SUBMITTING TO LEGAL AUTHORITIES: THE DIFFERENCE BETWEEN INTERPRETATION OF FEDERAL RULE OF EVIDENCE 803(3) AND APPLICATION OF MISSISSIPPI RULE OF EVIDENCE 803(3)

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INTRODUCTION

Hearsay statements that illustrate a person's state of mind or internal condition present unique evidentiary challenges. As the venerable case *Mutual Life Insurance Co. of New York v. Hillmon* from the United States Supreme Court noted:

> A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen.[1]

Evidentiary Rule 803 contains an exception for spontaneous statements. Numerous cases and authorities have applied and interpreted this complicated exception. This Comment will examine how leading secondary legal authorities define the scope of the hearsay exception set forth in Federal Rule of Evidence 803(3). Using these authorities as a benchmark, this Comment will then survey Mississippi cases that have applied Mississippi Rule of Evidence 803(3). Ultimately, this Comment aims to determine whether decisions from Mississippi courts applying this exception correspond with the authorities analyzing Federal Rule of Evidence 803.

I. INTERPRETATION OF FEDERAL RULE OF EVIDENCE 803(3)

Four types or categories of spontaneous statements implicate Federal and Mississippi Rule of Evidence 803(3).[2] The first group

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[1] 145 U.S. 285, 295 (1892).

[2] The rule states:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness . . . . A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

FED. R. EVID. 803(3); *see* 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:70 (3d ed. 2007) (describing Rule 803(3) as "a provision of extraordinary importance"); *see also* MCCORMICK ON EVIDENCE 474-80 (Kenneth S. Broun ed., 6th ed. 2006) [hereinafter MCCORMICK]; JACK B. WEINSTEIN & MARGARET

of statements, hereinafter category one, involve feelings, symptoms, and conditions.[3] Category two includes statements that indicate the speaker's state of mind.[4] Statements of intent comprise category three.[5] Finally, category four contains statements that recount memories or recite beliefs.[6] Generally, statements in categories one, two, and three fall within the Rule 803(3) exception and are admissible hearsay.[7] The exception does not apply to inadmissible category four statements.[8] A survey of evidence law treatises will define each category's scope.

A. Category One—Statements of Feeling, Symptom, and Condition

To qualify for the Rule 803(3) exception, category one statements must describe a then-existing feeling, symptom, or condition.[9] For example, someone might describe a pain felt while experiencing that feeling, like making an immediate declaration

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A. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 16.04 (2011) (noting that Rule 803(3) "combines in one provision what are really two exceptions of markedly different characteristics," referring to "the least troubling and complex exception[]" for feelings, symptoms, and conditions in contrast to the "most difficult issues" raised by statements involving state of mind); GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER'S FEDERAL EVIDENCE § 803.12 (7th ed. 2011).

[3] MCCORMICK, *supra* note 2, at 474.

[4] *Id.* at 474-76.

[5] *Id.* at 476-78.

[6] *Id.* at 478-80.

[7] *Id.* at 474-78.

[8] *Id.* at 478-80.

[9] *Id.* at 474 ("Being spontaneous, [these] hearsay statements are considered of greater probative value than the present testimony of the declarant."); *see also* 4 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 29:13, at 687 (7th ed. 2000) ("The statement must describe a physical condition as it exists."); 1 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 1211, at 12-35 (5th ed. 2011) ("If the declarant is asserting a then existing state of mind, there is no concern about the quality of the declarant's memory . . . ."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("While objective conditions may give some indication of the degree of pain involved, the sufferer's own contemporaneous description is often a decidedly superior form of proof."); WEISSENBERGER & DUANE, *supra* note 2, § 803.12 ("*Rule 803(3)* requires that the declaration be directed at a present condition, *i.e.*, a 'then-existing' condition. Only where the subject matter of the statement is a present condition are the testimonial defects in memory and sincerity reduced."); *id.* § 803.13 (stating that rule 803(3) requires "statements concerning . . . present internal physical condition").

after jamming a toe or smashing a finger with a hammer.[10] When an individual makes a statement about a feeling or condition while the sensation still exists, the spontaneity of the statement provides reliability and trustworthiness.[11] However, spontaneity does not require the statement to be made instantaneously with the cause of the declaration.[12] Necessity also justifies excepting these statements from the hearsay prohibition because frequently someone's description of a feeling or condition may be the only evidence available.[13]

Statements in category one resemble similar assertions admitted under the hearsay exception for present sense impressions.[14] To qualify for admission, category one statements cannot describe past feelings, symptoms, or conditions.[15] Category

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[10] MCCORMICK, *supra* note 2, at 474; MUELLER & KIRKPATRICK, *supra* note 2, § 8:70.

[11] FISHMAN, *supra* note 9, at 686 ("[T]he declarant's spontaneous statements describing a physical condition may be more reliable than subsequent in-court testimony where problems of memory and the declarant's self-interest come into play."); MCCORMICK, *supra* note 2, at 474 ("Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement.").

[12] MUELLER & KIRKPATRICK, *supra* note 2, § 8:70 ("Also, a statement may fit the exception even though it describes present pain caused by a blow or accident many days earlier, for there is no requirement that the statement be contemporaneous with the precipitating event."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("The declaration must be contemporaneous with the physical, emotional, or mental feeling, not the precipitating event."); WEISSENBERGER & DUANE, *supra* note 2, § 803.13 ("While the Rule is predicated upon the characteristic element of the contemporaneousness of the statement and the physical condition, there is no requirement that the statement be made contemporaneously with an external stimulus that produced the condition.").

[13] MCCORMICK, *supra* note 2, at 474; *see also* FISHMAN, *supra* note 9, at 686 ("The need for such evidence is obvious since only the declarant can directly prove internal pain.").

[14] MISS. R. EVID. 803(1); *see* FED. R. EVID. 803 advisory committee's note ("Exception [paragraph] (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility."); *see also* MCCORMICK, *supra* note 2, at 474 ("[T]he rule is a specialized application of the broader rule recognizing a hearsay exception for statements describing a present sense impression, the cornerstone of which is spontaneity."); WEISSENBERGER & DUANE, *supra* note 2, § 803.12 ("[T]he *Rule 803(3)* exception is parallel to the present sense impression exception formulated in *Rule 803(1)*.").

[15] MCCORMICK, *supra* note 2, at 474; *see also* WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("Since contemporaneity is the guarantee of trustworthiness, statements indicative of reflection rather than spontaneity must be excluded. Consequently,

one statements should also not identify or indicate the cause of the declaration.[16] Any individual that hears the speaker make a category one statement can later serve as a witness.[17] The rule's language permits use of category one statements without considering the speaker's availability to testify.[18]

B. Category Two—Statements that Show State of Mind

Hearsay statements can prove the speaker's state of mind.[19] To admit statements indicating state of mind under the exception in Rule 803(3), a cause of action or defense must involve the speaker's state of mind.[20] Simply, one issue in the case must

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descriptions of past pain or symptoms, and explanations of how the injury occurred may not be admitted . . . .").

[16] MCCORMICK, *supra* note 2, at 474; *see also* FISHMAN, *supra* note 9, at 687 ("A statement of current physical condition caused by a past incident falls within the exception, but a statement about the cause of that present condition does not."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:70 ("The exception does not allow statements to show *the external cause* of physical sensations."); WEISSENBERGER & DUANE, *supra* note 2, § 803.13 ("Self-diagnostic statements or statements as to the external source of an internal condition are not, however, admissible under *Rule 803(3)* . . . ."); *cf.* FED. R. EVID. 803(4) (creating an exception that allows description of past pain or symptoms if made to receive medical attention).

[17] MCCORMICK, *supra* note 2, at 474; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:70 ("[S]uch statements are admissible even though made to a spouse or friend, and need not be made to physicians."); WEISSENBERGER & DUANE, *supra* note 2, § 803.12 ("Rule 803(3) does not require that the statement be directed to, or made in the presence of medical personnel. Any person who had an opportunity to hear it may testify to the declaration, including friends, family, and unrelated bystanders."); *cf.* FED. R. EVID. 803(4) (permitting hearsay statements made in connection with medical care).

[18] FED. R. EVID. 803 ("The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness . . . ."); *see* MCCORMICK, *supra* note 2, at 474.

[19] MCCORMICK, *supra* note 2, at 474 (noting when "legal rights and liabilities hinge upon the existence of a particular state of mind or feeling," then "the mental or emotional state of the person becomes an ultimate object of inquiry."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:71; WEISSENBERGER & DUANE, *supra* note 2, § 803.14 ("[T]he most probative evidence of a person's mental state is usually the contemporaneous declarations of the person whose state of mind is at issue."). These statements could also meet the definition of party-opponent admissions. FED. R. EVID. 801(d)(2).

[20] MCCORMICK, *supra* note 2, at 474 ("[A statement of state of mind] is not introduced as evidence from which the person's earlier or later conduct may be inferred but as an operative fact upon which a cause of action or defense depends."); *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("[S]tatements are of course excludable when offered for such points in cases where state of mind does not count.").

concern the speaker's state of mind.[21] Like statements in category one, "[t]he guarantee of reliability is assured principally by the requirement that the statements must relate to a condition of mind or emotion existing at the time of the statement."[22] However, courts acknowledge "continuity" in state of mind, knowing that a person can maintain the same mindset.[23] Category two statements should indicate the speaker's state of mind, not that of a third party.[24] Because the statement must parallel state of mind, the speaker's availability is immaterial.[25]

Some statements that appear to fit in category two will avoid hearsay classification. The exception in Rule 803(3) permits admission of direct, assertive hearsay statements about state of mind.[26] As non-hearsay statements, indirect, non-assertive statements do not need to qualify for admission under an exception.[27]

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[21] WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("A statement may be proffered on the theory that it is probative of declarant's then existing state of mind, such as fear, knowledge, or belief, and this state of mind is the issue to be proved.").

[22] MCCORMICK, *supra* note 2, at 475; *see also* FISHMAN, *supra* note 9, at 703 ("[A] contemporaneous statement by the actor that reveals the purpose or reason for the conduct is within the exception . . . .").

[23] MCCORMICK, *supra* note 2, at 475; *see also* FISHMAN, *supra* note 9, at 680 ("[A] state of mind is not necessarily evanescent or ephemeral."); IMWINKELRIED, *supra* note 9, at 12-36 ("[I]f the interval between the operative time and the declaration is short enough, under Rule 401 the court then permits the proponent to draw the permissive inference that the declarant's state of mind was the same at both times."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("[C]ourts generally admit some statements indicative of the mental state in issue even if they were made before or after the moment in question on the assumption that states of mind have a certain degree of continuity. The trial court must decide whether a given statement falls within or without this period of continuous mental process.").

[24] *See supra* note 19 and accompanying text; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("Where one party seeks to prove the state of mind of another by the latter's out-of-court statements, the admissions doctrine provides the easiest avenue . . . .").

[25] MCCORMICK, *supra* note 2, at 475 (explaining that statements made at the time provide more accurate evidence than statements at trial subject to cross examination); *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("Problems of memory are negligible and problems of perception minimal, and such statements seem better (more reliable, more persuasive) than the next best alternative, which is backward-looking testimony by the person herself . . . .").

[26] MCCORMICK, *supra* note 2, at 474; WEINSTEIN & BERGER, *supra* note 2, § 16.04; WEISSENBERGER & DUANE, *supra* note 2, § 803.14.

[27] *See supra* note 26.

While many category two statements fit within the exception's scope, courts should admit only the relevant statements.[28] To qualify as relevant, the speaker's state of mind must be in dispute.[29] Relevancy concerns often arise about victim statements, usually expressions of fear, in homicide cases.[30] However, a victim's statements receive no special treatment; "[t]he victim's emotional state must relate to some legitimate issue in the case."[31] Because few homicide cases implicate the victim's state of mind, category two statements are generally irrelevant in this context.[32] Additionally, irrelevant category two statements

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[28] MCCORMICK, *supra* note 2, at 475-76, 480; *see also* WEISSENBERGER & DUANE, *supra* note 2, § 803.14 ("*Rule 803(3)* may be appropriately applied wherever the declarant's mental state is relevant."). Further clarification will facilitate discussion about admissibility and relevancy. A hearsay statement, otherwise inadmissible, becomes admissible evidence if it falls within the scope of an exception in Rule 803. *See supra* note 2. When dealing with the Rule 803(3) exception, the statement must fit within category one, two, or three to fall within the exception's scope and avoid exclusion. *Id.* However, after this first step, a statement must clear another hurdle. A hearsay statement must also be relevant to an issue in the case. MCCORMICK, *supra* note 2, at 480. If a hearsay statement fails to satisfy both requirements, a court should not allow it. *Id.*; *see infra* notes 29-31.

[29] FISHMAN, *supra* note 9, at 691 (citations omitted) ("Admissibility depends upon a careful analysis of what the victim said and how the statement is relevant. . . . Common situations include where the victim's state of mind is an element of the crime, cause of action or defense, where a homicide prosecutor offers evidence of the victim's fear of the defendant, when a defendant charged with assault or homicide offers evidence of the victim's animosity toward the defendant, [and] where the victim's statement of intent is a basis to infer that he subsequently did what he said he intended to do.").

[30] MCCORMICK, *supra* note 2, at 480 (noting that a statements of fear by victims "have generally [been] excluded"); *see also* FISHMAN, *supra* note 9, at 692-93 ("It is important to understand, however, that [the victim]'s state of mind is not an element of the crime of homicide. Thus, although *V*'s statement, 'I'm afraid *D* is out to get me,' is relevant evidence of *V*'s state of mind, this does not justify admitting *V*'s statement over a hearsay objection unless *V*'s state of mind becomes a factual issue in the case.").

[31] MCCORMICK, *supra* note 2, at 480 ("A recurring problem arises in connection with the admissibility of accusatory statements made before the act by the victims of homicide. If the statement is merely an expression of fear . . . no hearsay problem is involved, since the statement falls within the hearsay exception for statements of mental or emotional condition. This does not, however, resolve the question of admissibility.").

[32] FISHMAN, *supra* note 9, at 695 ("[I]f the defendant affirmatively puts in issue the victim's state of mind, the state should be permitted to respond with evidence of statements by the victim that contradict the defendant's claim."); 4 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:3, at 138 (6th ed. 2006) ("However, there are several exceptions to the general rule that a homicide victim's hearsay statements are inadmissible. First, a victim's state of mind is at issue when it goes to a

from a victim could prejudice the jury if admitted against the defendant.[33]

C. Category Three—Statements of Intent

Rule 803(3) permits use of hearsay statements indicating the speaker's intent to act.[34] Put another way, the exception allows statements that look "forward" to events that have yet to occur.[35] Absent an intervening event, the speaker should complete the intent.[36] Even if the speaker might not act on the stated intent,

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material element of the crime. Second, 'the victim's state of mind may become relevant to an issue in the case where the defendant claims: (1) self-defense; (2) that the victim committed suicide; or (3) that the death was accidental.'" (citations omitted)).

[33] GRAHAM, *supra* note 32, at 109 ("Every statement meeting the requirements of Rule 803(3) is subject to exclusion under Rule 403 if after considering the probable effectiveness of a limiting instruction, Rule 105, the incremental probative value of the statement is substantially outweighed by the danger of unfair prejudice or trial concerns."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("In the murder setting, fear on the part of the victim is *not* an element in the prosecutor's case, and the victim's fear instead is *usually* relevant only in suggesting inferences about prior conduct by the defendant."); ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW 378 (1998) ("An objection should still be sustained, however, if the state of mind of the declarant is irrelevant, or though relevant, its probative value is outweighed by the danger that the jury will use the out-of-court statement for some purpose other than showing the declarant's state of mind.").

[34] MCCORMICK, *supra* note 2, at 478 ("[S]tatements of intent to perform an act are admissible as proof that the act was in fact done.").

[35] *See infra* notes 52-53 and accompanying text; *see also* FISHMAN, *supra* note 9, at 682 ("[C]ourts also recognize the inference that declarant's state of mind continued for some time after she articulated it, and that she behaved consistently with that state of mind. Thus, a declarant's statement of intent to perform an act in the future is admissible as a basis to infer that she in fact performed the act . . . ."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("The mental state that we describe as 'intent' is by definition forward-looking, and intention is normally a *continuing* condition that begins at some moment of decision and continues until the intended act is accomplished or until something happens that persuades the person to revise or abandon the intent."); WEISSENBERGER & DUANE, *supra* note 2, § 803.15 ("[A] plan or intent is a mental state expressly comprehended by *Rule 803(3)*.").

[36] GRAHAM, *supra* note 32, at 112 ("The statement of intent as evidence is subject to two weaknesses: (1) the trustworthiness of the declarant and (2) the possibility of change of mind or supervening events to defeat the plan."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("Whether to admit such a statement depends very much on what the statement actually says about state-of-mind, on what happened in the life of the speaker after the statement was made, on the time lapse between the statement and the occasion of interest to the trier of fact, and on risks of prejudice . . . .").

category three statements run less risk of imperfect recall.[37] The Supreme Court confirmed the admissibility of category three statements in *Mutual Life Insurance Co. of New York v. Hillmon*.[38]

When used as evidence, category three statements show that the speaker carried out the stated intent.[39] As one authority

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[37] MCCORMICK, *supra* note 2, at 476 ("The special reliability of the statements is less in the present situation since it is significantly less likely that a declared state of mind is actually held."); *see also* FISHMAN, *supra* note 9, at 704-05 ("[T]he reliability of the inference (*X* said she intended to do act *Y*, therefore she did act *Y*) is far from certain: *X* may have changed her mind, or events beyond her control may have prevented her from following through."); GRAHAM, *supra* note 32, at 112 ("Consequently, if perception and recollection risks associated with recounting of the past event are held in proper perspective, to allow the declaration of intent as proof of the doing of the intended act is to admit evidence which is arguably inferior to that excluded by the hearsay rule."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 ("[Juries] are likely to be appropriately skeptical toward statements suggesting forward-looking inferences, because they bring obvious uncertainties that connect with everyday experience . . . ."); WEISSENBERGER & DUANE, *supra* note 2, § 803.15 (noting that statements of intent "do not suffer from possible defects in memory" and "are free of risks of defects in perception").

[38] 145 U.S. 285, 295-96 (1892) ("The letters in question were competent not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention."); *see* FED. R. EVID. 803 advisory committee's note ("The rule of *Mutual Life Ins. Co. v. Hillmon* allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed." (citation omitted)); MCCORMICK, *supra* note 2, at 477; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("Hillmon came to stand for the proposition that a statement indicating the intent of the speaker to do something may be admitted as evidence that he later did it."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("*Rule 803(3)* codifies *Hillmon* by classifying a statement of intent as a statement of the declarant's then existing state of mind to which the hearsay rule does not apply."); WEISSENBERGER & DUANE, *supra* note 2, § 803.15 ("[T]he Supreme Court, in the landmark case of *Mutual Life Insurance Co. v. Hillmon*, endorsed the use of statements of plan or intent to show that the planned or intended act was undertaken.").

[39] MCCORMICK, *supra* note 2, at 476-78; *see also* FISHMAN, *supra* note 9, at 682 ("[A] declarant's statement of intent to perform an act in the future is admissible as a basis to infer that she in fact performed the act . . . ."); IMWINKELRIED, *supra* note 9, at 12-38 to -39 (stating that "the court permits . . . use [of] the evidence as proof that the declarant in fact committed the act"); MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 (noting that statements of intent are admissible to show that "speaker later acted accordingly"); WEINSTEIN & BERGER, *supra* note 2, § 16.04 (defining admissible statements as those that create "an inference that the declarant subsequently acted in accordance with the earlier expressed intent"); WEISSENBERGER & DUANE, *supra* note

affirms, "Intent surely does make it more likely that the intended act was done."[40] Because category three statements increase the odds that the speaker acted in accord with the stated intent, these statements meet the relevancy test.[41] Precise, clear statements of intent will face fewer relevancy problems than conjecture about future plans.[42] Like categories one and two, an unavailable declarant is not required.[43]

Category three statements present an interesting problem when used to prove a third party, non-declarant's later actions.[44] A third party, non-declarant's involvement impacts the likelihood that the declarant will successfully execute a plan.[45] While some jurisdictions admit category three statements to establish the

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2, § 803.15 (explaining that the rule permits statements that are "probative evidence of the occurrence of the subsequent relevant conduct").

[40] MUELLER & KIRKPATRICK, *supra* note 2, § 8:72.

[41] MCCORMICK, *supra* note 2, at 476 ("[A] person who expresses an intent to kill is undeniably more likely to have done so than a person not shown to have had that intent. The accepted standard of relevancy, i.e., more probable than with the evidence, is easily met."); *see also* GRAHAM, *supra* note 32, at 112 ("The argument for admissibility is that persons who intend to do an act are more likely to do the act than are persons without the intent, and therefore the evidence of intent is relevant, Rule 401."); IMWINKELRIED, *supra* note 9, at 12-39 ("[T]he declared intent slightly increases the probability of the commission of the act; hence, it is logically relevant, circumstantial evidence of commission."); WEISSENBERGER & DUANE, *supra* note 2, § 803.15 ("[S]tatements of intent, plan, or design unquestionably alter the probabilities of subsequent conduct and are, consequently, relevant under *Rule 401* as to whether the subsequent conduct occurred.").

[42] MCCORMICK, *supra* note 2, at 477.

[43] *Id.*; *see supra* note 18.

[44] *See generally* Joseph A. Devall, Jr., Comment, *Whether Federal Rule of Evidence 803(3) Should Be Amended to Exclude Statements Offered to Prove the Subsequent Conduct of a Nondeclarant: Guidance from Louisiana*, 78 TUL. L. REV. 911 (2004) (arguing against the admission of hearsay statements as evidence of a third party's conduct); Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145 (1991) (arguing for admission of these statements to prove third-party conduct).

[45] MCCORMICK, *supra* note 2, at 477-78; *see also* FISHMAN, *supra* note 9, at 707 ("Hillmon has been read to stand for the proposition that the statement of a declarant manifesting a present intent to perform an act with a second party is admissible to prove the second party engaged in the intended conduct."); GRAHAM, *supra* note 32, at 115 ("Courts faced with deciding whether a statement of intent is admissible as evidence of actions of another under the Federal Rules of Evidence have opted in favor of admissibility.").

third party, non-declarant's conduct, other jurisdictions employ limiting instructions to minimize improper inferences.[46]

Within category three, threats indicate the speaker's intent to take a specific action against another individual.[47] Threats show "the speaker intended to cause harm to another, which supports an inference that he acted in furtherance of that intent."[48] The authorities and courts distinguish communicated threats, where the threat's recipient hears the speaker state the intent, from uncommunicated ones.[49] In self-defense claims, category three statements show the victim's intent toward the

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[46] MCCORMICK, *supra* note 2, at 477-78; *see also* FISHMAN, *supra* note 9, at 708-11 (describing three ways to handle these statements: admission, prohibition, and admission in conjunction with other evidence of cooperation); IMWINKELRIED, *supra* note 9, at 12-41 ("Because one person's state of mind is not reliable evidence of another person's act, the courts insist that the trial judge admit the evidence only to prove the declarant's act under appropriate limiting instructions."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("What someone says can only prove what he and another did if used to support both forward-looking and backward-looking inferences. The forward-looking inference is that the speaker acted in accord with his intent, which is fine. The backward-looking inference is that he had already met the other person when he spoke, that the two had agreed to do something together (the other had spoken words indicating his intent), and that both later acted in accord with these plans. These inferences are *not* fine . . . ."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 (noting that "the federal judiciary has been extremely circumspect about relying on *Rule 803(3)* when the action of a person other than the declarant is at issue.").

[47] MCCORMICK, *supra* note 2, at 478.

[48] MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("Threatening statements also fit the exception, and can be used to prove that the speaker intended to cause harm to another, which supports an inference that he acted in furtherance of that intent.").

[49] In many situations, communicated threats are not hearsay. MCCORMICK, *supra* note 2, at 478; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("If such threats were *communicated to the defendant*, then proof that he heard or was told of them may be admissible because this fact bears on the reasonableness of his later behavior, and hearsay issues can be put aside because the proof involves use of words to show effect on the listener or reader."). Uncommunicated threats must pass through an exception to the hearsay rule. MCCORMICK, *supra* note 2, at 478; *see also* IMWINKELRIED, *supra* note 9, at 12-39 ("[S]ome courts have been reluctant to admit evidence of the victim's uncommunicated threats and have done so only in limited circumstances such as when there is some corroborating evidence, perhaps the defendant's own testimony, that the decedent initiated the fray."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("[E]specially the situation in which the victim in a case of alleged murder or assault uttered threats against the defendant, the state-of-mind exception paves the way to prove those threats as evidence that the victim likely acted on the intent reflected in those threats, regardless whether the defendant knew or heard about the threats.").

defendant and provide an explanation for the defendant's conduct.[50]

D. Category Four—Statements of Memory or Belief

Unlike the forward-looking statements in category three, the Rule 803(3) exception does not pardon statements describing past events or subjective thoughts that comprise category four.[51] The rule and authorities sharply distinguish admissible "forward-looking statements" from inadmissible "backward-looking statements."[52] The Supreme Court confirmed this distinction in *Shepard v. United States*.[53] Similarly, a testator's or testatrix's statements after executing a will receive different treatment and will not be excluded with other category four statements.[54] In addition to reliability concerns, admission of category four statements under Rule 803(3) could eliminate the hearsay rule.[55]

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[50] MCCORMICK, *supra* note 2, at 478; *see also* FISHMAN, *supra* note 9, at 702 ("Where defendant concedes that he was involved in an altercation with *V* and asserts self-defense, statements by *V* as to his or her animosity toward *D* are relevant on the question of who was the initial aggressor, and therefore are admissible."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("In homicide cases where the accused claims self-defense, threats uttered by *the victim* against the defendant may be critical evidence in deciding who started the affray.").

[51] MCCORMICK, *supra* note 2, at 478-79; MUELLER & KIRKPATRICK, *supra* note 2, § 8:73; PARK ET AL., *supra* note 33, at 272; WEISSENBERGER & DUANE, *supra* note 2, § 803.16.

[52] *See supra* note 2 and accompanying text; *see also* MCCORMICK, *supra* note 2, at 479 ("[F]orward-looking statements of intention are admitted while backward-looking statements of memory or belief are excluded because the former do not present the classic hearsay dangers of memory and narration."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 ("Fed. R. Evid. 803(3) and Shepard insist on a bright-line distinction that allows inferences looking forward but not those looking backward.").

[53] 290 U.S. 96, 105-06 (1933) ("Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."); *see* MCCORMICK, *supra* note 2, at 479; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 ("Reasonably understood, Shepard condemns the use of the exception to show the speaker's memory of an act, event, or condition, hence to prove any such point. Wills cases apart, Fed. R. Evid. 803(3) takes this position, and for the most part modern courts flatly reject state-of-mind statements when offered for these purposes, not only in the setting of homicide trials where the speaker is the victim, but in other settings as well.").

[54] FISHMAN, *supra* note 9, at 712-13; MCCORMICK, *supra* note 2, at 479; MUELLER & KIRKPATRICK, *supra* note 2, § 8:74.

[55] FED. R. EVID. 803 advisory committee's note ("The exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the

Statements of memory or belief evidence "lack . . . of candor, misperception, and faulty memory," which support exclusion.[56]

II. APPLICATION OF MISSISSIPPI RULE OF EVIDENCE 803(3)

Mississippi courts frequently encounter statements that implicate the Rule 803(3) exception. While the state's appellate courts have issued several opinions with accurate and conclusive statements of law on this hearsay exception, the courts appear to deviate from the authorities in other cases.[57] Specifically, in cases involving statements of fear and statements from homicide victims, courts have reached different conclusions.[58] A thorough examination of Mississippi cases in each category will fully illustrate instances where Mississippi courts diverge from the authorities set forth above.

A. Mississippi Cases in Category One

Although state appellate courts have ruled on fewer category one statements in comparison to the other categories, the primary category one case, *University of Mississippi Medical Center v.*

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virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."); *see also* GRAHAM, *supra* note 32, at 121 (describing statements that could cause "the effective destruction of the hearsay rule"); MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 (explaining that these statements would "devour and destroy the hearsay doctrine"); WEINSTEIN & BERGER, *supra* note 2, § 16.04 (noting that statements of past acts could "annihilate the hearsay rule"); WEISSENBERGER & DUANE, *supra* note 2, § 803.16 (stating that these statements run the risk of "emasculating the entire hearsay system").

[56] MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 (listing "lack of candor," "narrative ambiguity," "misperception," and "faulty memory" as dangers associated with backward-looking statements); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("The blanket exclusion of statements of memory or belief is justified on the ground that the dangers of improper perception, faulty memory and deliberate misstatement are far greater when the statement is being used to prove a past act rather than a future act."); WEISSENBERGER & DUANE, *supra* note 2, § 803.16 (noting the potential for "defects in sincerity, perception, narration, and memory").

[57] *Compare* Harris v. State, 861 So. 2d 1003, 1019 (Miss. 2003) ("This Court has held that M.R.E. 803(3) encompasses relevant statements made by murder victims before their death."), *with* Hall v. State, 39 So. 3d 981, 983-84 (Miss. Ct. App. 2010) (allowing statements that described victim's past acts and the defendant's threats against the victim under the Rule 803(3) exception to show victim's state of mind).

[58] *See infra* notes 69-104 and accompanying text.

Johnson, provides an excellent illustration.[59] The *Johnson* case involved a woman, Brenda Easter, who "did not sleep lying down because when she did she felt as if she were drowning."[60] Easter provided this explanation in response to a fellow patient that asked why she slept in a chair.[61] When the fellow patient later testified, the court of appeals admitted the statement under the hearsay exception in Mississippi Rule of Evidence 803(3).[62]

In this case, the issue was whether Easter made the statements while her condition was then-existing.[63] Because there were no alternative means available to prove Easter's internal feeling and "only the declarant can directly prove internal pain," necessity argued for classification as a category one statement that would be admissible hearsay.[64] Even though Easter did not make the statements at the moment she felt the drowning sensation, her on-going condition also suggested that the statements were close enough in proximity to the feeling to qualify under category one.[65] However, strictly speaking, Easter was not experiencing the drowning sensation at the moment she responded to her fellow patient. Because Easter was sitting in a chair when she made the statement and did not suffer from the sensation while seated, the condition was not then-existing at the time of the statement.[66] Easter's statement was also an inadmissible description and explanation of her past experience.[67] Despite the necessity argument, Easter's statements do not seem to fall within category one and, therefore, could not qualify for admission under the exception in Rule 803(3).[68]

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[59] 977 So. 2d 1145, 1149 (Miss. Ct. App. 2007).

[60] *Id.* at 1148.

[61] *Id.*

[62] *Id.* at 1149.

[63] *See supra* note 9 and accompanying text.

[64] FISHMAN, *supra* note 9, at 686.

[65] *See supra* note 23 and accompanying text; *see also* United States v. Newell, 315 F.3d 510, 523 (5th Cir. 2002) ("Although Cooper could not identify the specific date on which she wrote the notes, she testified that she authored them when the events were still 'fresh in her mind.'"); MUELLER & KIRKPATRICK, *supra* note 2, § 8:70 ("An utterance may fit the state-of-mind exception even . . . without the sort of immediacy of present sense impressions or the impact that produces excited utterances.").

[66] *See supra* notes 9-12 and accompanying text.

[67] *See supra* note 15 and accompanying text.

[68] Easter's statements were likely inadmissible category four statements of memory or belief. *See supra* notes 51-56 and accompanying text.

B. Mississippi Cases in Category Two

For Mississippi courts, category two cases have presented the greatest challenge. State appellate courts have dealt with the two primary subcategories: statements of fear and statements from homicide victims.

1. Statements of Fear

In *Brown v. State*, the Mississippi Supreme Court used the state of mind exception to support admission of potential non-hearsay statements.[69] The hearsay problem in this case centered on in-court testimony from Investigator Mark Berry, who the court instructed not to "say what somebody else said outside court" but permitted to "tell how they appeared."[70] Berry then confirmed that he saw the "physical appearance, mannerism, and actions" of two individuals and concluded "they were both frightened."[71] The supreme court found no error with the trial court's admission of the statements, citing Mississippi Rule of Evidence 803(3).[72]

Examining the supreme court's ruling in *Brown*, two potential issues appear. First, Berry testified about admissible, non-hearsay conduct.[73] The court could have allowed these statements without referencing any hearsay exception.[74] Second, Berry gave testimony in court about the two individuals' states of mind, not his own.[75] The Rule 803(3) exception only permits statements from the declarant about his or her own state of mind.[76]

In *Nichols v. State,* the court of appeals—passing over other applicable hearsay exceptions—also affirmed the trial court's admission of hearsay statements under the Rule 803(3) exception.[77] Witness Terry Baptist said "Jones was 'scared' before

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[69] 890 So. 2d 901, 914-15 (Miss. 2004).
[70] *Id.* at 914.
[71] *Id.*
[72] *Id.* at 915.
[73] *See supra* note 27 and accompanying text.
[74] *See supra* note 27 and accompanying text.
[75] *See supra* notes 70-71 and accompanying text.
[76] *See supra* note 24 and accompanying text.
[77] 27 So. 3d 433, 441-42 (Miss. Ct. App. 2009).

the collision with Nichols" and while listening on the phone "that he heard Johnson in the background stating, 'This crazy blank, blank, blank going to run us . . . trying to run us off the road.'"[78] Testimony from Baptist would be within the exception's scope under category two as evidencing the first victim's frightened state of mind during the car crash.[79] As a non-hearsay statement when offered to prove fear, Baptist's testimony about overhearing the second victim describe contact that pushed the car from the road would not need to gain admission under the exception.[80] In *Nichols*, the defendant's depraved-heart murder case did not involve either victim's state of mind, making neither individual's state of mind at issue in the case.[81] However, these statements were admissible under either the Rule 803(1) exception as present sense impressions or the Rule 803(2) exception as excited utterances.[82]

2. Statements from Homicide Victims

From 1999 to 2003, Mississippi appellate courts authored three opinions containing sound pronunciations of law and excluding irrelevant statements from homicide victims. However, in the last few years, the court of appeals has used these precedents to sanction what is arguably inadmissible hearsay.

a. Instructive Opinions

In *Mosby v. State*, the court of appeals dealt with whether hearsay statements about the victim's fear of the defendant were relevant in a trial for capital murder.[83] Prior to her death, the victim, Gail Mosby, told her attorney that she "disliked" the defendant, Deborah Mosby, and "was afraid" of her.[84] During his testimony, the attorney "never repeated a literal quote by Gail Mosby that she was afraid of or disliked Deborah Mosby. Still, it is difficult to imagine that all this information was gained without

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[78] *Id.* at 442.
[79] *See supra* notes 28-30 and accompanying text.
[80] *See supra* notes 26-27 and accompanying text.
[81] *See supra* notes 20-22 and accompanying text.
[82] MISS. R. EVID. 803(1)-(2).
[83] 749 So. 2d 1090, 1092, 1096 (Miss. Ct. App. 1999).
[84] *Id.* at 1096.

Gail Mosby having made some statements regarding fear and dislike . . . ."[85] The court correctly held that these statements were inadmissible based on lack of relevance and stated, "We see little relevance to the victim Gail Mosby's state of mind."[86] In general terms, the court noted, "We in particular point out that a victim's pre-existing fear of the person accused of her murder is not in most circumstances relevant."[87]

Several months after deciding *Mosby*, the court of appeals issued its opinion in *Walker v. State* and again noted the irrelevance of a victim's state of mind.[88] While serving as an informant, victim Anthony Lloyd told a law enforcement officer that he "had received death threats" from the defendant and another individual.[89] According to the law enforcement officer, "Lloyd was afraid and that . . . [the defendant would] do what was necessary to protect himself."[90] Finding the statements irrelevant in the defendant's murder trial, the court denied admission of the statements under the Rule 803(3) exception.[91] However, the court explained that the statements could be relevant, and thus admissible, if the defendant asserted a self-defense or accidental death claim.[92]

In accord with the court of appeals, the Mississippi Supreme Court's opinion in *Harris v. State* offered an excellent recitation of law that courts in several subsequent cases recycled.[93] In *Harris*,

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[85] *Id.*

[86] *Id.* ("Had that been relevant, then hearsay testimony regarding it was admissible.").

[87] *Id.*

[88] 759 So. 2d 422, 426-27 (Miss. Ct. App. 1999).

[89] *Id.* at 426.

[90] *Id.*

[91] *Id.* at 426-27 ("While evidence of one's state of mind is admissible under M.R.E. 803(3), the evidence of which complaint is made appears to be a combined recitation of Lloyd's state of mind and a recitation of the threats giving rise to his state of mind. Even if we were to hold that the evidence was simply a statement of Lloyd's state of mind, it would still have to pass the relevancy test in order for it to be admissible, and if Lloyd's state of mind were an issue in this case, that would end the matter. However, it is not Lloyd's state of mind but the shooter's identity that is an issue in this case.").

[92] *Id.* at 427; *see supra* notes 48-50 and accompanying text.

[93] 861 So. 2d 1003, 1011, 1018-19 (Miss. 2003). Several subsequent cases have cited and relied on the statement of law in *Harris* without setting forth the relevancy of the victim's statement. *See* Wilson v. State, No. 2010-KA-00139-COA, 2011 WL 5027146, at *18 (Miss. Ct. App. Oct. 18, 2011); Lenard v. State, 77 So. 3d 530, 537 (Miss. Ct. App. 2011); Hall v. State, 39 So. 3d 981, 984 (Miss. Ct. App. 2010); Council v. State, 976 So.

prior to a fight, in which victim Ronnie Travis sustained fatal injuries, the witness testified that Travis said "F-it, man, let's get it on."[94] Finding the statement within the exception's scope, the opinion noted, "This Court has held that M.R.E. 803(3) encompasses relevant statements made by murder victims before their death."[95] The court also specified the statement's relevancy, such as it explained the victim's conduct.[96]

In these three cases, the courts provided textbook examples on how to analyze statements under Rule 803(3). In each case the court first placed the statement within the rule's scope and then addressed the statement's relevancy.[97]

b. Potentially Problematic Opinions

While the courts provided valuable guidance in the above cases, the court of appeals took a different approach in *Hall v. State*.[98] In this case, the victim, Shirley Jobe, made several statements to an acquaintance that "she had recently won a substantial amount of money at a local casino" and "had spent it

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2d 889, 894, 900-01 (Miss. Ct. App. 2007); Dendy v. State, 931 So. 2d 608, 614 (Miss. Ct. App. 2005).

[94] *Harris*, 861 So. 2d at 1011.

[95] *Id.* at 1019 (citing Parker v. State, 606 So. 2d 1132, 1139 (Miss. 1992), *overruled by* Goff v. State, 14 So. 3d 625, 662-63 (Miss. 2009)). The Fifth Circuit has taken a similar position on this issue. *See* Prather v. Prather, 650 F.2d 88, 90 (5th Cir. 1981) ("However, it is clear that before a statement, otherwise hearsay, can be admitted under 803(3) to show the declarant's then existing state of mind, the declarant's state of mind must be a relevant issue in the case."). The *Parker* decision, which the court used to support its holding in *Harris*, involved the admission of a homicide victim's irrelevant statements. *Parker*, 606 So. 2d at 1138-39. In *Parker*, the witness recounted that the victim expressed fear of a third party in the defendant's capital murder trial. *Id.* at 1134, 1138. The court used the Rule 803(3) exception to support admission of the statements, which were arguably irrelevant. *Id.* at 1139 ("That the victim told her friend, Ms. McCarty, that she was afraid Mike was going to beat her because she had been with another man was clearly a statement of her then existing state of mind or emotion. Whether analyzed under M.R.E. 803(24), 804(b)(5), or 803(3), the trial court abused its discretion by preventing the admission of the hearsay statements of the victim.").

[96] *Harris*, 861 So. 2d at 1019 ("In the instant case, the statement Arthur Black overheard Ronnie Travis make to the Harrises just before the fight began is relevant to show that Travis intended to fight and might have been the initial aggressor. It was therefore error to exclude the testimony.").

[97] *See supra* note 28 and accompanying text.

[98] 39 So. 3d at 983-84.

all at the casino."[99] Additionally, Jobe said that the defendant "had threatened to kill her over losing the money . . . when he returned from work."[100] Without much analysis other than to correct the trial court for admitting the statements as present sense impressions, the court affirmed the admission of the acquaintance's testimony under the Rule 803(3) exception.[101] The court did not address the relevance of Jobe's statements to the defendant's manslaughter case and also admitted the defendant's threatening statements to show the victim's state of mind.[102]

In *Lenard v. State*, the court of appeals again used *Harris* to support the admission of the victim's statements in a capital murder prosecution.[103] The witness described statements from victim Katrina Dumas about the plan "to end her relationship with Lenard and [that she] was going to tell him that she was seeing another man."[104] These statements were admissible without reference to *Harris* as category three statements of intent, which are admissible regardless of whether the victim made the statements prior to a homicide.[105]

C. Mississippi Cases in Category Three

Mississippi courts have ruled on category three statements of intent in several contexts, including statements that evidence a plan or design, threatening statements, and statements that implicate third parties. Generally, state appellate courts have had few problems recognizing and then admitting or excluding statements in this category.

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[99] *Id.* at 983.
[100] *Id.*
[101] *Id.* at 984.
[102] *See supra* notes 19, 24 and accompanying text.
[103] 77 So. 3d 530, 537 (Miss. Ct. App. 2011) (quoting Harris v. State, 861 So. 2d 1003, 1019 (Miss. 2003)) ("Haynes testified that Katrina told him of her plan or present intent to tell Lenard she was ending their relationship. Rule 803(3) allows statements of plan or intent, and this 'encompasses relevant statements made by murder victims before their death[s].'").
[104] *Id.*
[105] *See supra* notes 39-42 and accompanying text.

1. Statements Evidencing a Plan or Design

As one of the few reported civil cases to raise hearsay issues under the exception, *Ellison v. Meek* focused on whether statements from a deceased declarant were admissible to show his intent "to acquire title to land by purchasing it . . . rather than acquiring it by adverse possession."[106] The declarant, William Bright, made several statements prior to his death to his neighbor, Buck Meek, about purchasing property to avoid encroaching on Meek's property.[107] The court of appeals correctly admitted Meek's testimony under the exception to illustrate Bright's intent.[108] Because Bright died before purchasing the property, his statements failed to show that he later acted on his stated intent.[109] While the statements appropriately, but not ideally, fit into category three under the Rule 803(3) exception, Rule 804 for statements against interest provides a more apt exception.[110]

The supreme court dealt with a statement from a deceased declarant about her intent to evict the defendant in *McIntosh v. State*.[111] The declarant, Creola McIntosh, told her daughter "about a week before [her] death . . . that she . . . planned to evict [the defendant] from their home."[112] Using the Rule 803(3) exception, the trial court allowed McIntosh's daughter to testify.[113] The testimony concerned McIntosh's intent to evict the defendant at some point in the future, placing the statement within the exception's scope under category three.[114] Because the statement increased the likelihood that McIntosh later acted on her intent, relevancy concerns were absent.[115] The supreme court determined that the trial court erred in admitting the statement.[116] However,

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[106] 820 So. 2d 730, 734-38 (Miss. Ct. App. 2002).
[107] *Id.* at 738.
[108] *Id.* ("The chancellor did not abuse his discretion in allowing this hearsay testimony as the testimony presented was restricted to Mr. Bright's state of mind.").
[109] *See supra* notes 37, 39-41 and accompanying text.
[110] MISS. R. EVID. 804(b)(3).
[111] 917 So. 2d 78, 82-83 (Miss. 2005).
[112] *Id.* at 82.
[113] *Id.*
[114] *See supra* notes 34-38 and accompanying text.
[115] *See supra* notes 39-41 and accompanying text.
[116] *McIntosh*, 917 So. 2d at 83.

the trial court correctly admitted the statement in this instance.[117]

In *Sherrell v. State*, the supreme court distinguished two inadmissible hearsay statements from a third statement, which the Rule 803(3) exception permitted.[118] Witness Buddy Brock first testified that victim Bobbie Boone made statements describing past arguments she had with the defendant, Thomas Sherrell.[119] Next, Boone told Brock that she feared Sherrell would harm her if she asked him to move from her residence.[120] The court held that the statements were "inadmissible as . . . attempt[s] to show her state of mind prior to her death."[121] In her third statement, Boone said to Brock "that she intended to ask Sherrell to leave."[122] The court allowed this statement, which showed Boone's intent.[123]

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[117] The supreme court relied on a prior court of appeals opinion to support its ruling. *Id.* at 82-83; Edwards v. State, 856 So. 2d 587, 591-93 (Miss. Ct. App. 2003). Unlike *McIntosh* where the declarant made a statement of personal intent, *Edwards* involved a statement from the declarant that guessed at the defendant's intent. *Edwards*, 856 So. 2d at 592 ("During his testimony, Hayes explained that when the victim asked for his assistance in removing Edwards from his home, the victim stated, 'I want you to come get my son out of the house because he is going to hit me in the head and take my money.'"). The *McIntosh* court could have distinguished the statement in *Edwards*, which that court excluded. *Id.* ("Thus, Rule 803(3) is not a viable avenue for admission of the hearsay statement."). By contrast, the supreme court reached a different conclusion on a similar issue in a previous case. McLeod v. Allstate Ins. Co., 789 So. 2d 806, 808, 811 (Miss. 2001). In *McLeod*, a father's affidavit claimed that his daughter intended to re-establish her residence in his home prior to her death. *Id.* at 808, 811. Using the Rule 803(3) exception, the court allowed the affidavit. *Id.* at 811. Because the father stated his belief about an intent that his daughter never verbalized, the court could have excluded the affidavit. *Id.* at 811, 813-814 (Smith, J., dissenting) ("These affidavits are mere hearsay as her father and brother would not be allowed to testify to Matia's intent at trial.").

[118] 622 So. 2d 1233, 1236-37 (Miss. 1993).

[119] *Id.* at 1236. The court addressed these two statements as a single declaration from Boone. *Id.* The author separated the statements for discussion purposes.

[120] *Id.*

[121] *Id.* The first statement was inadmissible as a category four statement of Boone's memory or belief. *See supra* notes 51-53 and accompanying text. Inadmissible based on irrelevance, the second statement went to Boone's state of mind as the victim. *See supra* notes 28-32 and accompanying text.

[122] *Sherrell*, 622 So. 2d at 1237.

[123] *Id.* ("Boone's statement to Brock that she intended to ask Sherrell to leave is admissible under Miss.R.Evid. 803(3) because it responds to Sherrell's contention that Boone gave him things to pawn. Boone was frightened for her life by the person whom she was sharing a trailer. Although she was scared to return with Sherrell there, she was just as scared to ask him to leave. Therefore, Brock's testimony as to Boone's state of mind was both relevant and admissible under Miss.R.Evid. 803(3)."); *see also* United

However, in dissent, Justice Banks raised concerns about whether "the majority sanction[ed certain] testimony by referring to a part of Boone's statement that was admissible."[124]

2. Statements Implicating Third Parties

With some category three statements, an issue arises about using the declarant's statement of intent to establish the actions of a third party.[125] In *Bogan v. State*, the issue was whether to use the declarant's statement to his girlfriend about "his intent to pick 'Jerry' [Bogan] up on his way to work" as evidence in Bogan's trial for robbery and murder.[126] Allowing the declarant's statement of intent to place Bogan at the scene of the crime, the court of appeals stated, "The language of Rule 803(3) says that statements of intent are admissible. By its terms, the rule does not limit the class of person's [sic] statements of intent may be admitted against."[127]

3. Threatening Statements

The opinion from the court of appeals in *Sanders v. State* offers guidance on how to treat threats under Mississippi Rule of Evidence 803(3).[128] The defendant, Edna Mae Sanders, threw hot cooking oil on the victim, Sherman Sanders, and received a murder charge when Mr. Sanders's injuries proved fatal.[129] On the night he sustained these mortal injuries, Mr. Sanders made threats on Mrs. Sanders's life, and these threats led Mrs. Sanders

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States v. Donley, 878 F.2d 735, 738 (3d Cir. 1989) ("The motive for murder was contested. The appellant claimed that he killed his wife because he had found her with another man. The government claimed, however, that the defendant killed her because of the imminent marital separation. The government was entitled to introduce testimony from which the jury might reasonably infer the existence of the motive the government proposed . . . ."); *see supra* notes 34-38 and accompanying text.

[124] *Sherrell*, 622 So. 2d at 1239 (Banks, J., dissenting) ("Boone's statement that she intended to ask Sherrell to leave is admissible and supplies a motive for Sherrell's action. It does not follow, however, that her statement concerning her beliefs and fears is admissible. This is a statement of 'belief to prove the fact . . . believed' explicitly inadmissible under our rules of evidence.").

[125] *See supra* notes 44-46 and accompanying text.

[126] 754 So. 2d 1289, 1290, 1293 (Miss. Ct. App. 2000).

[127] *Id.* at 1293; *see* Devall, *supra* note 44, at 930.

[128] 77 So. 3d 497, 499, 507 (Miss. Ct. App. 2011).

[129] *Id.* at 499.

to fear him.[130] Finding that the trial court committed a reversible error in refusing to admit the threats, the court of appeals noted that the statements were crucial to explain that Mr. Sanders planned to cause the harm implied in his threats and the actions Mrs. Sanders took in response.[131]

D. Mississippi Cases in Category Four

As the only inadmissible category under Rule 803(3), statements of memory or belief have posed fewer problems for Mississippi courts. The Mississippi Supreme Court examined "statements made by [a] child to two social workers, her mother, and to her grandparents describing [an] event of sexual abuse some days or weeks *after* it is said to have occurred."[132] The court refused to admit the statements under the exception in Rule 803(3).[133] In *Ben v. State*, the victim told the witness that the defendant raped her.[134] The court of appeals prohibited admission of the witness's statement about the rape under Rule 803(3).[135] These cases provide cut-and-dried examples of standard backward-looking statements that the exception in Mississippi Rule of Evidence 803(3) does not allow.[136]

IV. RECOMMENDATIONS

While Mississippi's appellate courts apply the Rule 803(3) exception accurately in most cases, there is room for improvement. Specifically, statements of fear and statements from homicide victims have presented the most trouble. For an immediate

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[130] *Id.* at 507.

[131] *Id.* ("The [trial court's] suppression of this evidence prevented the jury from fully understanding Sherman's state of mind and intention to kill Sanders, Sanders's state of mind during the attack, and the grounds for her reasonable apprehension that she and her children were in serious imminent danger."); *see supra* note 50 and accompanying text.

[132] *In re* Interest of C.B., 574 So. 2d 1369, 1371-72 (Miss. 1990).

[133] *Id.* at 1372. However, the statements would be admissible under the tender years exception. MISS. R. EVID. 803(25).

[134] No. 2009-CA-01495-COA, 2011 WL 2120090, at *1, 4 (Miss. Ct. App. May 31, 2011).

[135] *Id.* at *4 ("The statement is a statement of belief to prove a fact believed by the victim, but it does not relate to the execution, revocation, identification, or terms of the victim's will.").

[136] *See supra* notes 51-53 and accompanying text.

change, the courts could directly address the relevancy of these statements. In addition to the dearth of relevancy considerations about statements indicating state of mind, appellate courts frequently offer brief explanations on any statement falling within the scope of Rule 803(3). The insufficient analysis contained in many existing cases leaves little guidance for courts and practitioners. An increase in reported opinions correctly applying the Rule 803(3) exception would benefit trial judges and lawyers, who need instructive precedent when making evidentiary determinations. Properly admitting or excluding statements under the exception will maintain and promote the integrity of the judicial process.

CONCLUSION

As the above discussion illustrates, Mississippi courts have cited the Rule 803(3) exception in several cases to allow arguably inadmissible hearsay statements. Proper application of this exception in accord with the authorities analyzing Rule 803 will ensure that proceedings involve only permissible statements and reach unassailable conclusions.

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* The author would like to thank Professor Robert Weems for suggesting this topic and his assistance throughout the process of drafting this Comment.