
 - Made by witness who cannot recall? Made/adopted when memory was fresh?
- **Business Record** (803(6))?
 - Kept in course of regularly conducted business activity? Regular practice to keep record?
- **Public Record** (803(8))?
 - Public office? Observations made while under legal duty to report? Factual findings (conclusions) from investigation? Offered against a criminal D? Trustworthy?
- **Learned Treaty?**
- **Ancient Document?**
- If not, does an exception apply that **requires** that the declarant be **unavailable?** (803)
 - **Former Testimony** of an unavailable witness (804(b)(1))?
 - Given as a witness at a trial, hearing, or deposition? Offered against party who had an opportunity and similar motive to develop the testimony in a prior case?
 - **Dying Declaration** of an unavailable witness (804(b)(2))?
 - Homicide or civil case? Belief that death is imminent? Statement about the cause or circumstances of injury?
 - **Statement against the interest** of an unavailable witness (804(b)(3))?
 - Statement contrary to declarant's proprietary or pecuniary interest? Tendency to invalidate the declarant's claim? Expose declarant to civil or criminal liability? If offered in a criminal case against the accused, do the surrounding circumstances suggest trustworthiness?
- If the evidence consist of an out-of-court statement offered against a criminal defendant, is the statement testimonial under the sixth amendment, and, if so, was there a prior opportunity to cross-examine the declarant?

