

**ADVISORY COMMITTEE
ON
EVIDENCE RULES**

**Denver, Colorado
October 19, 2018**

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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Denver, Colorado

October 19, 2018

I. Roundtable Discussion on Agenda Items

The Committee has invited nine distinguished guests to a roundtable discussion with Committee members on the Committee's current agenda items: 1) Rule 702 and forensic evidence; 2) Rule 702 on emphasizing that sufficiency of basis and reliability of methodology are questions for the court under Rule 104(a); 3) Rule 106; and (time permitting) 4) a new agenda item regarding Rule 615. This roundtable discussion will take place before the formal Committee meeting. The Committee will then discuss the agenda items at the meeting in light of the roundtable discussion. A background memo regarding the roundtable discussion, with bios for the participants, is included behind Tab 1.

II. Committee Meeting --- Opening Business

Opening business includes:

- Approval of the minutes of the Spring 2018 meeting.
- Report on the June 2018 meeting of the Standing Committee.
- Welcome to new member Kathy Nester.

III. Rule 702

Judge Livingston has established a Subcommittee to research and consider two issues regarding Rule 702: 1) How and whether the Committee should address recent challenges to forensic expert testimony, as discussed in the reports by PCAST and the National Academy of Sciences; and 2) Whether Rule 702 should be amended to specify that the admissibility requirements set forth in the rule (most especially sufficiency of basis and reliability of application) are matters that must be decided by the court a preponderance of the evidence under Rule 104(a).

The Subcommittee has been reviewing a number of changes and suggestions. Judge Schroeder, the Chair of the Rule 702 Subcommittee, has submitted a report on the Subcommittee's progress. That report is included behind Tab III. The Reporter's memos regarding each of the Rule 702 questions are appended to Judge Schroeder's report.

IV. Rule 106

Judge Paul Grimm has asked the Committee to consider a proposal to amend Rule 106, the rule of completeness, for two purposes: 1. to specify that completing evidence is not barred by the hearsay rule; and 2. to extend its coverage to oral statements. The Committee has discussed the proposal at the last two meetings and will continue review at this meeting. The Reporter's memorandum on the subject is behind Tab 4.

V. Rule 615

Judge John Woodcock, a former member of the Committee, has asked the Committee to consider possible changes to Rule 615, the rule on excluding witnesses from trial until they testify. The suggested changes are: 1) placing exclusion within the court's discretion; 2) imposing a timing requirement for a Rule 615 motion; and 3) adding a provision explicitly stating that experts are exempt from a sequestration order. The Reporter's research on Rule 615 in response to these suggestions uncovered another question for the Committee's consideration, on which courts are divided: whether the Rule should be amended to provide that a Rule 615 order extends to prohibiting discussions with prospective jurors *outside* the courtroom. The Reporter's memorandum on Rule 615 is behind Tab 5.

VI. A Roadmap on Impeachment and Rehabilitation

Maryland Rule of Evidence 616 is a unique rule. It is a "roadmap" to guide judges and practitioners on the rules that are pertinent to all forms of impeachment and rehabilitation. The Maryland drafters thought that a roadmap would be useful because Article 6 is silent as to many of the rules on impeachment. A member of the public suggests that the Committee consider proposing an amendment along the lines of Maryland Rule 616. The Reporter's memo on the subject is behind Tab 6.

VII. Rule 404(b)

The Committee's proposed amendment to Rule 404(b) was unanimously approved by the Standing Committee for release for public comment. The public comment period is August 15-

February 15. The Reporter has prepared a memo which sets forth the amendment and discusses all the comments submitted as of the date the Agenda Book is posted. That memo is behind Tab 7. Any comment received in the interim between the release of the Agenda Book and the day of the meeting will be discussed in a supplementary memo to be distributed at the Committee meeting.

VIII. *Crawford* Outline

The Reporter's updated outline on cases applying the Supreme Court's Confrontation Clause jurisprudence is behind Tab 8.

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COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair, Committee on Rules of Practice and Procedure <i>(Standing Committee)</i>	Honorable David G. Campbell United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156
Reporter, Committee on Rules of Practice and Procedure <i>(Standing Committee)</i>	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Associate Reporter, Committee on Rules of Practice and Procedure	Professor Catherine T. Struve University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104
Chair, Advisory Committee on Appellate Rules	Honorable Michael A. Chagares United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513
Reporter, Advisory Committee on Appellate Rules	Professor Edward Hartnett Richard J. Hughes Professor of Law Seton Hall University School of Law One Newark Center Newark, NJ 07102
Chair, Advisory Committee on Bankruptcy Rules	Honorable Dennis Dow United States Bankruptcy Court Charles Evans Whittaker United States Courthouse 400 East Ninth Street, Room 6562 Kansas City, MO 64106
Reporter, Advisory Committee on Bankruptcy Rules	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Associate Reporter, Advisory Committee on Bankruptcy Rules	Professor Laura Bartell Wayne State University Law School 471 W. Palmer Detroit, MI 48202

Chair, Advisory Committee on Civil Rules	Honorable John D. Bates United States District Court E. Barrett Prettyman United States Courthouse 333 Constitution Avenue, N.W., Room 4114 Washington, DC 20001
Reporter, Advisory Committee on Civil Rules	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Associate Reporter, Advisory Committee on Civil Rules	Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978

Chair, Advisory Committee on Criminal Rules	Honorable Donald W. Molloy United States District Court Russell E. Smith Federal Building 201 East Broadway Street, Room 360 Missoula, MT 59802
Reporter, Advisory Committee on Criminal Rules	Professor Sara Sun Beale Charles L. B. Lowndes Professor Duke Law School 210 Science Drive Durham, NC 27708-0360
Associate Reporter, Advisory Committee on Criminal Rules	Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181

Chair, Advisory Committee on Evidence Rules	Honorable Debra Ann Livingston United States Court of Appeals Thurgood Marshall United States Courthouse 40 Centre Street, Room 2303 New York, NY 10007-1501
Reporter, Advisory Committee on Evidence Rules	Professor Daniel J. Capra Fordham University School of Law 150 West 62nd Street New York, NY 10023

Secretary, Standing Committee and Rules Committee Chief Counsel	Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair, Standing Committee	Honorable David G. Campbell United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156
Reporter, Standing Committee	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Associate Reporter, Standing Committee	Professor Catherine T. Struve University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104
Members, Standing Committee	Honorable Jesse Furman United States District Court Thurgood Marshall United States Courthouse 40 Centre Street, Room 2202 New York, NY 10007-1501 Daniel C. Girard, Esq. Girard Gibbs LLP 601 California Street, 14 th Floor San Francisco, CA 94108 Robert J. Giuffra, Jr., Esq. Sullivan & Cromwell LLP 125 Broad Street New York, NY 10004-2498 Honorable Susan P. Graber United States Court of Appeals Pioneer Courthouse 700 S.W. Sixth Avenue, Suite 211 Portland, OR 97204 Honorable Frank Mays Hull United States Court of Appeals Elbert P. Tuttle Court of Appeals Building 56 Forsyth Street, N.W., Room 300 Atlanta, GA 30303

Effective: October 1, 2018
Standing Committee
Revised: October 1, 2018

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<p>Members, Standing Committee (cont'd)</p>	<p>Honorable William J. Kayatta, Jr. United States Court of Appeals Edward T. Gignoux Federal Courthouse 156 Federal Street, Suite 6740 Portland, ME 04101-4152</p> <p>Peter D. Keisler, Esq. Sidley Austin, LLP 1501 K Street, N.W. Washington DC 20005</p> <p>Professor William K. Kelley Notre Dame Law School P. O. Box 780 Notre Dame, IN 46556</p> <p>Honorable Carolyn B. Kuhl Superior Court of the State of California County of Los Angeles 312 North Spring Street, Department 12 Los Angeles, CA 90012</p> <p>Honorable Rod J. Rosenstein Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Ave., N.W. Washington, DC 20530</p> <p>Honorable Amy J. St. Eve United States Court of Appeals Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 1260 Chicago, IL 60604</p> <p>Honorable Srikanth Srinivasan United States Court of Appeals William B. Bryant United States Courthouse Annex 333 Constitution Avenue, N.W., Room 3905 Washington, DC 20001</p>
<p>Advisors and Consultants, Standing Committee</p>	<p>Bryan A. Garner, Esq. LawProse, Inc. 8133 Inwood Road Dallas, TX 75209</p>

<p>Advisors and Consultants, Standing Committee (cont'd)</p>	<p>Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933</p> <p>Joseph F. Spaniol, Jr., Esq. 5602 Ontario Circle Bethesda, MD 20816-2461</p>
<p>Secretary, Standing Committee and Rules Committee Chief Counsel</p>	<p>Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair, Advisory Committee on Evidence Rules	Honorable Debra Ann Livingston United States Court of Appeals Thurgood Marshall United States Courthouse 40 Centre Street, Room 2303 New York, NY 10007-1501
Reporter, Advisory Committee on Evidence Rules	Professor Daniel J. Capra Fordham University School of Law 150 West 62nd Street New York, NY 10023
Members, Advisory Committee on Evidence Rules	Honorable James P. Bassett Associate Justice New Hampshire Supreme Court One Charles Doe Drive Concord, NH 03301 Daniel P. Collins, Esq. Munger Tolles & Olson LLP 350 South Grand Avenue, 50 th Floor Los Angeles, CA 90071 Honorable Shelly Dick United States District Court Russell B. Long Federal Building 777 Florida Street, Room 301 Baton Rouge, LA 70801 Traci L. Lovitt, Esq. Jones Day 100 High Street, 21 st Floor Boston, MA 02110-1781 Honorable John Thomas Marten United States District Court United States Courthouse 401 North Market Street, Room 232 Wichita, KS 67202-2000 Kathryn N. Nester Federal Public Defender American Towers 46 West Broadway, Suite 110 Salt Lake City, UT 84101-2028

<p>Members, Advisory Committee on Evidence Rules (cont'd)</p>	<p>Honorable Edward O'Callaghan Acting Principal Associate Deputy Attorney General (ex officio) Office of the Deputy Attorney General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington DC 20530</p> <p>Honorable Thomas D. Schroeder United States District Court Hiram H. Ward Federal Building and United States Courthouse 251 North Main Street, Room 231 Winston Salem, NC 27101-7101</p>
<p>Consultant, Advisory Committee on Evidence Rules</p> <p>Liaison Members, Advisory Committee on Evidence Rules</p>	<p>Professor Liesa Richter William J. Alley Professor of Law Thomas P. Hester Presidential Professor University of Oklahoma School of Law 300 Timberdell Road Norman, OK 73019</p> <p>Honorable Jesse Furman <i>(Standing)</i> United States District Court Thurgood Marshall United States Courthouse 40 Centre Street, Room 2202 New York, NY 10007-1501</p> <p>Honorable Sara Lioi <i>(Civil)</i> United States District Court John F. Seiberling Federal Building and United States Courthouse Two South Main Street, Room 526 Akron, OH 44308</p> <p>Honorable James C. Dever III <i>(Criminal)</i> United States District Court Terry Sanford Federal Building 310 New Bern Avenue, Room 716 Raleigh, NC 27601-1418</p>
<p>Secretary, Standing Committee and Rules Committee Chief Counsel</p>	<p>Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Judge Frank Mays Hull <i>(Standing)</i>
	Judge Pamela Pepper <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Bankruptcy Rules	Judge Susan P. Graber <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. <i>(Standing)</i>
	Judge A. Benjamin Goldgar <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Amy J. St. Eve <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Judge Jesse Furman <i>(Standing)</i>
	Judge Sara Lioi <i>(Civil)</i>
	Judge James C. Dever III <i>(Criminal)</i>

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

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<p>Scott Myers Counsel (<i>Bankruptcy / Standing</i>) Phone: 202-502-1913 Scott_Myers@ao.uscourts.gov</p>	<p>Frances F. Skillman Paralegal Specialist Phone: 202-502-3945 Frances_Skillman@ao.uscourts.gov</p>
<p>Julie M. Wilson Counsel (<i>Civil / Criminal</i>) Phone: 202-502-3678 Julie_Wilson@ao.uscourts.gov</p>	

FEDERAL JUDICIAL CENTER LIAISONS

<p>John S. Cooke Director Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-100 Washington, DC 20002 Phone: 202-502-4060 jcooke@fjc.gov</p>	
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<p>Molly T. Johnson <i>(Bankruptcy Rules Committee)</i> Senior Research Associate Phone: 315-824-4945 mjohnson@fjc.gov</p>	<p>Emery G. Lee <i>(Civil Rules Committee)</i> Senior Research Associate Phone: 202-502-4078 elee@fjc.gov</p>
<p>Timothy T. Lau <i>(Evidence Rules Committee)</i> Research Associate Phone: 202-502-4089 tlau@fjc.gov</p>	<p>Tim Reagan <i>(Rules of Practice & Procedure)</i> Senior Research Associate Phone: 202-502-4097 treagan@fjc.gov</p>

TAB 1

FORDHAM

University School of Law

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail: dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules

From: Daniel J. Capra, Reporter

Re: Roundtable Discussion at Fall Meeting

Date: October 1, 2018

The Committee has invited a small group of experts to participate in a roundtable discussion regarding the major agenda items for the Fall meeting. This discussion, among participants and Committee members, will take place on the morning of the Fall meeting. The agenda items are:

1. Whether to propose an amendment to Rule 702 to prohibit experts from overstating their opinion --- a proposal that began as a way to address forensic expert testimony and might be expanded to cover all experts.
2. Whether to propose an amendment to Rule 702 to specify that the admissibility requirements in the rule are to be determined by the court under Rule 104(a).
3. Whether to propose an amendment to Rule 106 to allow completing hearsay to be admitted over a hearsay objection.
4. A new item (which will be discussed if time permits): whether to propose an amendment to Rule 615, to: a) provide that sequestration orders are discretionary rather than mandatory; b) impose a timing requirement on sequestration motions; c) specify that experts are excepted from exclusion; and/or d) specify that a Rule 615 order extends to preclude prospective witnesses from obtaining trial testimony outside the court.

The roundtable discussion will not consist of formal presentations. The idea is to have an interchange among the participants and Committee members regarding these agenda items. The

goal is for the Committee to obtain information that will help it to decide whether to pursue any or all of these agenda items, and if so, what a possible amendment should look like.¹

The background memos for the roundtable discussion can be found behind the tabs for each of the agenda items.

Bios of Roundtable Participants

Hon. Phillip A. Brimmer

Judge Philip A. Brimmer is a district judge for the United States District Court for the District of Colorado. He was appointed in 2008. He graduated from Harvard College in 1981 and Yale Law School in 1985. He was a law clerk for the Honorable Zita L. Weinshienk of the United States District Court for the District of Colorado from 1985 to 1987, after which time he joined the Denver office of Kirkland & Ellis. At Kirkland & Ellis, his practice areas included toxic torts, environmental insurance coverage disputes, and general commercial litigation. From 1994 to 2001, he was a deputy district attorney with the Denver District Attorney's Office. He was an Assistant United States Attorney for the District of Colorado from 2001 to 2008, serving as chief of the Major Crimes section and later as chief of the Special Prosecutions section. As a prosecutor with the Denver District Attorney's Office and the United States Attorney's Office, he tried over 100 criminal cases.

Hon. James O. Browning

Judge Browning is a district judge for the United States District Court for the District of New Mexico. He was nominated by President George W. Bush and appointed in 2003. He received a Bachelor of Arts degree from Yale University in political science in 1978, graduating magna cum laude. He earned his J.D. from the University of Virginia Law School in 1981, where he was Editor in Chief of the Virginia Law Review. After law school, Judge Browning served as law clerk to Judge Collins J. Seitz on the United States Court of Appeals for the Third Circuit from 1981 to 1982, and then clerked for Justice Lewis F. Powell of the Supreme Court of the United States from 1982 to 1983. After finishing his judicial clerkships, Judge Browning returned to New Mexico and began working at the law firm Rodey, Dickason, Sloan, Akin, & Robb. He was a Deputy attorney general of New Mexico Department of Justice from 1987 to 1988. Afterwards, he returned to private practice at Rodey, Dickason, Sloan, Akin, & Robb. In 1990, he formed his own law firm, Browning & Peifier, P.A. He continued to practice at Browning & Peifer until his appointment to the federal bench in 2003.

¹ A transcript of the roundtable discussion will be published in a forthcoming edition of the Fordham Law Review.

Eric G. Lasker, Esq.

Mr. Lasker is a partner in the Washington, D.C. law firm Hollingsworth LLP, where he litigates a wide variety of complex civil matters, with a current focus on toxic torts, environmental litigation, and pharmaceutical products liability. Mr. Lasker has represented clients in toxics/environmental matters involving herbicides, asbestos, lead paint, nonionizing radiation, PCBs, and chemical solvents and in pharmaceutical and medical device products liability claims involving antipsychotics, antifungals, antiepileptics, cancer medications, cough/cold treatments, intraocular and contact lenses, and obstetrical drugs. His practice focuses on matters at the intersection of science and law, and he accordingly has both litigated and published extensively on expert admissibility under Rule 702 and Daubert. Mr. Lasker has been recognized for his work as an American Lawyer “Litigator of the Week,” a Bloomberg News “Rainmaker,” a recipient of the 2012 George W. Yancey Memorial Award and the 2014 Burton Award for excellence in legal writing, and as one of Law360’s five Products Liability MVPs for 2013.

Along with George Mason University law professor David Bernstein, Mr. Lasker authored “Defending *Daubert*: It’s Time to Amend Federal Rule of Evidence 702,” 57:1 William & Mary L. Rev. (2015). In this article, Mr. Lasker reviews the drafting history of the 2000 amendments to Rule 702 and compares the drafters’ intent with how Rule 702 is being applied in federal district courts and federal courts of appeal. Mr. Lasker concludes that many courts have departed from this drafting intent and recommends that Rule 702 be amended to address this concern.

Professor Christopher Mueller

Christopher Mueller is the Henry S. Lindsley Professor of Law at the University of Colorado Law School, where he has taught since 1985. His scholarship focuses on Evidence, Civil Procedure, and Complex Litigation. Professor Mueller has written on privileges, hearsay, character evidence, expert testimony, plea bargaining, cross-examination, presumptions, and impeachment of jury verdicts. He is a former Evidence chair of the Section on Evidence of the American Association of Law Schools. He serves on the Colorado Civil Rules and Evidence Committees and is a life member of the American Law Institute. He has taught at the law schools of the University of Illinois, Emory, and the University of Wyoming. On graduation from law school, he practiced law with Pillsbury, Madison & Sutro in San Francisco.

Professor Mueller has collaborated for many years with Laird C. Kirkpatrick (George Washington University Law) on the five-volume treatise *Federal Evidence*, now in its fourth edition (Thompson/West 2013), a work that has been cited by the Supreme Court 17 times. He

and Professor Kirkpatrick collaborate with Professors Liesa Richter (Oklahoma Law) and Charles Rose III (Stetson Law) on a one-volume treatise entitled Evidence: Doctrine and Practice (Wolters Kluwer, fifth edition 2018). Professor Mueller is also the author of a coursebook in Civil Procedure entitled Twenty-First Century Procedure (Wolters Kluwer 2nd ed. 2017).

Hon. Kathleen M. O'Malley

Kathleen M. O'Malley was appointed to the United States Court of Appeals for the Federal Circuit by President Barack Obama in 2010. Prior to her elevation to the Federal Circuit, Judge O'Malley was appointed to the United States District Court for the Northern District of Ohio by President William J. Clinton on October 12, 1994.

Judge O'Malley served as First Assistant Attorney General and Chief of Staff for Ohio Attorney General Lee Fisher from 1992-1994, and Chief Counsel to Attorney General Fisher from 1991-1992. From 1985-1991, she worked for Porter, Wright, Morris & Arthur, where she became a partner. From 1983-1984, she was an associate at Jones, Day, Reavis and Pogue.

During her sixteen years on the district court bench, Judge O'Malley presided over in excess of 100 patent and trademark cases and sat by designation on the United States Circuit Court for the Federal Circuit. As an educator, Judge O'Malley has regularly taught a course on Patent Litigation at Case Western Reserve University Law School; she is a member of the faculty of the Berkeley Center for Law & Technology's program designed to educate Federal Judges regarding the handling of intellectual property cases. Judge O'Malley serves as a board member of the Sedona Conference; as the judicial liaison to the Local Patent Rules Committee for the Northern District of Ohio; and as an advisor to national organizations publishing treatises on patent litigation (Anatomy of a Patent Case, Complex Litigation Committee of the American College of Trial Lawyers; Patent Case Management Judicial Guide, Berkeley Center for Law & Technology).

Judge O'Malley began her legal career as a law clerk to the Honorable Nathaniel R. Jones, Sixth Circuit Court of Appeals in 1982-1983. She received her J.D. degree from Case Western Reserve University School of Law, Order of the Coif, in 1982, where she served on Law Review and was a member of the National Mock Trial Team. Judge O'Malley attended Kenyon College in Gambier, Ohio where she graduated magna cum laude and Phi Beta Kappa in 1979.

Paul L. Shechtman, Esq.

WORK EXPERIENCE:

May 2016 – Present: Bracewell LLP, Partner

October 2011 - May 2016: Zuckerman Spaeder, LLP, Partner

February 1997 - September 2011: Stillman, Friedman & Shechtman, P.C., Partner

June 2018 – Present: New York State Bar Association Task Force on Wrongful Convictions

June 2017 – Present: Member, National Conference of Bar Examiners Evidence Drafting Committee

May 2017 – Present: New York State Justice Task Force

October 2010 - November 2017: Member, New York State Permanent Sentencing Commission

September 2010 - September 2016: Member, Judicial Conference Advisory Committee on Evidence Rules

February 2006 - December 2006: Chair, New York State Commission on Lobbying

May 1998 - December 2006: Chair, New York State Ethics Commission

January 1988 – Present: Adjunct Professor, Columbia Law School, (Criminal Procedure and Evidence) (1990 & 1992: award for outstanding teaching)

January 1998 - December 2006: Chair, New York State Judicial Screening Committee

April 1995 - February 1997: Director of Criminal Justice and Commissioner of the Division of Criminal Justice Services for New York State

February 1994 - April 1995: Chief, Criminal Division, United States Attorney's Office, Southern District of New York

June 1987 - February 1994: Counsel to the District Attorney, New York County District Attorney's Office

June 1986 - May 1987: Associate Independent Counsel, Investigation of Michael Deaver

July 1985 - June 1987 : Assistant Professor, University of Pennsylvania Law School (1987: award for outstanding teaching)

March 1981 - July 1985: Chief Appellate Attorney and Chief, General Crimes Unit, United States Attorney's Office, Southern District of New York

July 1979 - July 1980: Law Clerk to Hon. Warren E. Burger, Chief Justice of the United States Supreme Court

September 1978 - June 1979: Law Clerk to Hon. Louis H. Pollack, United States District Court, Eastern District of Pennsylvania

ACADEMIC BACKGROUND:

1975-1978 Harvard Law School, magna cum laude

1971-1973 Oxford University, masters degree in economics

1967-1971 Swarthmore College, B.A. in economics, high honors

Judith A. Smith, Esq.

Judy Smith is an Assistant United States Attorney in Colorado and Chief of the Colorado office's Cybercrime and National Security Section where she supervises and prosecutes cyber, national security, and child exploitation cases. She has been a prosecutor for 15 years. Ms. Smith's legal experience includes working at the law firm Gibson, Dunn & Crutcher and serving as a Deputy District Attorney in the Denver District Attorney's Office. Ms. Smith received her bachelor and law degrees from the University of Colorado. She obtained her Master of Laws from Columbia Law School while teaching legal research, writing, and appellate advocacy there.

Aimee H. Wagstaff, Esq.

In 2010, Aimee became a founding partner of Andrus Wagstaff. The vast majority of Aimee's litigation is done through national mass tort consolidations, usually multidistrict litigations (MDLs) or Judicial Council Coordinated Proceedings (JCCPs). Aimee has been appointed by federal and state court Judges across the country to co-lead four national litigations, representing tens of thousands of injured claimants.

In 2016, Judge Chhabria appointed Aimee to serve as national Co-Lead counsel of MDL 2741- In Re: Roundup Products Liability Litigation, in the United States District Court for the Northern District of California. In 2015, Aimee made MDL history when Judge Kathryn H. Vratil appointed her to serve as Co-Lead counsel of the first ever majority women MDL plaintiffs' steering committee (PSC) – MDL 2652: In Re: Ethicon, Inc., Power Morcellator Products Liability Litigation, in the United States District Court for the District of Kansas. Recently, Judge Highberger appointed Aimee to serve on the Plaintiffs' Steering Committee of JCCP 4775: In Re Risperdal Product Liability Case, in Los Angeles County, California. Additionally, Chief Judge Joseph R. Goodwin, of the United States District Court for the Southern District of West Virginia, appointed Aimee to serve on the Plaintiffs' Steering Committee of: (1) MDL 2187: In Re C.R. Bard, Inc, Pelvic Repair System Products Liability Litigation; (2) MDL 2325: In Re American Medical Systems, Inc. Pelvic Repair System Products Liability Litigation Repair; (3) MDL 2326: In Re Boston Scientific Corporation, Pelvic Repair System products Liability Litigation; (4) MDL 2327: In Re Ethicon, Inc, Pelvic Repair System Products Liability Litigation; (5) MDL 2387: In Re Coloplast Corp. Pelvic Support Systems Product Liability Litigation; (6) MDL 2440: In Re Cook Medical, Inc. Pelvic Repair System Product Liability Litigation; and (7) MDL: 2511 In Re Neomedic Pelvic Repair System Product Liability Litigation (collectively, transvaginal mesh (TVM) MDLs). Judge Goodwin also appointed Aimee to serve on the eight-member national executive committee overseeing the TVM MDLs and to serve as national co-lead of MDL 2326 against Boston Scientific Corporation.

Aimee earned her undergraduate degree in Marine Science and Communications from the University of San Diego. She earned her law degree from University of Denver Sturm College of Law.

Rick Williamson, Esq.

1991- present: Assistant Federal Public Defender, First Assistant.

Office of the Federal Public Defender, Districts of Colorado and Wyoming.

1981-1991 Private practice, San Diego.

1972-1981 Trial Attorney, Chief Trial Attorney, Federal Defenders of San Diego, Inc.

Law School: University of San Diego, graduated cum laude 1972.

Undergrad: University of California, San Diego, graduated 1969.

TAB 2

TAB 2A

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Advisory Committee on Evidence Rules
Minutes of the Meeting of April 26-27, 2018
Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 26-27, 2018 at the Thurgood Marshall Building in Washington, D.C.

The following members of the Committee were present:

Hon. Debra Ann Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly D. Dick
Hon. Thomas D. Schroeder
Daniel P. Collins, Esq.
Traci L. Lovitt, Esq.
A.J. Kramer, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Jesse M. Furman, Liaison from the Committee on Rules of Practice and Procedure
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Robert K. Hur, Esq., United States Attorney for the District of Maryland
Dr. Joe S. Cecil, Esq.
Ted Hunt, Esq. (Department of Justice)
Andrew Goldsmith, Esq., (Department of Justice)
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Catherine T. Struve, Assistant Reporter to the Standing Committee (by phone)
Professor Liesa L. Richter, Academic Consultant to the Committee
Dr. Timothy Lau, Esq., Federal Judicial Center
Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice and Procedure
Bridget M. Healy, Esq., Attorney Advisor, Administrative Office of the Courts
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Patrick Tighe, Esq., Rules Committee Law Clerk

I. Opening Business

Approval of Minutes

The Chair welcomed everyone to the meeting and solicited discussion of the minutes from the October 26, 2017 meeting of the Committee in Boston. A motion was made to approve the minutes, which was seconded and approved.

Standing Committee Meeting

The Chair reported on the Standing Committee meeting in January, 2018 during which she updated the Standing Committee concerning the projects and rules amendments being considered by the Evidence Advisory Committee. Judge Livingston noted that she received largely positive, albeit limited, feedback from the Standing Committee with respect to the projects being pursued by the Evidence Advisory Committee.

II. Symposium on Forensic Evidence, FRE 702, and *Daubert*

Judge Livingston then opened discussion of the first item on the agenda: the Committee's role in addressing challenges to forensic expert testimony, as well as more general problems under *Daubert* and Rule 702. Judge Livingston noted that this was the first opportunity the Advisory Committee had to discuss the vast array of information provided to the Committee at the fall symposium on expert forensic evidence and Rule 702, held at Boston College Law School. She further noted that the project began with recommendations from the President's Council of Advisors on Science and Technology ("PCAST") that the Advisory Committee draft a "Best Practices Manual" with respect to forensic evidence or alternatively prepare a new Committee note to Rule 702. Although no specific rule change was recommended, PCAST expressed interest in a revision to the detailed Committee note to FRE 702 to address special considerations associated with forensic evidence.

The Reporter made several observations about the PCAST recommendations. He noted that it is not statutorily permissible to revise a Committee note in the absence of any change to a rule. Although it might be possible that a relatively minor change to a rule would, after discussion, prove appropriate, the Committee has consistently followed the principle that it is not good rulemaking to amend a rule for the purpose of creating a note. In addition, there are problems with a Best Practices Manual emanating from the Advisory Committee. The Reporter noted that a Best Practices Manual for the authentication of electronic evidence was started under the auspices of the Committee, but ultimately had to be published under the names of the contributing authors because of concerns that a Best Practices Manual might be outside the Committee's rulemaking authority.

In light of these concerns, the Chair explained that the Advisory Committee would first discuss and consider the possibility for rule revisions that might assist courts and litigants in dealing with expert opinion evidence, particularly in the area of forensic feature comparison. Short of potential amendments to the Evidence Rules, the Committee could consider what role the Advisory Committee might play in the arena of expert forensic testimony.

The Chair thereafter recognized Dr. Joe Cecil, who had recently retired from the FJC and had served as the Liaison from the FJC to the Evidence Advisory Committee for many years, including in 2000 when the amendments to FRE 702 were enacted. Dr. Cecil is an author of the highly respected Reference Manual for Scientific Evidence relied upon by judges to better understand scientific evidence, and he contributed to the PCAST. The Chair explained that Dr. Cecil had been invited to share with the Committee how his work on scientific evidence might inform or assist in the Committee's inquiry into forensic expert testimony.

Mr. Cecil explained a bit of the background and focus of the Reference Manual for Scientific Evidence, noting that the first Manual was published in 1994 and that the most recent version came out in 2011 shortly after the National Academy of Sciences 2009 Report on forensic evidence. He noted that the Manual is now published in collaboration with the National Academy of Sciences and is extensively peer reviewed. He explained that the focus of the Manual is to give judges who may not have a science background the necessary scientific foundation to decide questions involving science in the courtroom. For example, the Manual includes chapters on statistics, toxicology, epidemiology, and forensic feature comparison. Dr. Cecil emphasized that the Manual is designed to impart scientific information, but is *not* designed to tell judges how to decide issues and cases. It is informative but not prescriptive. For those reasons, Dr. Cecil did not believe that the Reference Manual was a "substitute" for the Best Practices Manual envisioned by PCAST. Dr. Cecil stated that he was open to working with the Committee in the development of a Best Practices Manual should the Committee decide to sponsor such a project.

Judge Livingston inquired whether the FJC has education programs to further assist in addressing issues of forensic expert evidence. Dr. Lau remarked FJC currently does not sponsor many judicial programs on forensic evidence, but that programs could be developed if there is demand. He further noted that the European Union does have a Best Practices Manual on Forensic Evidence. The Reporter inquired of Dr. Cecil whether the FJC would be able to identify the scientists in the relevant fields that the Advisory Committee would need to consult in developing a Best Practices Manual. Dr. Cecil responded that the FJC was in contact with many noted scientists and could help the Committee in identifying those resources. He further noted that the National Academy of Sciences could also help identify experts. Judge Livingston inquired as to the timeline for the next edition of the Reference Manual. Dr. Cecil reported that no firm timeline exists, but that funds are currently being raised to support the publication of a new edition. The Reporter also inquired whether the Reference Manual would be able to resolve disputed issues identified in the PCAST report. Dr. Cecil stated that the Manual served to identify and explain such disputes, but does not provide resolution.

The Chair thereafter introduced a guest from the Department of Justice ("DOJ") who had been invited to the Committee meeting to explain the work being done by DOJ with respect to forensic investigation and testimony. Ted Hunt is the Senior Advisor on Forensic Evidence for DOJ. He began by stating that improving forensic investigation and evidence is a high priority for the Deputy Attorney General. He noted that his position as the Senior Advisor on Forensic Evidence was created last April and that a permanent working group on forensic evidence had been established to bring together all relevant stakeholders to improve and validate forensic testing, and to provide guidelines for testimony by forensic experts. Mr. Hunt noted five key areas of focus:

1. Discontinuing statements by analysts and prosecutors expressing “a reasonable degree of scientific certainty” regarding findings. The Department directed prosecutors and analysts not to use this language in reporting results 18 months ago.
2. Establishing uniform terminology for examiners and analysts to employ in their reports and testimony to ensure that all terminology is scientifically based, appropriately qualified in scope, and not overstated. The first document on uniform terminology in latent print comparison was released in February of 2018 and additional directives for other disciplines will be forthcoming.
3. Monitoring expert forensic testimony for quality assurance to ensure that any mistakes are corrected immediately. This is a permanent program that evaluates testimony through real-time observation of testimonial presentations, as well as through transcript review. Feedback is promptly provided.
4. On-line posting of internal DOJ laboratory policies and procedures to enhance transparency. These documents are provided to defense counsel during discovery and also are being made publicly available, in order to provide greater insight and education into DOJ laboratory methodology, as well as to serve as a model for state crime labs.
5. Performing research and additional scientific study to strengthen the foundations of forensic science. The Department is conducting large-scale studies involving hundreds of examiners and thousands of forensic samples in a multi-year project in order to improve forensic methodologies.

Mr. Hunt concluded his remarks by emphasizing that each of the projects described was designed to enhance the reliability of forensics, to increase collaboration across federal and state laboratories, and to increase the capacity of forensic services.

The Reporter asked Mr. Hunt about who it is that performs the testimonial monitoring function that he described. Mr. Hunt explained that a peer of comparable qualifications does the monitoring and immediately critiques in-court testimony of an examiner to prevent exaggeration or overstatement of results and to avoid deviation from uniform language tailored to each field of forensic study. The Chair asked Mr. Hunt how an expert testifying about a forensic method that had not been validated through black box studies was permitted to express confidence while testifying according to the Department’s program. In response, Mr. Hunt described international standards of accreditation established for various forensic disciplines based upon extensive literature and hundreds of training hours that demonstrated the reliability of those methods, though without the more rigorous black box studies emphasized in the PCAST Report. The Reporter followed up, asking Mr. Hunt whether a ballistics expert could say a shell casing was “a match” for a particular weapon. Mr. Hunt stated that pre-trial rulings by the court would determine exactly what the expert could say, but that a ballistics examiner should be able to say that a shell casing was fired from a particular gun. The Reporter again queried whether that meant that examiners could testify to a “match” according to the Department protocol described by Mr. Hunt, to which he responded that it depends upon the discipline.

Dr. Cecil offered that the DOJ efforts to improve research and quality control were commendable, but that difficult issues remain concerning identification of a match between a forensic sample and an exemplar. According to Dr. Cecil, DOJ guidelines continue to permit an

examiner to state that she can identify the source of a particular sample and testimony to that level of certainty conflicts with the consensus in the scientific community that there is inadequate foundation for that specific attribution. Dr. Cecil noted that other groups, like the European Union, require more temperate terminology, involving a “likelihood” of attribution, in order to prevent overstatement. Mr. Hunt responded that the Department’s published documents on particular disciplines, such as the ULTR on Latent Prints, would list approved terms of art for the particular discipline, but then require explanations of those terms and a description of limitations. According to Mr. Hunt, it is impossible to craft a single term that accurately captures conclusions across forensic disciplines, and explanation of terminology is far more important than the particular term used.

A member of the Committee asked Dr. Cecil whether the concern of the scientific community is the failure of examiners to explain limitations or uncertainty surrounding a particular forensic methodology. Dr. Cecil explained that scientists prefer to express findings in confidence intervals that more accurately represent the likelihood of a match rather than in conclusions about a match. He stated that the concern of the scientific community is that there is inadequate foundation to make a specific attribution to a particular defendant for many disciplines. Scientists would prefer more discussion of confidence intervals in the legal arena. Mr. Hunt noted that the Department’s Latent Print document makes limitations on findings very transparent and that this publicly available document is accessible to defense counsel for purposes of cross-examination.

Another Committee member then asked Mr. Hunt what the remedy would be if an examiner did overstate conclusions during his testimony. Mr. Hunt stated that there would be a duty to notify the parties immediately of any misstatement by a testifying expert.

The Chair thanked Dr. Cecil and Mr. Hunt for their helpful contributions and explained that one possible response to the issues surrounding forensic testimony could be a change to the Rules. The Reporter directed the Committee’s attention to a draft of a new Rule 707 on Forensic Evidence on page 50 of the agenda materials. He noted that the draft rule was not a proposal, but more of a thought experiment drafted for the Symposium for purposes of discussion. The Reporter noted difficulties surrounding a definition of “forensic evidence” in a rule. In addition, the draft Rule 707 would overlap, problematically, with existing Rule 702. For that reason, amending Rule 702 might be a better solution.

The Reporter stated that one idea for amending Rule 702 would be a new subsection prohibiting an expert from overstating results. That more limited amendment was also prepared for discussion at the Symposium and was received favorably by a number of the panelists. An alternative would be a positive statement, such as that experts must accurately report the strength of their findings. The Reporter suggested that the Committee might review a formal proposal for such a textual change at a subsequent meeting.

Judge Dever, the Liaison from the Criminal Rules Committee, reported that Criminal Rules is addressing some of the concerns surrounding forensic expert evidence with potential amendments involving criminal discovery. Judge Dever stated that a subcommittee had been appointed to determine whether the expert disclosure obligations under Criminal Rule 16 should be broadened along the lines of Civil Rule 26. He suggested that more robust advance disclosure

to criminal defendants could aid them in testing expert testimony through *Daubert* motions and could also help in avoiding overstatement by providing a meaningful opportunity for expert cross-examination. Given the wide array of subjects about which experts are testifying, a broader criminal discovery provision could give defendants better access to information to challenge experts in all fields. Professor Coquillette noted the importance of having the Criminal and Evidence Committees work together on the issue of expert testimony in criminal cases and also commended the Department of Justice for its efforts. Judge Dever noted that the Criminal Rules Committee was gathering information from all constituencies, the Department of Justice, the Federal Public Defender, as well as the scientific community to get a broad perspective on the issue of criminal discovery of expert opinion evidence.

The Chair thanked Judge Dever for his report and noted that it was very helpful to coordinate with the Criminal Rules Committee in thinking about potential amendments to the Evidence Rules. Of the possible amendments, the Chair noted that one preventing overstatement was one that seemed most plausible. She further noted the challenge presented by the disconnect between civil and criminal cases with respect to expert testimony that was highlighted at the Boston College symposium. Civil lawyers lamented the vast resources being needlessly consumed by *Daubert* challenges, while criminal lawyers expressed concern about the lack of attention being given to forensic expert testimony in criminal trials. The divergent experiences in civil and criminal cases present another challenge for rulemakers. She noted that a Best Practices Manual might be an alternative to rulemaking to address these matters.

The Reporter explained that it would not be possible to write a rule prohibiting overstatement by testifying experts on the criminal side only, because that would imply that overstatement is acceptable in civil cases, which of course it is not. He then provided an update on the case law regarding FRE 702 and forensic expert testimony and directed the Committee's attention to the case digest in the agenda materials. A review of recent cases revealed that courts are relying on precedent to support the admissibility of many forensic methods without conducting independent analysis of *Daubert* factors. The cases also showed significant overstatement by forensic experts, including testimony that a sample identification was "100% accurate." A Committee member asked what conclusion a testifying expert could make if testifying to a "reasonable degree of scientific certainty" constituted overstatement. Mr. Hunt responded that with sufficient foundation, an expert should be able to opine that a sample comes from a particular source, but stated that the Department of Justice did not believe that it was necessary to testify to a "reasonable degree of scientific certainty." Mr. Hunt stated that no "magic word" would be adequate in all cases and that explanation by the examiner of the meaning and limitations of her findings was more important.

The Reporter expressed concerns that the findings of both the National Academy of Sciences and of PCAST have been largely ignored by the courts in the recent opinions and that a Best Practices Manual (that cannot emanate directly from the Evidence Advisory Committee) might also be ignored.

Judge Dever then asked Mr. Hunt whether the Department of Justice was working to monitor testimony by state examiners to the extent that state experts testify in federal cases. Mr. Hunt responded that federal prosecutors governed by Department policies would not elicit

improper testimony from state examiners, and further noted that one of the goals of publishing Department of Justice best practices was to provide a model for state laboratories as well.

The Chair then noted that it might be advisable for the Evidence Advisory Committee to appoint a small subcommittee to do intense reading and study regarding the possible role of the Committee in addressing concerns with forensic evidence. She stated that she and the Reporter currently felt that an amendment to Rule 702 preventing overstatement of findings appeared to be the most promising possibility and that a potential amendment distinguishing between scientific and other types of expert opinion testimony appeared less viable.

Mr. Hur then thanked the Reporter for his detailed case digest and stated that the cases are the data that the Committee should be considering. He opined that the courts are grappling carefully and thoughtfully with *Daubert* issues and limiting expert testimony where necessary. He seconded Mr. Hunt's assertion that the Department of Justice was already working to prevent overstatement of expert conclusions. The Reporter emphasized the excessive reliance on precedent by the federal courts in place of detailed consideration of other *Daubert* factors, and the overstatement found in the cases. Mr. Hur noted the longstanding acceptance of certain scientific methods like latent fingerprint analysis. While he acknowledged that courts could start from the ground up in a *Daubert* analysis of such methodologies, he stated that the reliance on the longstanding precedent reaches the same result – the proper admissibility of such testimony. Mr. Hur further opined that the PCAST report is having an impact, noting that defense counsel have cited to it. He further emphasized that the PCAST report looked favorably on the black box studies conducted by the FBI in connection with fingerprint evidence. Mr. Hur stated that the courts need more time to absorb the PCAST report and for its findings to filter into *Daubert* analysis.

The Reporter then turned the Committee's attention to another concern about the application of Rule 702 raised by two members of the public in a law review article. Specifically, the article found that some federal courts treat the sufficiency of an expert's basis, and the application of the expert's methods, as questions of weight for the jury --- when in fact these matters are both questions of admissibility under Rule 702, as amended in 2000. The Reporter explained that the subdivisions of Rule 702 set forth admissibility requirements that a trial judge must find to be satisfied by a preponderance of the evidence *before* allowing the expert to testify before the jury. Therefore, federal courts that are treating these foundational requirements as matters of weight that may be given to a jury are indeed wrong. That said, the Reporter noted that FRE 104(a) clearly applies to the admissibility requirements of FRE 702, and that crafting an amendment that essentially tells federal courts to "apply the rule" may be challenging.

One member of the Committee remarked that the federal cases treating the requirements of FRE 702 as matters of weight are very troubling. Essentially, it is as if some courts are saying that FRE 702 doesn't apply in their circuit. The Committee member suggested that it might be important to amend Rule 702 to prevent it from being ignored. Another Committee member also reported being taken aback by the federal courts blatantly ignoring Rule 702. That Committee member wondered whether a rule revision (that could also be ignored) would be the most fruitful solution or whether judicial education might be a better solution to the problem.

A Committee member reiterated the sharp divide between expert discovery in civil and criminal cases, noting that the adversarial process works out many issues with expert testimony on the civil side and that the failure of the adversarial process on the criminal side is placing greater burdens on trial judges to police the use of forensic experts. Judge Dever noted that the Department of Justice was training on this issue in an effort to get more information about testifying experts to defense counsel earlier in the process to allow for more adversarial testing. Andrew Goldsmith, the Criminal Discovery Coordinator in the Deputy Attorney General's office noted that a January, 2017 memo from Sally Yates on expert discovery was now part of the U.S. Attorney's Manual and that all federal prosecutors are receiving training on early disclosure. He opined that it was important for the Evidence Advisory Committee to collaborate with the Criminal Rules Committee and suggested that a rule change was unnecessary because prosecutors are giving defense counsel the information they need with respect to testifying experts. Professor Coquillette noted that issues regarding expert testimony are well resolved through adversarial testing in civil cases, but that has not historically been the case in criminal trials. He remarked that he was delighted to learn that the Department of Justice was working to rectify the imbalance.

Judge Livingston closed the discussion of the fall symposium and of Rule 702 and *Daubert*. She noted the sense of complexity of the issues raised and the need for further study by the Committee. She stated that proposals for rule amendments regarding overstatement of conclusions, and Rule 702 admissibility requirements, would be considered at a future meeting.

III. Proposed Amendment to Rule 807

The Reporter opened discussion of the proposed amendment to Rule 807 that was released for public comment. The public comment period closed on February 15, 2018. In order to facilitate discussion of revisions raised by the public comment and by the Standing Committee, the Reporter directed the Committee's attention to a supplementary memorandum prepared in advance of the meeting.

The Chair noted that the memo was designed to provide a draft of the amendment to Rule 807 that would make it easier to resolve issues raised during the public comment period. The Chair and the Reporter proceeded to walk the Committee through the following revisions to the proposed amendment as released for public comment:

- The language regarding the hearsay exceptions in Rules 803 and 804 was moved from an admissibility requirement back into the prefatory section of the rule. Both the American Association for Justice and Judge Furman recommended this change, noting concerns that a trial judge might find it necessary to test proffered hearsay against every exception in Rules 803 and 804 before applying Rule 807 – which was never the intent of the proposal.
- In response to concerns that the term “substance” of the statement used in the amended notice provision could prove vague, a “See” cite to Rule 103(a)(2) governing offers of proof (in which the “substance” of the proffered evidence must be presented) was added to the Advisory Committee note.

- A reference to the use of corroborating evidence to determine the “accuracy” of a hearsay statement in the Advisory Committee note was replaced with language requiring the use of corroborating evidence to determine “whether a statement should be admissible under this exception.”
- In addition, language requiring a finding of “sufficient guarantees of trustworthiness” was retained over a requirement that a trial judge find the hearsay “trustworthy” to avoid any reading of the amendment that would make Rule 807 narrower and more difficult to satisfy.
- The language in the Rule text regarding Rules 803 and 804 was changed from “not specifically covered by a hearsay exception in Rule 803 or 804” to “not admissible under a hearsay exception in Rule 803 or 804” to reflect the “near-miss” interpretation given to the existing rule by the majority of courts. The near-miss issue was added to the Committee note as well.
- The word “limit” used in the proposed Committee note was changed to “guide” to better reflect the intent of the sufficient guarantees of trustworthiness requirement in informing the trial court’s exercise of discretion.
- A reference to Rule 104(a) was added to the Note, in response to a suggestion from a member of the Standing Committee.
- A reference to the Confrontation Clause was added to the Note, in response to a suggestion from a member of the Standing Committee.

The Committee discussed the revised draft of the proposed amendment to Rule 807 and the accompanying Committee note. Judge Furman suggested replacing omitted language in the Committee note clarifying that a trial judge need not make a finding that the hearsay is not admissible under any Rule 803 or 804 exception before employing the residual exception. The language was removed from the Committee note when the Rule 803/804 language was eliminated as an admissibility requirement and moved back into the preface. Judge Furman expressed concern that a trial judge might still think that such findings were necessary and advocated retaining the clarifying language. He also proposed deleting language in the note that rule 807 should be “invoked only when necessary” as unduly limiting. Committee members agreed with these suggestions.

Another Committee member argued that if the intent of Rule 807 is not to allow parties to use the residual exception unless they need it, then inadmissibility under Rules 803 and 804 should be required. The Chair responded that making it an admissibility requirement would risk forcing trial judges to make a threshold examination of every Rule 803 and 804 hearsay exception before applying Rule 807 – which was not intended, and which would unnecessarily constrain the use of the rule. Judge Campbell raised the concern that the Committee Note would say that a party could *not* use Rule 807 to admit hearsay admissible through Rules 803 and 804 (suggesting that a party could not proceed directly to Rule 807 to admit hearsay) when nothing in the text of Rule 807

would prevent a party from doing just that. The Reporter noted that case law interpreting existing Rule 807 does prohibit parties from proceeding directly to Rule 807. Judge Campbell proposed altering the Committee note to provide that nothing in the amendment is intended to “alter the case law holding that parties may not proceed directly to the residual exception, without considering the admissibility of the hearsay under Rules 803 and 804.” Committee members agreed with that suggestion. Another Committee member noted that Rule 807 is always the last exception argued by parties and the Reporter highlighted litigants’ natural incentives to start with the Rule 803 and 804 hearsay exceptions because Rule 807 is ordinarily more difficult to satisfy.

The Reporter then explained that revised language in the Committee note had been added to deal with the “near-miss” precedent and the new rule text stating that hearsay not “admissible” through a Rule 803 or 804 exception (as opposed to “not specifically covered by” an exception) could be admissible under Rule 807. He noted that the language was designed to suggest that courts employing a near-miss analysis of hearsay offered through Rule 807 should think about how nearly a proffered hearsay statement misses a standard exception, as well as about the importance of the requirement of a Rule 803 or 804 exception that the hearsay statement fails to satisfy. One Committee member expressed concern that the near-miss language in the Committee note might lead some to believe that near-miss analysis was a substitute for considering sufficient guarantees of trustworthiness. The proposed Committee note was revised to clarify that a near-miss analysis may be part of an inquiry into guarantees of trustworthiness, but is not a replacement for that inquiry. Judge Furman also expressed concern that litigants and judges might not appreciate which requirements of the Rule 803 and 804 hearsay exceptions are the “important ones.” The reference to the importance of the admissibility requirements was removed from the Committee note to accommodate that concern.

The Reporter next explained that a member of the Standing Committee suggested adding a sentence to the Committee note clarifying that testimonial hearsay satisfying the requirements of Rule 807 would nonetheless be excluded under the Sixth Amendment Confrontation Clause in a criminal case. Given that the Constitution prohibits the admission of uncross-examined testimonial hearsay through *any* of the hearsay exceptions, the Chair queried why this reference to the Sixth Amendment was needed in the note to Rule 807 when the notes to the other hearsay exceptions contain no such caveat. The Reporter responded that the categorical exceptions generally avoid the admissibility of testimonial hearsay, because the admissibility requirements require a showing that would be inconsistent with primary motivation for use in a criminal prosecution. For example, a record that satisfies the requirements of the business records exception in Rule 803(6) would, by definition, not be testimonial, because it would have to be made in the course of regularly conducted activity. And a statement admissible as an excited utterance will not be testimonial because it must be made under the influence of a startling event, which is inconsistent with preparing a statement for a criminal prosecution. In contrast, Rule 807 presents the greatest risk of admitting testimonial hearsay due to its “sufficient guarantees of trustworthiness” standard. So there is some justification for adding the language about the right to confrontation in the Committee Note. No further objections were made to its inclusion.

The Committee then discussed changes to the notice provision and the Committee Note regarding notice. The Reporter noted that the “See” cite to Rule 103(a)(2) in the Committee Note was designed to inform the court’s inquiry into whether the “substance” of the statement had been

disclosed. He also noted that language in the note regarding case law under the former requirement that “particulars” be disclosed had been removed as unhelpful. The Reporter also explained that conflicting statements about the rigor or flexibility of the good cause exception to the notice requirement had been removed. The suggestions were a provision that good cause should not be easily found (provided by a Standing Committee member) and a provision that good cause should be easily found as to criminal defendants (provided by the National Association of Criminal Defense Lawyers). The Committee decided to leave the interpretation of good cause to trial judges and the extensive pre-existing case law from courts that had applied a good cause exception even though it was not specifically provided for in the rule.

At the conclusion of the Committee’s discussion, the Chair explained that the Reporter would provide a clean copy of the revised Rule 807 and accompanying Committee note reflecting all changes made during the discussion and that the Committee would vote on sending the proposed amendment to the Standing Committee, with the recommendation that it be released for public comment, on the following day. Thereafter, the Committee adjourned.

The Committee meeting resumed Friday, April 27

Mr. Hur served as the representative of the Department of Justice, as Ms. Shapiro could not be present.

IV. Rule 702 and Rule 104(a) Admissibility Requirements (Revisited)

Judge Livingston explained that the Committee would take Rule 807 back up later in the day after all Committee members had a chance to review the latest version of the proposed amendment prepared by the Reporter. She then asked the Reporter to share an idea for resolving the misapplication of Rule 702 by federal courts who are treating the Rule’s admissibility requirements as matters of weight. The Reporter suggested that the preface to Rule 702 that precedes the admissibility requirements could be modified to address this concern by stating that a qualified expert may testify if “the court finds the following by a preponderance of the evidence.” The Reporter explained that adding this language would emphasize that the Rule 702 requirements are admissibility requirements governed by Rule 104(a). He explained that a Committee Note could accompany such a revision, explaining that it was a needed clarification to address confusion in the courts. While the new language would basically state the existing rule --- that Rule 104(a) applies to the Rule 702 requirements --- it has the benefit of making the principle explicit, thus hard to ignore. And it might be justified in light of the disregard of the admissibility requirements by many courts.

Judge Campbell then opened the discussion with an example from a hypothetical trial in which an expert testifies in a *Daubert* hearing that he rejects 7 of 10 seminal studies in an area and is relying on the 2 or 3 minority studies in the field as the basis for his opinion. Judge Campbell queried, if the judge is not persuaded that the three minority studies are reliable and sufficient, but the jury might be, does the judge exclude? The Reporter responded that the trial judge must make

a finding by a preponderance of the evidence on the admissibility requirements before allowing the expert to testify, and that it would be error to permit the testimony if the judge is not satisfied that the expert's basis is sufficient, as would be the case in Judge Campbell's hypothetical. Another Committee member stated that the question is whether Rule 702 works under a Rule 104(b) analysis, and the Reporter responded that this was indeed the issue that some courts were struggling with, but that the admissibility requirements in Rule 702 are clearly governed by Rule 104(a) --- as also stated in *Daubert* itself. The Reporter then asked whether the Committee members would be interested in reviewing a draft with revised prefatory language requiring a finding of each of the Rule 702 requirements by a preponderance of the evidence. Committee members expressed interest in reviewing such a draft and the Chair suggested that such a proposal might be part of the broader conversation the Committee would continue to have about its role in helping trial judges apply Rule 702.

V. Prior Inconsistent Statements: Possible Amendment to Rule 801(d)(1)(A)

Judge Livingston next opened the discussion of a potential amendment to Rule 801(d)(1)(A) that would allow for substantive admissibility of prior inconsistent statements of witnesses that were recorded audio-visually and available for presentation at trial. She acknowledged that the Committee had been considering the proposal for a long time. She traced the history of Rule 801(d)(1)(A), noting that the original Advisory Committee had favored a wide open approach allowing substantive admissibility of all prior inconsistent statements by testifying witnesses --- an approach that is now employed in a number of states, including California and Wisconsin. She noted that Congress pushed back on this proposal, expressing concern that a criminal defendant might be convicted solely on the basis of out of court statements of a witness who did not implicate the defendant at trial. This concern resulted in the compromise rule embodied in existing Rule 801(d)(1)(A) requiring prior inconsistent statements to be made under oath and in a prior proceeding if they are to be used substantively.

The Chair noted that this Advisory Committee began reviewing prior inconsistent statements due to concern that the limiting instructions provided to jurors when such statements are admitted for impeachment purposes only are difficult to comprehend and follow. In addition, the Committee noted Wigmore's opinion that cross-examination is the greatest engine for the discovery of truth in exploring the possibility of broader admissibility of hearsay statements made by testifying witnesses. Some expansion of the admissibility of prior inconsistent statements was also thought to be consistent with the basic thrust of the Federal Rules of Evidence to make more information admissible and available to the fact-finder. With the caveat that evidence rulemaking should focus on the process of deriving the truth at trial, some value was also seen in the likelihood that a rule allowing substantive admissibility of audio-visually recorded statements would encourage more recording and greater documentation of witness statements. On the other hand, concerns had been expressed about the reliability of prior inconsistent statements and the ways in which the oath and the grand jury process contribute to reliability. Other potential downsides to an amendment could be added litigation costs needed to determine whether statements were recorded "audio-visually" or were made "off camera." And questions had arisen about the impact of the amendment at a time when recording technology was exploding to include dash-cam and body-cam footage, as well as

cellphone and social media recordings. There were also lingering concerns over the impact on summary judgment practice in civil cases. The Chair noted that every straw vote taken on the proposal in the Committee resulted in 2/3 of the Committee in favor of exploring the amendment and 1/3 opposing it.

After this introduction, the Reporter noted that the Department of Justice had proposed allowing substantive admissibility of prior inconsistent statements acknowledged by a witness at trial, in addition to audio-visual witness statements. Committee members inquired about the interaction between the audio-visual and acknowledgement proposals. The Chair explained that the Department's proposal would be more liberal because it would allow substantive admissibility of any prior inconsistent a witness would acknowledge while on the stand – whether recorded or not. Judge Campbell asked whether case law had developed over how a witness “acknowledges” a prior statement. The Reporter noted that there was case law in jurisdictions with an acknowledgement rule and that the acknowledgement provision had sometimes resulted in problematic inquiries at trial, but that this was not an inevitable outcome.

Dr. Lau noted that technologies making it relatively easy to create fake video content were proliferating and that the Committee should consider that falsifying video material might become extremely easy 5-10 years from now. The Reporter responded that if this was a problem, then it was a problem for *all* electronic evidence, not just the narrow band of audiovisual statements that would be admissible under the amendment. The Federal Public Defender noted that defendants and witnesses already deny making statements that appear on video and that experts are employed to determine whether a defendant actually made a statement reflected in a recording.

The Chair asked Dr. Lau to report on the survey performed by the Federal Judicial Center on the proposed admissibility of audio-visual inconsistent witness statements. Dr. Lau noted that federal judges seemed to be split along lines similar to those in the Committee, with little appetite for the adoption of wide-open substantive admissibility of prior inconsistent statements and some support for a compromise approach to expanding admissibility. Judges expressed few concerns about expanded use of prior inconsistent statements in civil cases. In criminal cases, judges reported encountering oral prior inconsistent statements more frequently than they encounter audio-visual statements. Judge Livingston noted the bottom line in the survey that 58% of judges supported or strongly supported the proposal, while 29% opposed or strongly opposed it.

The Reporter thanked the FJC for the survey and the report and noted appreciation for feedback received from the American Association of Justice (“AAJ”), the National Association of Criminal Defense Lawyers (“NACDL”), and the Innocence Project on the proposal as well. He noted that the feedback from AAJ was largely favorable. The AAJ suggested adding a reference to future recording technologies in the Committee note. The Innocence Project suggested a pilot project to further explore the proposal in action due to two primary concerns: 1) the possibility that a recorded statement may be the last in a long series of statements taken from the witness that may not reflect all of what the witness has said and 2) the concern that a defendant could be convicted solely on the basis of a prior inconsistent statement. The Reporter first noted that it would be wonderful to be able to conduct million dollar pilot projects in connection with rulemaking efforts, but that no Committee had ever done such a project prior to rulemaking and that it would be impossible. He also responded to the substantive concerns raised by the Innocence Project. He noted that a Federal

Rule of Evidence could not mandate the recording of all of a witness's statements because that would exceed the Advisory Committee's statutory mandate. He explained that an evidence rule might condition admissibility of one recorded statement on the availability of all other statements in recorded form to the opponent, but questioned whether that would be advisable. With respect to the concern that a defendant could be convicted on the basis of a prior inconsistent statement alone, the Reporter reiterated that Rule 801(d)(1)(A) makes statements admissible for their truth, but does *not* deal with the sufficiency of the evidence to convict. He noted that Congress rejected the same objection to Rule 801(d)(1)(C) dealing with prior statements of identification and that a Committee note could clarify that the amendment does not speak to sufficiency.

Judge Furman noted that the issue of admissibility is intertwined with sufficiency because a prior inconsistent statement that could not be used to get a case to the jury under the existing rule could support submission to the jury under the proposal. He queried whether the Committee has solicited feedback from the defense bar in states where there is wide-open substantive admissibility of prior inconsistent statements. The Reporter responded that the Committee had received such feedback and described research by Professor Dan Blinka into the practice in Wisconsin that solicited input from all constituencies, the defense bar included. That report suggested that there is very little controversy over substantive admissibility of prior inconsistent statements in that jurisdiction. The Reporter also obtained input from noted Evidence expert Professor Ed Imwinkelried, who reported little activity in the California cases concerning the substantive admissibility of prior inconsistent statements in California. The Chair stated that it is not surprising that there is little controversy over the admissibility of prior inconsistent statements in Wisconsin and California because the wide-open rule that makes all such statements substantively admissible is straightforward. She expressed concern, however, that a compromise position that allows only audio-visual or acknowledged prior inconsistent statements could generate significant litigation over the scope of those limitations.

Another Committee member reminded the Committee of the symposium at Pepperdine in 2016 in which California prosecutors talked about the impact of substantive admissibility of prior inconsistent statements in obtaining plea agreements in domestic violence cases, and in proving up gang-related prosecutions, where witnesses often recant. He noted the report that defendants would accept a plea knowing that a prosecution could proceed even without the cooperation of the victim. The Chair noted that one of the concerns of the Innocence Project is that innocent defendants might plead guilty if witness statements taken in the aftermath of an incident, that have since been recanted, can form the basis of a prosecution. The Federal Public Defender also noted situations in which a domestic partner calls police out of anger at a partner and recants later because there was no abuse. He explained that there are times when the initial report is not accurate, even in the domestic violence context, and that the proposal would allow substantive use of these recanted early reports. He also reiterated the concerns of the Innocence Project about a series of interviews that lead up to the final audio-visual statement and the inability of the jury to view the entire back and forth that created the prior inconsistent statement. Finally, he expressed concern that the government might claim that a prior inconsistent statement was substantively admissible under the proposed rule even if the *defense* sought to offer the statement only for impeachment purposes. The Reporter noted that an Advisory Committee note had been included to prevent that possibility. The Federal Public Defender further expressed concern about unreliable body-cam or cell phone recordings, noting that defense lawyers could record witnesses exonerating defendants

and substantively admit those statements if the witness shows up and testifies favorably for the prosecution. He suggested that the proposal could create abuses and litigation on both sides of criminal cases.

Another Committee member noted that any prior inconsistent statement may already be used to impeach a testifying witness and that juries don't understand the limiting instruction accompanying such statements. This Committee member suggested that the proposal would be an improvement because it would impose more rigor with respect to the prior inconsistent statements admitted substantively than is currently required of prior inconsistent statements already allowed to impeach. Judge Lioi remarked that it does matter a great deal in criminal cases if the prior inconsistencies are allowed fuller use because substantive admissibility may be enough to defeat a defendant's otherwise valid Rule 29 motion for acquittal. The Chair also noted potential impact on summary judgment practice in civil cases if plaintiffs produce audio-visual statements that are inconsistent with a witness's deposition testimony. Judge Campbell noted that such a recorded statement may allow a civil case to go to trial under the proposal where summary judgment could be granted under the existing rule. The Reporter noted that if the recorded statement were a sham designed to defeat summary judgment, existing case law would permit a judge to disregard the statement even after an amendment. He further queried whether an audio-visually recorded statement by a witness expected to testify at trial that supported the plaintiff's case shouldn't mean that the case *should* proceed to trial.

Another Committee member questioned the absence of an oath requirement for statements that would be admissible under the proposal, indicating that the statements would lack the gravity of the statements admissible under existing Rule 801(d)(1)(A). The Reporter noted that the trial cross-examination before the jury required by the Rule was designed to reveal any weaknesses in the statement. Another Committee member remarked that the effect on Rule 29 practice in criminal cases should drive the result on the proposal, especially in light of evidence suggesting that jurors do not follow instructions with respect to prior inconsistent statements offered only for impeachment once they get a case. This Committee member suggested that audio-visually recorded statements of a testifying witness who is subject to cross-examination at trial -- that the jury can view for itself -- might be worthy of substantive effect and justifiably affect Rule 29 practice. The Committee member expressed some uncertainty regarding the Department of Justice proposal to include acknowledged witness statements in an amendment. The Reporter suggested that the Department's acknowledgement proposal should be included in the rule, if it were released for public comment, in brackets to signal that the Committee had not endorsed the acknowledgement option, but was seeking input from the public concerning it. He noted that this was done with the selective waiver provision of Rule 502 that did not ultimately find its way into the rule as enacted.

Another Committee member asked whether there is data suggesting that jurors do not understand limiting instructions regarding prior inconsistent statements offered for impeachment only. The Reporter noted that there was such data, involving mock juries, as well as judicial experience. The Committee member suggested that jurors do understand when instructed clearly. Another Committee member expressed concern about the voluminous dockets of the federal trial courts and the possibility that the proposed rule could increase the volume of cases requiring evidentiary hearings or trial. The Committee member noted the high volume of prisoner cases that

could be impacted by an amended rule. The Reporter suggested that recordings submitted by plaintiffs in prisoner litigation would reflect anticipated testimony at a new trial that might necessitate evidentiary hearings, even without Rule 801(d)(1)(A).

The Chair again expressed skepticism about the proposal, noting concerns about Rule 29 practice in criminal cases and summary judgment practice in civil cases, concerns about plea bargaining impact and increased litigation costs surrounding the Rule. Although she doubted whether a change was worth the candle, she noted that social science has shown that jurors do not understand limiting instructions and noted the results of the Federal Judicial Center survey revealing that the majority of trial judges favored the change. The Chair noted that the Committee could send it out for public comment or table the idea for two years. Another Committee member queried what the standard for releasing a proposal for public comment should be. Judge Campbell noted that there are many potential standards, but that the consensus on the Standing Committee was that the public comment process should not be used as a research tool. On the other hand, if the Advisory Committee thinks the Rule is probably a good idea depending upon what public comment reveals, that is a sound basis for forwarding a proposal. The Reporter noted that the Rule 801(d)(1)(A) proposal certainly had not been rushed to public comment given several years of research, an FJC survey, two symposia, and Committee consideration at six consecutive meetings. Professor Coquillette noted that the risk of sending something forward to the Standing Committee improvidently was a loss of credibility for the Advisory Committee. The Reporter observed that negative public comment has been a catalyst for effective rule changes; in 2006 a proposal to amend Rule 408 to allow civil settlements to be admissible in criminal cases was released at the urging of the Department of Justice. The Reporter noted that very negative commentary fostered a compromise rule, which is now in effect. The Chair opined that tabling the proposal would provide the Committee more time to see how body and dash cameras, as well as cell phone recordings affect trials in the future.

The Reporter explained that the question for the Committee was whether to send the proposal forward to the Standing Committee to be released for public comment or to remove it from the Committee's agenda. A Committee member made a motion to refer the proposed amendment to the Standing Committee with the acknowledgement provision included in brackets for release for public comment. The Committee voted 5-4 *in favor* of sending the proposed amendment to the Standing Committee. The Committee then proceeded through the proposed Committee note to determine which portions of that note would advance with the proposed rule, and reached agreement on a Committee Note.

However, following lengthy discussion by the Committee of potential amendments to Rules 807, 606, and 404(b) [detailed below], and after the lunch break, Rob Hur of the Department of Justice was recognized by the Chair. Mr. Hur stated that he was moved by the many good points made in opposition to the proposal to amend Rule 801(d)(1)(A), particularly those made by the Federal Public Defender. Having consulted with Betsy Shapiro and Andrew Goldsmith, Mr. Hur changed the Department of Justice vote on the proposed amendment from one in favor to one against, making the vote tally 5-4 *against* the proposed amendment, thus defeating it. Therefore, Rule 801(d)(1)(A) was not referred to the Standing Committee for release for public comment.

VI. Rule 807 Approved

After the Committee reviewed all revisions to the proposed amendment to Rule 807, it was unanimously approved for transmission to the Standing Committee, with the recommendation that it be sent to the Judicial Conference for approval.

The text and Note of the Rule, a GAP report, and a summary of public comment, are attached to these Minutes.

VII. Rule 606(b) and *Pena-Rodriguez*

The Chair next raised the Rule 606(b) ban on juror testimony about deliberations, and the impact of the Supreme Court's 2017 decision in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that Rule 606(b) could not be applied to bar testimony of racist statements about the defendant made in juror deliberations --- such a bar violated the defendant's Sixth Amendment right to a fair trial. The Chair noted that the Committee had discussed three potential amendments to Rule 606(b) to bring the rule text in line with *Pena-Rodriguez* at its spring 2017 meeting, and had tabled the issue after discussion. Rule 606(b) was back on the Committee's agenda again to consider the need for an amendment to reflect the holding. The Chair explained that if the Committee decided not to take action on Rule 606(b) at this meeting, the topic would be tabled for at least a year to observe the case law developing in the wake of *Pena-Rodriguez*.

The Reporter directed the Committee's attention to a digest of federal cases interpreting *Pena-Rodriguez*, and observed that courts have declined to expand the exception to the no-impeachment rule beyond that holding --- which was limited to statements of racial bias toward the defendant in jury deliberations. He then briefly outlined the potential amendments previously considered by the Committee, including an amendment that would expand an exception beyond that required by *Pena-Rodriguez*, one that would seek to codify the racial animus exception from *Pena-Rodriguez* narrowly in rule text, and a generic amendment that would create an exception to the no-impeachment rule for evidence required by the Constitution. The Committee previously rejected both the expansive and narrowly-tailored potential amendments as problematic, and at the meeting it focused on the more generic constitutional exception in the rule that would flag the *Pena-Rodriguez* issue for litigators consulting only rule text.

Two possibilities have been considered. First, an amendment that makes an exception to the no-impeachment rule "when excluding the testimony would violate a party's constitutional rights." This generic constitutional exception would be modeled upon the one that currently exists in Rule 412(b)(1)(c). Due to concern in the Committee at the spring 2017 meeting that a generic constitutional exception in Rule 606(b) could be read to expand upon *Pena-Rodriguez* and to permit post-verdict juror testimony in any case where a defendant claims violation of a "constitutional right" by the jury, a Committee member suggested using the restrictive language of the AEDPA in a Rule 606(b) amendment to avoid such an expansive reading. Such an amendment would allow juror testimony about deliberations when "excluding the testimony would

violate clearly established constitutional law as determined by the Supreme Court of the United States.” This proposal was suggested as a way to send up a red flag or at least a yellow light for courts considering using Rule 606(b) to expand beyond the holding in *Pena-Rodriguez*. The Reporter explained that the use of the AEDPA language would be problematic due to its substantive restriction on lower courts and suggested that a generic constitutional exception like the one in Rule 412 was a better solution for the Committee to consider. The Chair and the Committee agreed that the AEDPA alternative would not work, and proceeded to reconsider the generic constitutional exception.

The Reporter also brought to the attention of the Committee a law review note to be published in the *Columbia Law Review* on *Pena-Rodriguez* that chronicled the Advisory Committee’s inaction on Rule 606(b). The note advocated expansion of the *Pena-Rodriguez* exception to the no-impeachment rule beyond racist statements and favored a general constitutional exception in Rule 606(b) that would accommodate such future expansions. The Chair reiterated that the goal of the Committee was to raise the *Pena-Rodriguez* issue for the trial lawyer consulting only the text of evidence rules, without suggesting expansion.

Judge Campbell expressed concern that even a generic constitutional exception would invite lawyers to seek expansion of the *Pena-Rodriguez* holding. He posited a case in which a defendant claims that the jury violated his constitutional rights and points to a constitutional exception to Rule 606(b) to show that the court must hear juror testimony. Judge Campbell suggested that the lack of an exception in Rule 606(b) currently helps courts hold the line on *Pena-Rodriguez* because courts can point to the prohibition in the Rule as support for the idea that no other exceptions exist. If the Committee removes that constraint, he suggested that courts might feel compelled to expand to create exceptions to Rule 606(b) for other constitutional violations. The Reporter noted that the Committee note accompanying an amendment would explain that no expansion was intended. The Reporter also reiterated that courts are finding that *Pena-Rodriguez* did not create constitutional rights outside the narrow circumstance it recognized, meaning there is no other constitutional right to introduce post-verdict juror testimony.

Judge Furman noted that there is a recognized constitutional right not to have the jury draw an adverse inference from a defendant’s silence. If a defendant claims that right was violated in the jury room, Judge Furman queried why an amended Rule 606(b) wouldn’t also allow juror testimony on that point. The Reporter responded that courts had already rejected such arguments after *Pena-Rodriguez* and that nothing in any Evidence Rule could determine substantive constitutionality.

A Committee member suggested that Judges Campbell and Furman made compelling points and that it would be difficult for a court to refuse to take juror testimony about other constitutional violations with an amended Rule 606(b) containing a generic constitutional exception. The Committee member stated that the proposal to amend Rule 606(b) was rightly tabled by the Committee in the spring of 2017 to avoid potential expansion by rule.

The Reporter emphasized that it is not optimal to have an evidence rule that could be applied unconstitutionally, and queried whether the language of an amendment might be tweaked to provide some signal in rule text without suggesting any expansion of *Pena-Rodriguez*. Another

Committee member suggested that the only way to truly prevent expansion would be to reference *Pena-Rodriguez* in rule text. The Reporter suggested that it would not be appropriate rulemaking to have an amendment that specifically referenced a case, and moreover that to do so would be to risk the possibility that another amendment would be required should the Supreme Court expand upon the *Pena-Rodriguez* exception.

Other Committee members, after this discussion, agreed that a potential constitutional exception was problematic and that tabling the issue was appropriate. The Chair wrapped up the discussion by noting that the issue would be tabled for one to two years to allow more time for case law to develop before the Committee reconsidered action on Rule 606(b).

VIII. Possible Amendment to Rule 404(b)

The Chair next turned the Committee's attention to potential amendments to Rule 404(b) that had been considered in light of recent Seventh and Third Circuit cases limiting admissibility of evidence of uncharged misconduct in criminal cases. The Chair explained that four different proposals remained on the Committee's agenda: 1) a proposal to restrict use of the "inextricably intertwined" doctrine that takes prior act evidence outside the protections of Rule 404(b); 2) a substantive amendment requiring judges to exclude bad act evidence offered for a proper purpose, where the probative value as to that purpose proceeds through a propensity inference; 3) a proposal to add the balancing test from Rule 609(a)(1)(B) to Rule 404(b) to require that the probative value of prior act evidence offered against a criminal defendant outweigh unfair prejudice; and 4) a proposal to expand the prosecution's notice obligation in criminal cases. The Chair explained that she met with the Reporter prior to the meeting in an effort to streamline the Committee's consideration by subjecting each proposal to an independent determination and vote by the Committee.

The Chair first addressed the "inextricably intertwined" proposals. She stated that the inextricably intertwined doctrine in the courts is problematic, partly due to the variable terminology adopted by courts employing it (including acts that "pertain" to the charged crime, those that are "integral" to the charged crime, those which "complete" the story of the charged crime, or are "intrinsic" to the charged crime). The proposal before the Committee to limit the inextricably intertwined doctrine was an amendment requiring all acts "indirectly" proving the charged crime to proceed through Rule 404(b). The Chair concluded that such an amendment would not be workable or helpful in applying Rule 404(b), particularly because it might sweep any and all conduct apart from the act specifically charged into a Rule 404(b) analysis. The Chair gave an example of a defendant fleeing the scene of the charged crime as indirect evidence that would have to proceed through Rule 404(b) if such an amendment were adopted. One Committee member noted that the inextricably intertwined doctrine is important in determining which acts of a defendant are "other" acts for purposes of Rule 404(b) and opined that the restyling project was wrong to move the word "other" (to read "crimes, wrongs or other acts" instead of "other crimes, wrongs or acts"). That Committee member suggested that if any other amendments to Rule 404(b) are proposed, the word "other" should be relocated to its former position. The Reporter agreed that a change might be made if other amendments were proposed, but noted that such a change would not affect the case law on

inextricably intertwined acts, because courts would still need to decide which acts were “other” regardless of the placement of the term. The Reporter also noted that the style change did not result in any change in the courts in the application of the inextricably intertwined doctrine.

The Committee determined that it would no longer proceed with any attempt to rectify the “inextricably intertwined” doctrine through an amendment to Rule 404(b).

The Chair then recommended that the Committee remove from the agenda the proposal to bar admission of uncharged misconduct unless the court found the evidence probative of a proper purpose by a chain of reasoning that did not rely on any propensity inferences. She noted that the proposal came from the Seventh Circuit’s opinion in *United States v. Gomez*. She expressed skepticism that a required “chain of non-propensity inferences” could be a workable requirement. She suggested that requiring a trial judge to find a chain of non-propensity inferences sounded more like taking an evidence exam than managing a trial. She further suggested that the original Advisory Committee had rejected “mechanical solutions” in drafting Rule 404(b) and had rejected the notion that there was a truly binary distinction between a “propensity use” and use for a proper purpose -- to show “intent” for example. The line between intent and propensity is often difficult if not impossible to draw. The Chair concluded that *Gomez* made the exercise in eliminating propensity inferences sound easy and straightforward when it often is not.

One Committee member suggested that Rule 404(b) is the most critical rule of evidence in a criminal case and that the real reason that other acts are offered is in fact to suggest the defendant’s propensity to commit crimes. In this Committee member’s opinion, this evidence improperly tips the scales significantly against the defendant, and so the prosecution ought to bear a heavier burden in establishing admissibility. The member concluded that incorporating the *Gomez* test would not be too burdensome on judges, and that the amendment should be adopted. The Federal Public Defender agreed, stating that Rule 404(b) evidence is by far the most prejudicial evidence offered in criminal trials. He noted that proof of Rule 404(b) acts often consumes far more time at trial than proof of the charged offense. He further contended that the instruction given to jurors regarding the use of Rule 404(b) evidence is incomprehensible and offers defendants no protection.

Rob Hur noted that the Department shared the Chair’s concerns that requiring articulation of the chain of reasoning would be unworkable. He opined that a review of pre-trial transcripts reveals that trial courts are already putting the burden on prosecutors to demonstrate the admissibility of this evidence and that Rule 404(b) issues are thoroughly flushed out at the trial level. Mr. Hur further stated that the recent shift in Circuit precedent was having an effect on prosecutorial behavior vis a vis Rule 404(b). Prosecutors know they need to follow the Rule and defend the admissibility of the evidence on appeal. Therefore, he argued that the courts are resolving these issues appropriately and no amendment is necessary. The DOJ did concede that an amendment to the notice provision of Rule 404(b), to codify what the Department is already doing to ensure that defendants receive timely and proper notice, might be viable.

In response to the suggestion that further development in the courts would resolve any problems with Rule 404(b), the Reporter pointed to a recent opinion in the Tenth Circuit, *United States v. Banks*. In that case, the court acknowledged recent efforts to analyze other acts carefully in other circuits, but rejected this trend and held summarily that drug crimes are admissible in the

Tenth Circuit to show knowledge. The Reporter suggested that cases like *Gomez* might arguably go too far in preventing use of other act evidence through Rule 404(b), but that other circuits may continue to do too little to prevent misuse. He suggested that an amendment that falls somewhere in between these divergent approaches may be optimal. Mr. Hur cautioned that Congress may get involved if the Committee chose to pursue an amendment limiting admissibility of Rule 404(b) evidence.

The Chair highlighted another recent Tenth Circuit opinion, *United States v. Henthorn*, in which the government was permitted to offer evidence to show that the defendant's first wife died alone in his presence in very suspicious circumstances, to rebut the defendant's argument that his second wife's death while alone with him in suspicious circumstances was an unfortunate accident. She noted that the relevance of the prior accident turned to some degree on the doctrine of chances --- it is highly unlikely that one husband would lose two wives in such similar and tragic circumstances by accident. But she also explained that some suggestion of the defendant's propensity to kill his wives might be found in the evidence. She noted that Wigmore opined that there should be room for a difference of opinion. The Chair explained that the propensity ban in *Gomez* failed to account for that difference of opinion and could confuse trial judges.

A motion to remove the non-propensity inference requirement from discussion passed by a vote of 6-3.

The next amendment alternative discussed was a proposal to add a new balancing test to Rule 404(b) requiring the probative value of other acts evidence offered against a criminal defendant to outweigh unfair prejudice. The Reporter explained that this alternative would offer a more flexible solution that avoids the mechanical tests rejected by the Advisory Committee Note to the current rule, and would avoid any rigid requirement of a chain of non-propensity inferences. He noted that the proposed balancing test would not be a true "reverse" balancing because it would not require probative value to "substantially" outweigh prejudice. Instead, it would be the same balancing test found currently in Rule 609(a)(1)(B), that protects criminal defendants from similar character prejudice. He suggested that it made good sense to have similar balancing tests governing Rule 404(b) and Rule 609(a)(1)(B) evidence offered against criminal defendants because the two rules deal with similar character concerns. He further explained that Congress crafted the protective test in Rule 609(a)(1)(B) that could be usefully applied to Rule 404(b) evidence as well. The Reporter explained that making the balancing test slightly more protective would eliminate the characterization of Rule 404(b) as a rule of inclusion --- a characterization that has resulted in almost per se admission of prior offenses in many federal drug prosecutions. Still, the balancing test would continue to permit probative other acts to be admitted. The Reporter noted that there is support for such a balancing test in pre-Rules cases and that the Uniform Rules of Evidence and some states employ the more protective standard.

Rob Hur from the Department of Justice noted that the applicable balancing represents a policy choice about Rule 404(b) evidence and that Congressional adoption of Rule 404(b), limited only by the standard Rule 403 balancing test, is reason enough to reject a balancing amendment. Another Committee member expressed concern that a balancing amendment would not help courts deal with the issue of what counts as prejudice and whether propensity uses are permissible. That Committee member suggested that no change be made unless it is one to fix the concern about

other acts offered for propensity purposes. The Reporter responded that a balancing test requiring the prosecution to demonstrate that probative value outweighs bad character prejudice would do a better job of protecting defendants from improper uses of Rule 404(b) evidence. Another Committee member questioned whether having the same test for Rules 404(b) and 609(a)(1)(B) was appropriate, given that the past convictions are offered for impeachment only under Rule 609, but can be offered on the merits under Rule 404(b). The Reporter responded that the prejudice in both instances is the same, and that the different goals in admitting the evidence is factored in as part of the consideration of probative value --- so that there is no reason not to apply the same test for both situations.

The Chair asked for a straw vote on whether to continue discussing a balancing amendment or whether to remove it from the agenda. The Committee voted 5-4 to continue discussing the balancing alternative.

One Committee member queried why the test to protect criminal defendants from character prejudice in Rule 609(a)(1)(B) should differ from the balancing test in Rule 404(b), apart from historical practice. The Chair noted that Rule 404(b) helps the prosecution sustain its burden of proof, while Rule 609 pertains to impeachment only. The Reporter then noted that decisions about balancing and protections are indeed policy decisions commonly underlying rules of evidence like Rule 412. The policy underlying the balancing amendment of Rule 404(b) would be living up to our commitment to try cases and not people. Judge Lioi commented that the Rule 403 factors serve that purpose well and put the government through its paces, to which the Reporter responded that the proposed balancing test would utilize the identical factors but would simply replace the Rule 403 balance favoring inclusion with one requiring probative value to outweigh prejudice. Another Committee member noted that an amended balancing test would ensure that Rule 404(b) is a rule of exclusion and not inclusion. The Reporter noted that it would be a rule of “mild exclusion” where it would simply require probative value to overcome prejudice to even a slight degree to be admitted.

The Chair then stated that Rule 404(b) is not a rule of exclusion. Instead, it prohibits one inference that a defendant is a bad person due to past misdeeds. She opined that other act evidence relevant to anything other than that bad character inference is admissible subject to Rule 403. She further argued that young prosecutors are so nervous about overstepping with Rule 404(b) evidence that they often limit comments on such evidence in closing argument to brief statements that the evidence is admissible to prove “intent” for example. The Chair concluded that the balancing test should not be made more protective because it might limit the admissibility of evidence prosecutors need to prove a case.

The Reporter noted that the courts permissively admitting other act evidence under the Rule 403 standard are not necessarily ruling incorrectly because that standard favors admissibility so heavily. The question raised by a balancing alternative is whether Rule 404(b) should allow evidence of other acts to come in as freely as it does. Although the drafters of Rule 404(b) limited it only with Rule 403, the Reporter emphasized that there is much less legislative history regarding Congressional intent for Rule 404(b) than there is regarding the proposed balancing test found in Rule 609. Therefore there should not be substantial concern about overriding congressional intent.

At the conclusion of these remarks, another straw vote was taken on whether to proceed with consideration of a balancing amendment. The Committee vote was 7-2 against continuing consideration of a balancing amendment.

The Committee then discussed the final potential amendment to Rule 404(b) – changes to the notice provision in criminal cases. The Reporter explained that a proposal to eliminate the requirement that the defense request notice in criminal cases had already been unanimously approved by the Committee. The Reporter also called the Committee’s attention to a proposed amendment to the notice provision circulated to the Committee by the DOJ prior to the meeting. This provision would require a prosecutor to “provide reasonable notice of the general nature of any such evidence.” It would also require a prosecutor to “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning supporting the purpose.” Finally, it would require the prosecution to provide notice “in writing” before trial or during trial “if the court, for good cause, excuses lack of pretrial notice.”

Committee members raised concerns about requiring the prosecution to provide notice of only the “general nature” of Rule 404(b) evidence. Some discussion was had about requiring the government to disclose “the substance” of the evidence to make the Rule 404(b) notice provision consistent with the notice provision in the proposed amendment to Rule 807. Concern was also raised about the lack of any timing requirement for the notice. Some suggested that requiring notice 14 days in advance of trial could be superior, although Mr. Hur thought a timing requirement could prove rigid and unworkable. The Reporter suggested that the language used in the proposed amendment to Rule 807 requiring disclosure sufficiently before trial to allow the opponent to meet the evidence could be a useful solution to the timing issue, and would promote uniformity in the Rules. Other Committee members agreed that trial judges set deadlines in pre-trial orders and that including a 14-day limit in rule text was unnecessary.

The Federal Public Defender commented that prosecutors commonly provide the minimum notice possible and resist all efforts by the defense to obtain more information. He noted that there is a great deal of needless litigation over who the Rule 404(b) witness will be and what act will be proved and that prosecutors rely on the terms “general nature” in Rule 404(b) to defend minimal notice. The Reporter queried whether use of the term “substance” would represent an improvement over “general nature.” The Department of Justice suggested that the articulation requirement in the proposed notice provision would resolve the existing concerns over the quality of the notice. The Federal Public Defender did not think the articulation of reasoning requirements would necessarily help in identifying the specific act to be proved and thought that a “particulars” or “specific details” requirement would be superior. Judge Furman suggested putting the term “substance” together with the “fair opportunity to meet the evidence” qualification to address the problem. Judge Campbell suggested deleting the required description of the act in the notice and simply stating that the prosecutor must provide “reasonable notice of any such evidence” --- which all agreed was workable. Committee members agreed that requiring notice in writing sufficiently in advance of trial “to give the defendant a fair opportunity to meet the evidence” would be a good solution to the timing issue as well. The DOJ noted that the good cause exception to the notice requirement should apply to all of the prosecutor’s obligations (including articulation). The Reporter explained that the good cause exception was made applicable to all notice obligations due to its placement at

the conclusion of all notice requirements, and that the Committee Note could emphasize that the good cause exception would go to articulation as well as timing.

The Committee voted unanimously to approve the amendment to the notice provision of Rule 404(b).

The Reporter then took the Committee through the text of Rule 404(b) and a proposed Committee Note that was set forth in the agenda book. During that discussion, one Committee member proposed moving the word “other” in the heading of Rule 404(b) and in the text of Rule 404(b)(1) to return the word to its correct pre-restyling position; “Other crimes, wrongs, or acts.” The Committee unanimously agreed with this proposal. The Reporter also recommended changing “Permitted Uses” in the heading of Rule 404(b)(2) to “Other Uses.” He explained that headings were added to the Rule as part of the restyling and that “Other Uses” more accurately reflects the operation of Rule 404(b)(2). The Committee tentatively agreed with this proposal.

The Committee generally approved the proposed Committee Note, subject to further wordsmithing after the meeting. After discussion by email, the following changes were made to the proposal:

- “Permitted uses” in the heading of Rule 404(b)(2) would be retained.
- Two changes proposed by the Style Subcommittee to the Standing Committee would be implemented.
 - The good cause provision would be amended to provide, consistently with Rule 807, that if the court finds good cause to allow notice during the trial, that notice can be given in any form.
 - Minor changes to the Committee Note were made to clarify that the good cause exception as to articulation would apply to additional proper purposes that became evident after notice was provided.

The Committee, by email, unanimously approved the text and the Committee Note of the proposed amendment to Rule 404(b). The proposed amendment will be submitted to the Standing Committee with the recommendation that it be released for public comment.

The Committee resolved that it would revisit certain questions during public comment, such as whether notice provided after trial has begun (upon a showing of good cause) must be made in writing, and whether the Committee Note should be changed with respect to good cause and the articulation requirements.

The text and Committee Note of the proposed amendment to Rule 404(b) is attached to these Minutes.

IX. Possible Amendment to Rule 106

The next item on the agenda for the Committee’s consideration was a potential amendment to the Rule 106 rule of completion. The amendment would rectify a conflict in the courts over the admissibility of otherwise inadmissible hearsay to complete misleading statements, and would

include oral statements within the coverage of Rule 106. The Reporter reminded the Committee that Judge Paul Grimm had raised these problems about Rule 106 for the Committee's consideration, and directed the Committee's attention to Judge Grimm's thoughtful opinion on the issues in the agenda materials.

The Reporter explained that the hearsay issue relates to a very narrow circumstance in which the government offers a portion of a defendant's statement that is misleading (as a statement of a party opponent under Rule 801(d)(2)(A)) and the remainder of the statement is necessary for completion --- but is hearsay. Some courts find that the hearsay rule bars the defendant's attempt to admit the remainder of his own hearsay statement through Rule 106 to correct the distortion, because a defendant may not admit his own hearsay statement under Rule 801(d)(2). In those cases, the unfairness created by the government's misleading presentation of a partial statement goes uncorrected. The question for the Committee is whether this result is appropriate under the traditional "door-opening" approach of the evidence rules that seeks to ensure that adversaries are not prejudiced by a misleading presentation of evidence.

The Reporter explained that Rule 502(a), regarding subject matter waiver of privilege, borrowed the language of Rule 106 exactly and embodies the same principle: that a misleading use of privileged information by one side allows the opponent full access to privileged materials on the same subject to correct any distortion. He argued that it was difficult to understand why the government should be permitted to lodge a hearsay objection to prevent needed completion of a misleading statement, when similar behavior by a litigant is sufficient to waive privilege. An amendment would be necessary to address the cases in which courts prevent defendants from correcting a misleading partial statement due to the rule against hearsay.

One option previously discussed by the Committee would be to amend Rule 106 to allow the completing statement to be admitted solely for its not-for-truth purpose in showing the full "context" of the partial statement already admitted. The Reporter suggested, however, that the "context" option would be problematic in that the parties would not be left on equal footing: the government could argue the truth of the misleading portion of the statement, while the defendant could not argue the truth of the completing portion. The only way to a fair result would be to allow the completing statements to be admissible for their truth. Otherwise the proponent is given an advantage from a misleading presentation.

The Reporter also noted that, prior to a style amendment designed to make Rule 106 gender neutral, the language of Rule 106 required the *proponent* of the original partial and misleading statement to admit the completing portion of the statement at the same time the misleading portion was admitted. If the government were required to admit the completing statement itself, the hearsay objection would be eliminated because the government would be offering the defendant's entire statement through Rule 801(d)(2)(A), as a statement by a party-opponent. That prior version of the Rule suggests that Congress did not intend to have the hearsay rule prevent completion of a misleading partial statement. Moreover, the legislative history indicates that Congress rejected a DOJ request to provide in Rule 106 that the completing statement had to be independently admissible.

Judge Furman suggested that a return to the language requiring the original proponent to do the completing would be a good alternative to an amendment that would allow the opponent's completion over a hearsay objection. This would avoid establishing a hearsay exception outside the context of Article 8 of the Federal Rules. The Reporter expressed concern that a return to the old provision might be too subtle to correct the unfair result in some of the recent cases. A Committee member stated that requiring the proponent to do its own completing would not be too subtle and would represent a more surgical solution to the problem than a broader hearsay exception would.

Another Committee member noted a footnote in Judge Grimm's opinion on Rule 106 stating that the Advisory Committee had voted unanimously against an amendment to address these issues in 2002-2003, finding that the costs of an amendment exceed its benefits due to judicial handling of the issues. The Reporter explained that amendments to Rule 106 had come up in 2002 and again in 2006, but were rejected due to other more pressing rulemaking priorities at the time. He noted that recent cases allowing misleading partial statements to go uncorrected present a more significant conflict and concern in the case law. The Chair queried whether the conflict is confined to the Sixth and Ninth Circuit, and whether everyone else is basically getting it right. The Reporter noted prior amendments designed to correct even lesser conflicts and concluded that an amendment would be the only way to correct the unfairness in the Circuits that allow a misleading partial statement to go uncorrected, given the many years in which this conflict has gone uncorrected.

The Chair agreed that the function of the Advisory Committee is to resolve conflicts, but advocated proceeding slowly. She expressed reluctance to propose a hearsay exception for completing statements and more interest in a housekeeping amendment that would require the party offering a misleading portion to also offer the completing remainder --- without creating a broader hearsay exception. The Chair noted that the Department of Justice had proposed limiting completion to circumstances in which the original portion is "misleading." The Reporter noted that Judge Grimm thought that limiting the rule to "misleading" statements would be workable.

Judge Furman reiterated his proposal to return to the language of Rule 106 requiring the original proponent to complete the proffered statement, to be accompanied by Advisory Committee notes explaining that hearsay is not a bar to completion and that the Committee was returning to the original language to resolve the split in the cases. Judge Campbell expressed the concern that opponents would use such a requirement as a tactical advantage to interrupt the proponent of a statement repeatedly to demand completion. Judge Furman noted that the Rule 106 existing requirement that completion is required only in narrow circumstances would limit such interruptions. The Reporter stated that limiting Rule 106 to "misleading" statements expressly might further clarify that the Rule is limited in scope.

The Chair asked the Committee whether it was interested in considering an amendment requiring the proponent to do its own completion, with a "misleading" limitation added to the rule text. The Committee voted to consider such a proposal for the next meeting with a Committee note explaining that there "can be no hearsay objection because the proponent is required to introduce the completing portion."

The discussion then moved to whether oral statements should be covered by Rule 106. The Chair noted that Rule 106 currently applies only to written or recorded statements and that Judge Grimm advocates extending Rule 106 to cover oral statements needed to complete misleading statements. She noted that many courts allow completion of oral statements through their inherent Rule 611(a) authority, but that the question was whether to bring oral statements under the umbrella of Rule 106. The Reporter noted that one concern that had been raised about completing oral statements was the difficulty in proving the content of an oral statement. He noted that Judge Grimm thought that extensive and distracting inquiries into the content of an oral statement could be prevented by the trial judge through Rule 403 --- and that courts have done so. The Reporter further questioned why the difficulty in proving the content of completing oral statements should foreclose their use, when the difficulty in proving the content of the oral statement originally offered by the proponent poses no obstacle to its proof.

Committee members discussed practical problems in the completion of oral statements testified to by a witness and how they might be handled at trial. Judge Lioi noted that the most common statements sought to be corrected at trial appear in depositions or in transcripts of wiretap recordings. In those cases, she explained, the trial judge knows exactly what was said, can see whether a proffered portion is misleading, and decide how much of the remainder is necessary to complete. Extending Rule 106 to oral statements might open up a can of worms because it would allow completion without providing the judge access to this crucial information needed to rule on this issue. The Reporter stated that an Advisory Committee Note would be useful in giving the court guidance that trial judges should decline to consider completion of oral statements if problems of proof become too complicated and time-consuming. Andrew Goldsmith from the DOJ noted that Criminal Rule 16 ensures pre-trial notice of any oral statements of the defendant that will be offered at trial, meaning that disputes about completion should not arise on the fly in the heat of trial. The Reporter remarked that such pre-trial disclosures should make completion issues surrounding a defendant's oral statements easier to resolve.

The Committee voted to continue consideration of an amendment to Rule 106 that would add oral statements to the rule at its next meeting. The Reporter agreed to write up amendment alternatives for the fall meeting including a hearsay exception proposal, a requirement that the proponent complete to avoid the hearsay issue, the addition of the limiting term "misleading," and the addition of oral statements to Rule 106.

X. Proposed Amendments to Rule 609(a)(1)

The Chair explained that there were multiple proposals on the table concerning Rule 609(a)(1) and the use of a criminal defendant's non-dishonesty felony convictions to impeach his trial testimony. She noted that there are only a small number of states with greater protections for criminal defendants, and that the vast majority of states are following the federal approach. The Reporter noted that the first alternative to an amendment was to prohibit non-dishonesty felony impeachment of criminal defendants --- or even more broadly to abrogate Rule 609(a)(1) entirely. The Committee at the previous meeting, however, expressed reluctance about such bans, as in tension with the hard-fought compromise in Congress that resulted in Rule 609(a).

The Chair asked whether Committee members wished to discuss an abrogation alternative. No interest was expressed in pursuing abrogation and no further discussion about an amendment abrogating Rule 609(a)(1)(B) impeachment was had.

The Reporter noted another potential amendment, suggested by Professor Ric Simmons, to limit Rule 609(a)(1) impeachment to theft convictions. Michigan follows this approach. The Reporter explained that such an amendment would allow impeachment with the non-dishonesty felony convictions most probative of untruthfulness -- like theft and receipt of stolen property -- while eliminating impeachment with less probative felonies like assault and sex crimes. The Reporter recognized that there could be some difficulty in defining the crimes to be included in a theft-related amendment (such as receipt of stolen property) but a Committee Note might be useful in defining such crimes. A Committee member opined that crimes such as drug distribution should not be absolutely barred, because they are often indicative of a life of underhandedness that could be probative for impeachment. The Chair noted that defense counsel in criminal cases frequently impeach prosecution witnesses with felony convictions that are not theft-related, and suggested that it would not do any favors for defendants to abrogate impeachment for these witnesses. The Committee thereafter rejected a potential amendment to Rule 609(a)(1) that would limit felony impeachment to theft-related offenses.

The Reporter then raised the possibility of an amendment to the balancing test in Rule 609(a)(1)(B) suggested by Professor Jeff Bellin. A small adjustment to the balancing test could restore congressional intent to protect defendants from routine felony impeachment and provide defendants with prior convictions a more meaningful opportunity to testify. This revision would require courts to consider the marginal impeaching value of prior felony convictions in light of the inherent bias of a criminal defendant testifying to evade conviction. Professor Bellin notes that a defendant is already significantly impeached by his desire to avoid punishment and that the probative value of prior felony convictions is reduced by this alternative impeaching factor. A balancing test that expressly requires courts to take the defendant's bias into account would result in a more accurate assessment of probative value. Professor Bellin has also suggested that courts should be strongly cautioned against admitting prior felonies similar to the current charges for the purpose of impeachment. The Reporter noted that the extensive digest compiled in the agenda materials on Rule 609(a)(1)(B) rulings demonstrates that courts frequently admit similar crimes for impeachment purposes. The Reporter described data compiled by Professor Bellin indicating that jurors do not limit consideration of prior felonies to impeachment, do not follow limiting instructions as to impeachment, and that jurors punish defendants who choose to remain off the stand to avoid impeachment with a silence penalty notwithstanding instructions not to do so.

Judge Campbell contended that the suggested modifications to the Rule 609(a)(1)(B) balancing test seemed pretty prescriptive and would micromanage a trial judge's balancing process unduly. Further, Judge Campbell thought that including some specific factors for consideration might suggest the omission of others, making the amended test underinclusive. In the end, he did not see why it would be advisable to mandate specifics for trial judges applying this balancing test. The Reporter agreed that it may not have been necessary to include such specifics in the initial rule, but that evidence from the cases shows that judges are not properly accounting for these factors such that spelling them out now may be necessary. Moreover, the proposed amendment focuses

on marginal probative value and the similarity of the conviction to the crime charged, but does not purport to limit the court's use of other factors.

The Chair stated that trial judges don't think in terms of "marginal probative value," but evaluate impeachment in light of the defendant's position on the stand and in the hurly burly of the courtroom. The Reporter responded that the reported cases belie that notion --- they indicate that the courts do take account of other matters affecting marginal probative value (such as other convictions) but not the self-interest of the defendant.

The Chair expressed her view that it was inadvisable to micromanage trial judges in their assessments of probative value and prejudicial effect. No Committee member provided further discussion or moved for the adoption of a proposed amendment to the balancing test. In the absence of any further comment, the Chair stated that the proposed amendment to the balancing test would be tabled. The Reporter noted that he had hoped for a more robust Committee exchange on potential amendments to Rule 609(a)(1)(B), particularly with regard to the balancing test.

XI. Rule 611 and Illustrative Evidence

The final item on the agenda originated with a proposal from a law review article suggesting that the Committee should adopt a rule on the use of illustrative evidence at trial. The line between "demonstrative" evidence, used substantively to prove disputed issues at trial, and "illustrative" evidence, offered solely as a pedagogical aid to assist the jury in understanding other evidence, is a difficult one to draw. An idea for a draft of an amendment to Rule 611 was included in the agenda materials to govern the use of truly "illustrative" evidence at trial. This draft rule was not designed as a proposal for the Committee, but was included to give the Committee an idea of what might be done if it wished to consider the matter further. The draft amendment was placed in Rule 611 because courts typically find authority to regulate illustrative evidence in Rule 611(a). The draft would not cover demonstrative evidence at all, but would regulate the use of illustrative aids. It would prohibit a judge from sending an illustrative aid to the jury during deliberations absent the consent of all parties.

Judge Campbell asked whether there is any indication that courts are confused about these issues. The Reporter noted that there is some confusion in the cases regarding the distinction between demonstrative and illustrative evidence, and also between pedagogical summaries and those substantively admissible under Rule 1006. The Reporter opined that there was not a crying need for an amendment, but that there could be value in providing organizing principles around illustrative evidence. The Chair asked for the experience of the trial judges in the room with respect to illustrative aids. There was a consensus among judges that illustrative aids present no significant difficulty and that there is no need for a rule covering their use. Several members of the Committee noted, however, that they found the Maine rule on illustrative evidence and the thoughtful accompanying legislative notes, which were included in the agenda materials, to be extremely valuable.

XII. Closing Matters

The Committee thanked the Reporter for the immense amount of work he put into the excellent agenda materials and the meeting was adjourned.

XIII. Next Meeting

The fall meeting of the Evidence Rules Committee will be held at the University of Denver in Colorado on Friday, October 19, 2018.

Respectfully submitted,

Liesa L. Richter
Daniel J. Capra

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 12, 2018 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee” or “Committee”) held its spring meeting at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., on June 12, 2018. The following members participated:

- | | |
|--------------------------------|-----------------------------|
| Judge David G. Campbell, Chair | Professor William K. Kelley |
| Judge Jesse M. Furman | Judge Carolyn B. Kuhl |
| Daniel C. Girard, Esq. | Elizabeth J. Shapiro, Esq.* |
| Robert J. Giuffra, Jr., Esq. | Judge Amy St. Eve |
| Judge Susan P. Graber | Judge Srikanth Srinivasan |
| Judge Frank Mays Hull | Judge Jack Zouhary |
| Peter D. Keisler, Esq. | |

The advisory committees were represented by their chairs and reporters:

- | | |
|--|---|
| Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter | Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate
Reporter |
| Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Incoming Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate
Reporter | Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter |
| Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate
Reporter | |

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Catherine T. Struve	Associate Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Bridget M. Healy	Attorney Advisor, RCS
Scott Myers	Attorney Advisor, RCS
Julie Wilson	Attorney Advisor, RCS
Frances F. Skillman	Paralegal Specialist, RCS
Shelly Cox	Administrative Specialist, RCS
Dr. Tim Reagan	Senior Research Associate, FJC
Patrick Tighe	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order. He apologized to any Washington Capitals fans who would miss the Stanley Cup victory parade in D.C. because of the meeting.

He welcomed Judge Dennis Dow of the U.S. Bankruptcy Court for the Western District of Missouri, who will be the Chair of the Advisory Committee on Bankruptcy Rules beginning October 1, 2018. Because the current Chair, Judge Sandra Segal Ikuta, could not attend the meeting, Judge Dow is attending in her place. Judge Campbell also welcomed Professor Ed Hartnett who was recently appointed as Reporter to the Advisory Committee on Appellate Rules. He also noted that Chief Justice Roberts reappointed Judges Bates and Molloy as Chairs of their respective Advisory Committees for another year. Judge St. Eve was recently appointed to the U.S. Court of Appeals for the Seventh Circuit, and although Director Duff appointed Judge St. Eve to the Judicial Conference Committee on the Budget, Judge St. Eve graciously agreed to serve her remaining term on the Standing Committee.

Judge Campbell remarked that Judge Zouhary's tenure on the Standing Committee ends on September 30, 2018. Judge Zouhary will continue to help with the pilot projects going forward. He thanked Judge Zouhary for his service, noting that he is an innovator in district court case management.

In addition, Judge Campbell lamented the passing of Professor Geoffrey C. Hazard, Jr., a longtime member of and consultant to the Standing Committee. Professor Hazard passed shortly after the Committee's meeting in January 2018, and Judge Campbell said that he will be greatly missed.

Lastly, Judge Campbell discussed Professor Dan Coquillette's upcoming retirement from his role as Reporter to the Standing Committee in December 2018 but noted that Professor Coquillette will remain as a consultant thereafter. Chief Justice Roberts appointed Professor Catherine Struve as Associate Reporter, and we will ask the Chief Justice to appoint Professor Struve as Reporter while Dan transitions to a consulting role. Judge Campbell thanked Professor Coquillette for his service and looks forward to the celebration later this evening.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process, which is included in the Agenda Book. Also included are the proposed rules approved by the Judicial Conference in September 2017, adopted by the Supreme Court, and transmitted to Congress in April 2018. If Congress takes no action, the rule package pending before Congress will become effective December 1, 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee approved the minutes of the January 4, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met on April 6, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of five action items and presented a few information items.

Action Items

Appellate Rules 3 and 13 – Electronic Service. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 3 and 13, both of which concern notices of appeal. The proposed amendments were published for public comment in August 2017 and received no comments.

The proposed amendments to Rules 3 and 13 reflect the increased reliance on electronic service in serving notice of filing notices of appeal. Rule 3 currently requires the district court clerk to serve notice of filing the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Similarly, Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

One Committee member remarked that use of "sends" and "sending" in Rule 3 seemed vague and inquired why more specific language was not used. Judge Chagares responded that a more general term was used to cover a variety of ways to serve notices of appeal, reflecting the various approaches courts use as they transition to electronic service.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 3 and 13.**

Appellate Rules 26.1, 28, and 32 – Disclosure Statements. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 26.1, 28, and 32. The proposed amendment to Rule 26.1 changes the disclosure requirements in several respects designed to help judges decide whether they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term “corporate disclosure statement” to “disclosure statement.” These proposed amendments were published in August 2017. The proposed amendments to Rules 28 and 32 received no public comments whereas Rule 26.1 received a few.

The National Association of Criminal Defense Lawyers (“NACDL”) suggested that the Committee Note include additional language to help deter overuse of the government exception in 26.1(b) concerning organizational victims in criminal cases. In response, the Advisory Committee revised the Rule 26.1 Committee Note to more closely follow the Committee Note for Criminal Rule 12.4 and account for the NACDL comment. In addition, Charles Ivey suggested that Rule 26.1(c) include additional language referencing involuntary bankruptcy proceedings and requiring that petitioning creditors be identified in disclosure statements. The Advisory Committee consulted Professor Gibson, Reporter to the Bankruptcy Rules Committee, and accepted Professor Gibson’s suggestion that no change was needed. Finally, two commentators argued that the meaning of 26.1(d) regarding intervenors was ambiguous. In response, the Appellate Rules Committee folded language from 26.1(d) regarding intervenors into a new last sentence in 26.1(a) and changed the title of subsection (a) to reflect that intervenors are subject to the disclosure requirement.

One member asked what constitutes a “nongovernment corporation” and whether this term includes entities such as Fannie Mae and Freddie Mac, which are government-sponsored publicly traded companies. This member also questioned why Rule 26.1 was limited to corporations, noting that limited partnerships can raise similar issues as corporations. One Committee member stated that disclosures should be broader rather than narrower and did not see the harm in deleting “nongovernmental.” Another member questioned whether it is onerous to list governmental corporations. A different member reiterated that other types of entities can present similar problems as corporations.

Professor Struve noted that the goal of the proposed amendments to Rule 26.1 is to track the other disclosure provisions in the Civil, Criminal, and Bankruptcy Rules. Professor Cooper relayed the history of these disclosure statement rules, stating that the Civil Rules Committee decided to limit the disclosure statement to “nongovernment corporations” given the significant variation among local disclosure rules. Judge Chagares reiterated Professor Struve’s point that the purpose underlying the proposed change to Appellate Rule 26.1 is consistency with the other federal rules regarding disclosure statements. Professors Beale and King noted a memo by Neal Katyal exploring why the disclosure statement is limited to “nongovernmental corporations” and concluding that this limitation was not causing a practical problem.

A member noted the federal rules should be consistent with each other. However, a bigger problem is whether the newly consistent rules provide judges with adequate information for recusal. Judge Campbell said that there are two distinct issues: first, whether to approve Rule 26.1 to make it consistent with the other federal rules, and second, whether to change or revisit the current policy underlying the disclosure statement rules. He argued that the second question was not ripe for the Committee's consideration.

A member asked if 26.1(b)'s disclosure obligation is broader than 26.1(a). Judge Campbell responded that subsection (b) is parallel with Criminal Rule 12.4 whereas subsection (a) is parallel with Civil Rule 7.1. He reiterated that the scope of the disclosure obligation should perhaps be reconsidered at a later time.

A member suggested deleting "and intervenors" in Rule 26.1(a)'s title, and Judge Chagares concurred. For consistency with other subsection titles, another member recommended making "victim" and "criminal case" plural in Rule 26.1(b)'s title, as well as deleting the article "a" preceding "criminal case." The Committee's style consultants recommended making a few stylistic changes in subsection (c), including adding a semicolon after "and" as well as deleting "in the bankruptcy case" in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 26.1, 28, and 32, subject to the revisions made to Rule 26.1 during the meeting.**

Appellate Rule 25(d) – Proof of Service. The Advisory Committee sought final approval for a proposed amendment to Appellate Rule 25(d), which is designed to eliminate unnecessary proofs of service in light of electronic filing. This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court. But after discussion at the January 2018 meeting, the previously submitted version was withdrawn for revision to address the possibility that a document might be filed electronically but still require service through means other than the court's electronic filing system on a party who does not participate in electronic filing. The Advisory Committee now seeks final approval of the revised language. Judge Campbell thanked Professor Struve for noting the potential issue. Judge Chagares also noted a few minor changes that should be made, including adding a hyphen between "electronic filing" in 25(d)(1) and deleting the words "filing and" in the Committee Note. Judge Chagares noted the Advisory Committee's view that the proposed revision to 25(d) was technical in nature, and did not require republication.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 25(d), subject to the revisions made during the meeting.**

Appellate Rules 5, 21, 26, 32, and 39 – Proof of Service. If the proposed amendment to Appellate Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee sought final approval without public comment of what it views as technical and conforming amendments to Rules 5, 21, 26, 32, and 39. Proposed amendments to

Rules 5, 21(a)(1), and 21(c) delete the phrase “proof of service” and add “and serve it,” consistent with Rule 25(d)(1). Rule 26(c) eliminates the “proof of service” term and simplifies the current rule for when three days are added for certain kinds of service. Current Rule 32(f) lists the items that are excluded when computing length limits, including “the proof of service.” Given the frequent occasions in which there would be no proof of service, the article “the” should be deleted. Given this change, the Advisory Committee agreed to delete all of the articles in the list of items. Rule 39(d) removes the phrase “with proof of service” and replaces it with “and serve.” Judge Chagares explained that the Advisory Committee did not think public comment was necessary for these technical, conforming amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 5, 21, 26, 32, and 39.**

Appellate Rule 35 – En Banc Determinations. The Advisory Committee sought approval for publication of proposed amendments to Appellate Rules 35 and 40, which would establish length limits applicable to responses to petitions for rehearing en banc. Also, Rule 40 uses the term “answer” whereas Rule 35 uses the term “response.” The proposed amendment would change Rule 40 to use the term “response” for consistency.

Some members noted other inconsistencies between the two rules. For instance, one member stated that Rule 35(e) just concerns the length limit whereas Rule 40 imposes additional requirements. Professor Hartnett responded that although the Advisory Committee has formed a subcommittee to examine Rules 35 and 40 more comprehensively, the committee felt it appropriate to move forward with this amendment in the interim. Judge Campbell asked if the Advisory Committee has a time table for when this review will conclude, and Judge Chagares stated they hope to finish this review in the fall. One Committee member noted that clarifying the length limits in the appellate rules is generally helpful and important.

One Committee member commented that the Committee Note to Rule 35 states “a court,” instead of “the court” like the text of rule. The Committee’s style consultants concurred that “a” should be changed to “the.”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rules 35 and 40, subject to the revisions made during the meeting.**

Information Items

Judge Chagares announced the formation of three subcommittees to examine: (1) Rule 3(c)(1)(B) and the merger rule; (2) Rule 42(b) regarding voluntary dismissals, and; (3) whether any amendments are appropriate in light of the Supreme Court’s decision in *Hamer v. Neighborhood Hous. Servs. Of Chi.*, 138 S. Ct. 13 (2017). One member asked if the Rule 42(b) subcommittee will explore whether different rules regarding voluntary dismissals should exist for class actions, and Judge Chagares stated that the subcommittee is exploring why judicial discretion over voluntary dismissals may be necessary, including in the class action context.

In addition, Judge Chagares noted that the Advisory Committee examined the problem of appendices being too long and including too much irrelevant information, as well as how much the requirements vary by circuit. However, technology is changing quickly which may transform how appendices are done. Accordingly, the Advisory Committee decided to remove this matter from the agenda and to revisit it in three years. Judge Chagares stated that the Advisory Committee also removed from its agenda an item relating to Rule 29 and blanket consents to amicus briefs, and an item relating to whether “costs on appeal” in Rule 7 includes attorney’s fees. The Committee discussed the Supreme Court’s recent decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), but that discussion did not give rise to an agenda item.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Incoming Chair Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which met on April 3, 2018, in San Diego, California. The Advisory Committee sought approval of eight action items and presented three information items.

Action Items

Bankruptcy Rule 4001(c) – Obtaining Credit. The Advisory Committee sought final approval for a proposed amendment to Bankruptcy Rule 4001(c), which details the process for obtaining approval of post-petition credit in a bankruptcy case. The proposed amendment would make this rule inapplicable to chapter 13 cases. The Advisory Committee received no comments on this proposed change. Some post-publication changes were made, such as adding a title and a few other stylistic changes. No Standing Committee members had any comments or questions about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 4001(c).**

Bankruptcy Rule 6007(b) – Abandonment or Disposition of Property. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 6007(b). The proposed amendments are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b), and to make the rule consistent with the procedures set forth in Rule 6007(a). The Advisory Committee received some comments on this rule, some of which they accepted but others they declined to adopt. The Committee’s style consultants suggested changes to subpart (b) which would have improved the overall language. Because the purpose of the current amendment is simply to parallel the text of Rule 6007(a), the Advisory Committee declined to accept these suggestions, but will revisit the styling improvements if the restyling project goes forward.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 6007(b).**

Bankruptcy Rule 9036 – Notice and Service Generally; Deferral of Action on Rule 2002(g) and Official Form 410. These amendments are designed to expand the use of electronic noticing and service in bankruptcy courts. The proposed amendments to Rule 2002(g) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. The published amendments to Rule 9036 allow not only clerks but also parties to provide notices or to serve documents through the court’s electronic-filing system. The proposed amendments to Official Form 410 add a check box for opting into email service and noticing.

The Advisory Committee received four comments, each raising concerns about the technological feasibility of the proposed changes and how conflicting email addresses supplied by creditors should be prioritized given the different mechanisms for supplying email addresses for service. The AO and technology specialists with whom the Advisory Committee consulted confirmed these concerns. Consequently, the Advisory Committee unanimously recommended deferring action on amendments to Rule 2002(g) and Official Form 410. By holding these amendments in abeyance, the Advisory Committee will have additional time to sort out these technological issues.

Nevertheless, the Advisory Committee recommends approving the amendments to Rule 9036. In Rule 9036, the word “has” in the second sentence of the Committee Note should be changed to “have.” One Committee member asked if the phrase “in either of these events” should be “in either of these cases,” and the Committee’s style consultants noted that they try not to use “case” unless referring to a lawsuit.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 9036, subject to the revision made during the meeting.**

Bankruptcy Rule 9037(h) – Motion to Redact a Previously Filed Document. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 9037, which adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in compliance with Rule 9037(a). The Advisory Committee received comments on the proposed changes, including one seeking to expand the amendments to address how documents placed under seal by the bankruptcy court should be handled on appeal. The Advisory Committee rejected this concern as beyond the scope of the rule amendment.

Another comment suggested an explicit waiver of the filing fee if a party bringing the motion seeks to redact protected privacy information disclosed by a different party (i.e., a debtor motion to redact his or her social security number inappropriately revealed in an attachment to a creditor’s proof of claim). The Advisory Committee agreed with this sentiment but did not think that changing the rule was necessary because Judicial Conference guidelines already permit the court to waive the filing fee in this situation. A third commenter noted that nothing in the rule required filing the redacted document. In response, the Advisory Committee added language making it clear that the redacted document must be filed.

A final comment argued that restrictions on accessing the originally filed document should not go into effect until the redacted document is filed. The current rule as written imposes restrictions on the document once the motion to redact is filed. The Advisory Committee rejected this comment, finding such restrictions necessary and appropriate because other people will be made aware of this sensitive information when the motion to redact is filed.

Judge Campbell asked if the language of “promptly restrict” is sufficient to guide clerks and whether clerks know to restrict access to these documents upon the filing of a motion to redact. Judge Dow responded affirmatively and noted that the clerk member of the Advisory Committee advised that clerks already impose restrictions as a matter of course. Judge Chagares asked about the scope of the rule and whether it applies to an opinion, which is also a “document filed.” Judge Dow stated that it could, and Professor Bartell noted that the rule only applies to the protected privacy information listed in Rule 9037(a).

A member stated that he is generally supportive of the rule change and asked whether the rule should apply more broadly, including in the Civil and Criminal Rules. Professor Beale noted that the Advisory Committees on Civil and Criminal Rules, respectively, have considered this question and decided against a parallel rule change because outside the bankruptcy context, where the problem is more frequent, judges routinely and quickly handle these matters when they arise.

This same member also asked why the information is limited to the information listed in Rule 9037(a). Professors Gibson and Beale explained that Rule 9037(a) is the bankruptcy version of the privacy rules adopted by the advisory committees to limit certain information in court documents as required by the E-Government Act. Professor Capra noted that the E-Government Act does not prohibit going farther than the information listed and that the Committee could decide to prohibit disclosing additional information. He added that if the issue is taken up, it should apply across the federal rules and not just in bankruptcy.

A member questioned why the rule uses the term “entity.” Judge Dow explained that the term “entity” is a defined term in the Bankruptcy Code, and the broadly defined term even encompasses governmental entities.

This member also asked if the Advisory Committee considered any changes to 9037(g) regarding waiver. Professor Bartell explained that the waiver rule is still intact and that the Advisory Committee decided no change was needed. A member inquired about local court rules that address this waiver problem, and Professor Bartell noted that bankruptcy courts have such rules.

Another Committee member suggested adding language in the Committee Note stating that 9037(g) does not abrogate the “waiver” provision. Professor Gibson was reluctant to make that change absent discussion with the Advisory Committee. Judge Campbell stated that, under the current rule, a problem already exists. Parties are currently filing motions to redact, and in certain situations it is possible such a motion could conflict with the waiver provision. This rule just creates a formal procedure for filing a motion to redact. It does not affect the current case law regarding waiver.

Professor Hartnett asked what happens when the motion is granted and whether the court, not the party, is required to docket the redacted document. Professor Gibson noted that the filing party must attach the redacted document to its motion to redact and that the court has the responsibility to docket the redacted document. The Advisory Committee explored requiring the moving party to file the redacted document as a separate document, but rejected this approach.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 9037.**

Official Forms 411A and 411B – Power of Attorney. Proposed Official Forms 411A and 411B are used to execute power of attorney. As part of the Advisory Committee's Forms Modernization Project, prior versions of these forms were changed from Official Forms to Director's Forms 4011A and 4011B. However, Judge Dow explained that this created a problem because Bankruptcy Rule 9010(c) requires execution of a power of attorney on an Official Form, and these forms are no longer Official Forms. To rectify this problem, the Advisory Committee sought approval to re-designate Director's Forms 4011A and 4011B as Official Forms 411A and 411B. Because there would be no substantive changes for which comment would be helpful, the Advisory Committee sought final approval of the forms without publication.

Judge Campbell asked if the Judicial Conference can designate these forms as Official Forms, or if Supreme Court approval is required. Professor Gibson and Mr. Myers said that under the Rules Enabling Act, the Judicial Conference makes the final decision in approving Official Bankruptcy Forms, and that if it acts this September, the changes will become effective on December 1, 2018.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the designation of Director's Forms 4011A and 4011B as Official Forms 411A and 411B effective December 1, 2018.**

Bankruptcy Rule 2002(f), (h), and (k) – Notices. Bankruptcy Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee sought approval to publish amendments to three of the rule's subdivisions for public comment. These amendments would: 1) require giving notice of the entry of an order confirming a chapter 13 plan; 2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and 3) add a cross-reference reflecting the relocation of the provision specifying the deadline for an objection to confirmation of a chapter 13 plan. The Standing Committee had no questions or comments about these proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rule 2002(f), (h), and (k).**

Bankruptcy Rule 2004(c) – Examinations. Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. The

Advisory Committee sought approval to publish an amendment to 2004(c) adding a reference to electronically stored information to the title and first sentence of the subdivision. The Standing Committee had no questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 2004(c).**

Bankruptcy Rule 8012 – Corporate Disclosure Statement. The Advisory Committee sought approval to publish an amendment to Rule 8012 concerning corporate disclosure statements in bankruptcy appeals. The amendment adds a new subdivision (b) to Rule 8012 to require disclosing the names of any debtors in an underlying bankruptcy case that are not revealed by the caption in an appeal and, for any corporate debtors in the underlying bankruptcy case, disclosing the information required of corporations under subdivision (a) of the rule. Other amendments track Appellate Rule 26.1 by adding a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal, and make stylistic changes to what would become subdivision (c) regarding supplemental disclosure statements.

Professor Gibson noted that the reference to subdivision (c) will be dropped from the Committee Note. A Committee member asked if the term “corporation appearing” already captures corporations seeking to intervene. Professor Gibson responded that it might be better to track the language used in FRAP 26.1. The first sentence should read: “Any nongovernmental corporation that is a party to a proceeding in the district court” She also noted that Rule 8012(b) will incorporate the language changes made to FRAP 26.1(c) at the meeting today, including adding a semicolon before “and” as well as deleting “in the bankruptcy case” in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 8012, subject to the revisions made during the meeting.**

Information Items

Judge Dow stated that a Restyling Subcommittee is exploring whether to recommend that the Advisory Committee restyle the Federal Rules of Bankruptcy Procedure. To inform this recommendation, the Committee’s style consultants produced a draft of a restyled Rule 4001. In consultation with the FJC, the Subcommittee is conducting a survey of interested parties, including judges, clerks of courts, and other bankruptcy organizations, which will conclude on June 15, 2018. The survey uses a restyled example of 4001(a). The Subcommittee will analyze the survey responses and make a recommendation to the Advisory Committee at its September 2018 meeting. Although only preliminary results were available at the time of the meeting, Judge Dow said that responses from most bankruptcy judges and clerks were positive.

Professor Capra asked whether the Bankruptcy Rules could be restyled given that they track language in the Bankruptcy Code. Judge Dow noted that the parallels with the Code do not prohibit restyling; rather, they provide a reason for caution in undertaking that restyling effort. He

emphasized that no decision on restyling has been made. Informed by the survey of interested parties, the Advisory Committee will consider the advantages and disadvantages of restyling and determine how, if at all, to move forward.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on April 24, 2018, in Washington, D.C. The Advisory Committee sought approval of two action items and shared two information items.

Action Items

New Criminal Rule 16.1 – Pretrial Discovery Conference. Judge Molloy reviewed the history of the proposal, which originated as a suggestion by members of the defense bar to amend Rule 16 to address disclosure and discovery in complex criminal cases, including those involving voluminous information and electronically stored information. At Judge Campbell’s suggestion, a subcommittee held a mini-conference to gather information on the problem and potential solutions. Mini-conference participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. This conference significantly helped the Advisory Committee develop the proposed new Rule 16.1 by, among other things, building consensus on what sort of rule was needed and whether the rule should apply to all criminal cases. One member echoed that the mini-conference was fantastic and helped the Advisory Committee reach consensus on this rule. Judge Campbell applauded the Advisory Committee for finding consensus.

The new rule has two new sections. The first section, Rule 16.1(a), requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. The second section, Rule 16.1(b), states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.”

Publication of the rule produced six comments. One comment from the DOJ expressed concern that the new rule could be read to grant new discovery authorities that could undermine important legal protections. The Advisory Committee agreed and decided to conform the language of the proposed rule to the phrasing of Criminal Rule 16(d)(2)(A). Two comments addressed whether the rule required the government to confer with pro se litigants and the Advisory Committee, in turn, changed the rule’s language to “the government and the defendant’s attorney” reasoning that it would not be practical for the government to confer about discovery with each pro se defendant. Two commenters recommended relocating the rule, but the Advisory Committee rejected this suggestion. One commenter suggested adding “good faith” to the meet and confer requirement but the Advisory Committee had already explored and rejected this idea. Professor Beale noted that the words “try to agree” capture this idea of conferring in good faith.

Lastly, two comments concerned whether the new rule would displace local rules or orders imposing shorter times for discovery. As published, the Committee Note stated that the rule “does not displace local rules or standing orders that supplement its requirements or limit the authority

of the district court to determine the timetable and procedures for disclosure.” The Advisory Committee determined that the Committee Note affirms the district courts retain authority to impose additional discovery requirements by local rule or court order, and that no further clarification was needed.

Many Committee members expressed concern that the Committee Note did not address adequately the concern about displacing local rules. One member reads the note to authorize local rules that are inconsistent with Rule 16.1. Judge Bates said that this issue has come up in his court and he shares the same concern. Professor Capra stated that whether a local rule that supplements the Federal Rules is inconsistent remains an open question. Professor Marcus discussed the history of Civil Rule 83 dealing with local rules.

Judge Campbell proposed addressing this concern by adding the language “and are consistent with.” Professor Cooper suggested that it would be helpful to add a comment that the local rules must be consistent with the Federal Rules. He also proposed adding a citation to Rule 16 to ensure that Rule 16.1 is not interpreted as altering Rule 16’s discovery obligations. Judge Livingston echoed Professor Cooper’s concern that this last sentence is too freestanding and could benefit from a citation.

Professor Beale responded that this Committee Note language satisfied the interested parties and that she did not think that referencing other rules in the Committee Note is a good idea. Instead, she proposed adopting Judge Campbell’s proposal. A Committee member expressed similar sentiments asking why the Committee Note does not use the phrase “consistent with.” Judge Campbell reminded the Committee that the proposed language reflected an accord that had been carefully worked out among the interested parties.

After much discussion, consensus emerged to revise the last sentence in the third paragraph of the Committee Note as follows: “Moreover, the rule does not (1) modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, (2) displace local rules or standing orders that supplement and are consistent with its requirements, or (3) limit the authority of the district court to determine the timetable and procedures for disclosure.”

Other Committee members raised stylistic concerns with Rule 16.1. In an email sent prior to the meeting, a Committee member raised some grammatical and stylistic comments about Rule 16.1, which Judge Molloy and the Reporters agree require revisions. First, the word “shortly” in the first sentence in the Committee Note should be replaced with “early in the process, no later than 14 days after arraignment,” to better track the language of the rule. Second, an errant underline between “it” and “displace” in the third paragraph of the Committee Note will be removed. Third, the phrase “determine or modify” will be added in the fifth paragraph of the Committee Note to more closely parallel the rule’s language. Lastly, this member also noted that the commas in Rule 16.1(b) should not be bolded.

Another Committee member proposed using words like “process” or “procedure” instead of “standard” in the third paragraph of the Committee Note reasoning that such terms better reflect that Rule 16.1 is instituting a new procedure. The Committee’s style consultants stated that the

word “procedure” would be appropriate to use. Judge Molloy and the Reporters agreed with this change.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed new Rule 16.1, subject to the revisions made during the meeting.**

Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings – Right to File a Reply. Judge Richard Wesley, a former member of the Standing Committee, raised this issue with the Advisory Committee, noting a conflict in the cases construing Rule 5(d) of the Rules Governing Section 2255 Proceedings. This rule currently states that “[t]he moving party may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.” Although the Committee Note and history of the rule make clear an intent to give the inmate a right to file a reply, some courts have held that the inmate has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right. After reviewing the case law, the Advisory Committee concluded that the text of the current rule contributes to a misreading of the rule by a significant number of district courts. A similar problem was found with regard to parallel language in Rule 5(e) of the Rules Governing Section 2254 Cases. The Advisory Committee agreed to correct this problem by placing the provision concerning the time for filing in a separate sentence, thereby making clear in the text of each rule that the moving party (or petitioner in § 2254 cases) has a right to file a reply.

Three comments were received during publication. The Advisory Committee determined that the issues raised by the comments were considered at length prior to publication and no changes were required. No Standing Committee members raised any questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings.**

Information Items

Criminal Rule 16 – Pretrial Discovery Concerning Expert Witnesses. The Advisory Committee received two suggestions from district judges recommending that Rule 16’s provisions concerning pretrial discovery of expert testimony should be amended to provide expanded discovery similar to that under Civil Rule 26. Judge Molloy noted that there are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil cases. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded discovery of forensic expert testimony. While there will not be a simple solution, there is consensus among the Advisory Committee members that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Evidence Rules) and also plans to hold a mini-conference.

Task Force on Protecting Cooperators. Judge St. Eve updated the Committee on the efforts of the Task Force on Protecting Cooperators. In April 2018, Director Duff sent 18 recommendations identified by the Task Force for implementation by the Bureau of Prisons (“BOP”). A day before the Director’s scheduled meeting with the BOP, the BOP Director resigned, and that meeting did not occur. Since then, meetings have taken place with the BOP’s Acting Director, who had attended the Task Force meetings. He and his staff are preparing the BOP’s response, which they anticipate sending to Director Duff and the Task Force later this month. Some of the BOP Recommendations must be approved by the BOP union. Ms. Womeldorf has drafted the Task Force’s second and final report, which will be submitted sometime next month to Director Duff. Some of the Task Force’s recommendations may have to be considered by the Standing Committee and the Committee on Court Administration and Case Management. That said, Judge St. Eve stated that the Task Force’s work is coming to a close.

Judge Campbell noted that, last January, the Standing Committee reviewed the Advisory Committee’s decision not to recommend any rules implementing the CACM Interim Guidance or similar approaches to protecting cooperator information in case files and dockets based on the Task Force’s recommendations. The Advisory Committee on Criminal Rules will revisit this decision after the Task Force’s second and final report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which met on April 10, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of one action item and presented four information items.

Action Item

Rule 30(b)(6) – Deposition of an Organization. The Advisory Committee sought approval for publication of proposed amendments to Rule 30(b)(6) which would impose a duty to confer. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to Rule 30(b)(6). In the summer of 2017, the subcommittee invited comment on a preliminary list of possible rule changes. Over 100 comments were received. Discussions eventually focused on imposing a duty on the noticing and responding parties to confer in good faith. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule.

As drafted, the duty to confer is iterative, and the proposed language requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each person who will testify. The first topic has not proved controversial; however, the second topic – the identity of the witnesses – has generated more discussion. Some fear the rule might be interpreted to require that organizations obtain the noticing party’s approval of its selection of witnesses. Nevertheless, the Advisory Committee decided to keep the identity of witnesses as a topic of conferring, at least for the public comment process, because the proposal carries forward the present rule text stating that the named organization must designate the persons to testify on its behalf, and the Committee Note affirms that the choice of the designees is ultimately up to the organization.

Judge Bates noted that the Standing Committee received comments about the Advisory Committee's decision to include the identity of witnesses as a topic on which the parties must confer. Although these comments were addressed to the Standing Committee, he assured the Standing Committee that the Advisory Committee considered their substance when deciding to recommend publication. He noted that there is some force to the concerns stated in the comments, but that the Advisory Committee decided to include this topic because it is tied to the question of the matters for examination (the other question about which the parties must confer). Discussing what kind of person will have knowledge about a matter for examination may help avoid later disputes. Judge Bates also emphasized that the amendment only adds a requirement to confer; it does not require that the parties agree nor lessen the organization's ability to choose its witnesses.

Moreover, he cautioned that the comments to the Standing Committee are coming from only one segment of the bar, particularly from the defense bar and those who represent organizations who often must identify such witnesses. Interestingly, one letter from past, present, and upcoming Chairs of the ABA Section of Litigation did raise concerns about the "identity" topic. That said, Judge Bates anticipates receiving many comments on this topic if the proposed amendment is approved for public comment, and he thinks comments from other groups will be informative. He guaranteed that these late submissions will be included as part of the Advisory Committee's broader assessment after public comment concludes.

Judge Campbell noted that the Standing Committee has received eight to ten last-minute comments about the proposed amendments to Rule 30(b)(6). This happens from time to time, but having received a number of them, he stated that the Standing Committee needs to clarify when it is appropriate to address comments directly to the Standing Committee. Clarification will help ensure that the public has fair notice of when to properly submit comments and that all commenters are treated equally. The Reporters discussed these questions at their lunch meeting today, and the Standing Committee will consider this procedural issue at its January 2019 meeting.

Many of these late comments noted by Judge Campbell expressed concern that the noticing party would have the ability to dictate the witnesses the organization must produce for deposition. In response, Judge Campbell stated that this is not the intent of the rule. Moreover, he noted that the rule also lists the matters for examination as a topic of conferring. Under the logic of the comments, it could be said that the organization now can dictate the matters for examination. Again, this is not the intent of the rule.

Lastly, Judge Bates reported that the Advisory Committee rejected adding a reference to Rule 30(b)(6)'s duty to confer in Rule 26(f) because Rule 26(f) conferences occur too early.

After this introduction, the Standing Committee engaged in a robust discussion about the Rule 30(b)(6) amendments. One member asked whether the conference must always occur and whether complex litigation concerns were driving this requirement. Professor Marcus responded that many complained about the inability to get the parties to productively engage on these matters and that the treatment here reflects repeat reports from the bar about issues with Rule 30(b)(6). This same member questioned whether the iterative nature of the confer requirement needs to be included in the rule. Judge Bates answered that it is important to signal in the rule the continuing

obligation to confer because the topics of the conference may not be resolved in an initial meeting. For example, the identity of the organization's witnesses may have to be decided once the matters for examination are confirmed. The member stated this is a helpful change to a real problem and that it avoids the "gotcha" element of Rule 30(b)(6) depositions by requiring more particularity.

Another member asked whether it may be wise to require parties to identify and produce documents they will use at the deposition. By providing all such documents in advance of the deposition, parties can better focus on the issues. Moreover, Rule 30(b)(6) notices often list the matters to be discussed and providing the documents to be used will enable parties to get more specific. Another member agreed, asserting that documents ought to be identified prior to the deposition. Professor Marcus noted that such a practice could help focus the issues, but it also could lead to parties dumping a bunch of documents they may not use.

One member suggested that identifying documents is a best practice and should be highlighted in the Committee Note to Rule 30(b)(6). Professor Coquillette responded that committee notes should not be used to discuss best practices but to illustrate what the rule means. A member noted that nothing in the proposed rule would prohibit providing the document in advance; in fact, it would not change what many lawyers already do. One member recommended deleting "at least some of" from the first paragraph of the Committee Note, which discusses how it may be productive to discuss other matters at the meet and confer such as the documents that will be used at the deposition.

Other members questioned why the rule does not address timing. One member proposed adding a provision requiring the parties to make such disclosures within a certain number of days before the deposition. Another member seconded this concern. Judge Bates stated that this is a rule about conferring, not about timing, and the Advisory Committee learned that timing is often not the real issue facing the bar.

Echoing a point raised in the letter from present, past, and incoming Chairs of the ABA Section of Litigation, one Committee member expressed concern about previous committee notes – the 1993 Committee Note stating that a Rule 30(b)(6) deposition counts as a single deposition (for purposes of the presumptive limit on the number of depositions), and the 2000 Committee Note indicating that, if multiple witnesses are identified, each witness may be deposed for seven hours. The member thought this approach could carry unintended consequences. Professor Marcus discussed the history of the seven-hour rule and stated that the Advisory Committee has twice studied this issue carefully, most recently when Judge Campbell served as Chair. Getting more specific seemed to generate more problems, and although the Advisory Committee considered this, they do not think there is a cure because any solution would lead to other problems. The Advisory Committee consequently concluded that a requirement to confer was a step in the right direction.

Committee members discussed at length the "identity" requirement. One member noted his agreement with the criticism that "identity" is unclear. He does not know if it is helpful to require conferencing about "identity." The member stated that he conducted an informal survey and said that this is not much of an issue, especially for good lawyers. Another member noted that she does not see Rule 30(b)(6) issues often unless they concern the scope of the deposition, which

the “matters for examination” topic addresses. She shared her colleague’s concern that “identity” is unclear.

Judge Bates noted that district court judges do not see many Rule 30(b)(6) issues, but the Advisory Committee heard from the practicing bar that problems do not always get to the judge. The proposal is responsive to the practicing bar’s concerns. Judge Campbell explained that they write rules for the weakest of lawyers and that the “identity” topic responds to the concerns of practitioners who complain that they cannot get organizations to identify the witnesses. Judge Bates reminded everyone that the proposed language is not final, but rather is the proposed language for public comment. The comments received thus far are from one constituency – members of the bar that primarily represent organizations – and comments have yet to be received from the rest of the bar.

Another Committee member remarked that the “identity” topic is important because it will inform the serving party whether the organization has no responsive witness and must identify a third party to depose. This member also suggested adding something encouraging the parties to ask the court for help in resolving their Rule 30(b)(6) disputes and to remind them of this practice’s efficacy. Judge Bates noted that committee notes typically do not remind parties to come to the court to resolve such disputes, and Professor Marcus noted that judicial members on the Advisory Committee objected to inclusion of this concept in an earlier draft.

Despite this conversation, a Committee member stated that he was still uncomfortable with the “identity” language. He proposed stating “and when reasonably available the identity of each person who will testify.” Another Committee member noted that such language would reinforce the iterative nature of the rule because organizations could identify witnesses shortly after conferring on the matters for examination.

Professor Cooper expressed skepticism about this Committee member’s proposal. After conferring with Judge Bates and Professor Marcus, Professor Cooper recommended adding “the organization will designate to” so that the topic for conferral will be “the identity of each person the organization will designate to testify.” The additional language – “the organization will designate to” – will reinforce that organizations maintain the right to choose who will testify and thus better respond to the concerns raised. If they make this change, they also recommended deleting the earlier use of “then.”

Another Committee member noted that the Committee Note’s use of the phrase “as necessary” was confusing and could be interpreted as requiring multiple conferences. He recommended instead: “The duty to confer continues if needed to fulfill the requirement of good faith.” Judge Bates liked this proposal, in part because it used fewer words and clarified the iterative nature of the rule.

After this discussion, Judge Campbell summarized the proposed modifications: (1) deleting “then” before the word “designate”; (2) deleting “who will” and adding “the organization will designate to”; (3) deleting “at least some of” from the first paragraph of the Committee Note; and (4) changing the wording of the penultimate sentence of the third paragraph of the Committee Note to read “The duty to confer continues if needed to fulfill the requirement of good faith.”

Judge Bates noted that they may need to explain the deletion of “then” in the Committee Note, and Judge Campbell said that he and Professors Cooper and Marcus can explore this after the meeting. If such language is needed, a proposal can be circulated to the Standing Committee for consideration and approval.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 30(b)(6), subject to the revisions made during the meeting.**

Information Items

Rules for Multidistrict Litigation. The subcommittee formed to consider creating rules for multidistrict litigation is still in the information gathering phase. Proposed legislation in Congress known as the Class Action Fairness Bill would affect procedures in MDL proceedings. Judge Bates noted that consideration of this subject will be a long process, and that the subcommittee is attending various conferences on MDLs. The subcommittee has identified eleven topics for consideration, including the scope of any rules and whether they would apply just to mass torts MDLs or all types of MDLs, the use of fact sheets and *Lone Pine* orders, rules regarding third-party litigation financing, appellate review, etc. He encouraged Committee members to provide the subcommittee their perspective on any of these topics. Judge Bates noted that the subcommittee has not decided if rules are necessary or whether a manual and increased education would be better alternatives.

Social Security Disability Review Cases. A subcommittee is considering a suggestion from the Administrative Conference of the United States to create rules governing Social Security disability appeals in federal courts. The subcommittee has not concluded its work, and whatever rules it may recommend, if any, still need to be considered by the Advisory Committee. The most significant issues concerning these types of proceedings are administrative delay within the Social Security Administration and the variation among districts both in local court practices and in rates of remand to the administrative process. Whatever court rules may be proposed will not address the administrative delay.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which met on April 26-27, 2018, in Washington, D.C. The Advisory Committee presented two action items and seven information items.

Action Items

Evidence Rule 807 – Residual Exception. The Advisory Committee sought final approval for proposed amendments to Evidence Rule 807. Professor Capra reviewed the history of suggestions to amend the rule, noting that the Advisory Committee found that the rule was not working as well as it could. The proposal deletes the language requiring guarantees of trustworthiness “equivalent” to those in the Rule 803 and Rule 804 hearsay exceptions and instead

directs courts to determine whether a statement is supported by “sufficient” guarantees of trustworthiness in light of the totality of the circumstances of the statement’s making and any corroborating evidence. Subsections (a)(2) and (a)(4) are removed because they are at best redundant in light of other provisions in the Evidence Rules. The amendments also revise Rule 807(b)’s notice requirement, including by permitting the court, for good cause, to excuse a failure to provide notice prior to the trial or hearing.

One member asked if this proposal will increase the admissibility of hearsay evidence. Professor Capra noted that any increase will be marginal, perhaps in districts that adhere to a strict interpretation of the rule regarding “near miss” hearsay.

Ms. Shapiro noted the fantastic work Professor Capra did to help improve this rule and stated that the DOJ is incredibly grateful for his work.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 807.**

Evidence Rule 404(b) – “Bad Acts” Evidence. The Advisory Committee sought approval to publish proposed amendments to Evidence Rule 404(b). Professor Capra explained various Rule 404(b) amendments considered and rejected by the Advisory Committee. The Advisory Committee, however, accepted a proposed amendment from the DOJ requiring the prosecutor to provide notice of the non-propensity purpose of the evidence and the reasoning that supports that purpose. The Advisory Committee liked this suggestion because articulating the reasoning supporting the purpose for which the evidence is offered will give more notice to the defendant about the type of evidence the prosecutor will offer. The Advisory Committee also determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “*other* crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Professor Bartell asked whether the Advisory Committee considered designating a specific time period for the prosecutor to provide notice. Professor Capra said the Advisory Committee considered this idea but thought it was too rigid.

One member inquired about implementing a notice requirement for civil cases. Professor Capra responded that notice was not necessary in civil cases because this information comes out during discovery. Judge Campbell also noted that lawyers in civil cases are not bashful about filing Rule 404 motions in limine.

Another member asked whether it would be better that subsection 404(b)(3) track the language of 404(b)(1) instead of stating “non-propensity purpose.” Professor Capra said the Advisory Committee will consider this idea during the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 404(b).**

Information Items

Judge Livingston provided a brief update of the Advisory Committee's other work. First, the Advisory Committee decided not to proceed with rule changes to Evidence Rules 606(b) and 801(d)(1)(A).

Second, the Advisory Committee considered at its April 2018 meeting the results of the Symposium held at Boston College School of Law in October 2017 regarding forensic expert testimony, Rule 702, and *Daubert*. The Symposium proceedings are published in the Fordham Law Review. No formal amendments to Rule 702 have been considered yet but the Advisory Committee is exploring two possible changes: 1) an amendment focusing on forensic and other experts overstating their results and 2) an amendment that would address the fact that a fair number of courts have treated the reliability requirements of sufficient basis and reliable application in Rule 702 as questions of weight and not admissibility.

Lastly, Judge Grimm proposed amending Rule 106 regarding the rule of completeness to provide that: 1) a completing statement is admissible over a hearsay objection, and 2) the rule covers oral as well as written or recorded statements. The courts are not uniform in their treatment of Rule 106 issues, and the Advisory Committee decided to consider this proposal in more depth at its next meeting.

THREE DECADES OF THE RULES ENABLING ACT

To honor Professor Coquillette's thirty-four years of service to the Standing Committee and his upcoming retirement as Reporter to the Standing Committee, Judge Sutton – a former Chair of the Standing Committee – led a question and answer session with Professor Coquillette. The discussion was wide-ranging and provided current Committee members with helpful history on challenges faced by the rules committees over time. Professor Coquillette noted that the Rules Enabling Act ("REA") has been so successful in part because the Department of Justice played an integral role in the REA process. He thanked the DOJ for recognizing the value of the REA and for helping preserve its integrity. Although the Standing Committee must be sensitive to the political dynamics Congress faces, Professor Coquillette cautioned that the REA process should not become partisan football. He stated that the Committee must "check its guns at the door" and do the fair and just thing. It is so important that the Committee be seen as fair, Professor Coquillette explained, because the manner in which the Committee is perceived when reaching its decisions is vital to preserving the REA and faith in the rules process.

JUDICIARY STRATEGIC PLANNING

Brian Lynch, the Long-Range Planning Officer for the federal judiciary, discussed the strategic planning process and how the Standing Committee can provide feedback on the *Strategic Plan for the Federal Judiciary*. He emphasized that the Committee's reporting on long-term initiatives will help foster dialogue between the Executive Committee and other judicial committees.

Following Mr. Lynch’s presentation, Judge Campbell directed the Committee to a letter dated July 5, 2017, in which the Standing Committee provided an update on the rules committees’ progress in implementing initiatives in support of the *Strategic Plan for the Federal Judiciary*. Judge Campbell proposed updating this letter to reflect its ongoing initiatives that support the judiciary’s strategic plan. In 2019, the Committee will be asked to update the Executive Committee on its progress regarding these identified initiatives.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved authorizing Judge Campbell to update and forward to Chief Judge Carl Stewart correspondence reflecting the Committee’s long-term initiatives supporting the *Strategic Plan for the Federal Judiciary*.**

LEGISLATIVE REPORT

Julie Wilson of the Rules Committee Staff (“RCS”) briefly delivered the legislative report. She noted that two new pieces of legislation have been proposed since January 2018 – namely, H.R. 4927 regarding nationwide injunctions, and the Litigation Funding Transparency Act of 2018 (S. 2815) regarding the disclosure of third-party litigation funding in class actions and MDLs. Neither bill has advanced through Congress. Ms. Wilson indicated that the RCS will continue to monitor these bills as well as others identified in the Agenda Book and will keep the Committee updated.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Standing Committee will next meet on January 3, 2019 in Phoenix, Arizona. He reminded the Committee that at this next meeting it will confer about its policy regarding comments on proposed rules addressed directly to the Standing Committee outside the typical public comment period.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2C

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Effective December 1, 2017

REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress (Apr 2017); approved by the JCUS and transmitted to the Supreme Court (Sept 2016)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 4	Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009.	
BK 1001	Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015.	CV 1
BK 1006	Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule.	
BK 1015	Amendment substitutes the word "spouses" for "husband and wife."	
BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1	Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms.	
CV 4	Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons.	
EV 803(16)	Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998.	
EV 902	Adds two new subdivisions to the rule on self-authentication that would allow certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial.	

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 8, 11, 39	The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	"Computing and Extending Time." Technical, conforming changes.	AP 25
AP 28.1, 31	The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	"Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	"Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	"Declaration of Inmate Filing." Technical, conforming change.	AP 25
BK 3002.1	The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	"Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”	CV 62, 65.1
BK 8002(a)(5)	The proposed amendment to 8002(a) would add a provision similar to FRAP 4(a)(7) defining entry of judgment.	FRAP 4

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
BK 8002(b)	The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing) (Official Forms approved by Judicial Conference as noted above, which is the final step in approval process for forms).	FRAP 4, 25
BK 8006	The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limits, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40.	FRAP 5, 21, 27, 35, and 40
BK 8017	The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	The bankruptcy general and special power of attorney forms, currently director's forms 4011A and 4011B, will be reissued as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). Approved by Standing Committee at June 2018 meeting; to be considered by Judicial Conference at September 2018 meeting.	
CV 5	The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
CV 23	"Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to "supersedeas bond"; rearranges subsections.	AP 8, 11, 39
CV 65.1	The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant’s initial appearance; revise the rule to refer to “later” rather than “supplemental” filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2).	
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Effective (no earlier than) December 1, 2019

Current Step in REA Process: submitted to the Judicial Conference for approval (Sept 2018)
 REA History: approved by the Standing Committee (June 2018); approved by Advisory Committees (Spring 2018);
 unless otherwise noted, published for public comment Aug 2017-Feb 2018; approved for publication (June 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)	
AP 5.21, 26, 32, 39	Technical amendments to remove the term "proof of service." (Not published for comment.)	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsection (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Effective (no earlier than) December 1, 2020

Current Step in REA Process: published for public comment (Aug 2018-Feb 2019)

REA History: unless otherwise noted, approved for publication (June 2018)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendments clarify that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
CV 30	Proposed amendments to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.	
EV 404	Proposed amendments to subdivision (b) would expand the prosecutor's notice obligations by (1) requiring the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act, and (3) deleting the requirement that the defendant must request notice be deleted; the proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

TAB 3

TAB 3A

Memorandum

To: Advisory Committee on Evidence Rules
From: Thomas D. Schroeder
Re: Work of the Subcommittee on Rule 702
Date: September 15, 2018

Judge Livingston established a Subcommittee¹ to explore three matters regarding Rule 702 that the Advisory Committee has been considering: 1) whether the Rule should be amended to provide some regulation of forensic expert testimony; 2) whether the Rule should be amended to emphasize that questions about sufficiency of basis and application of method are questions of admissibility, to be decided by the judge under Rule 104(a); and 3) whether efforts other than a rule amendment--- such as education programs --- would be useful to address these Rule 702 issues.

The Subcommittee read memoranda prepared by the Reporter and received documentary input from the Justice Department. It has also received input and advice from representatives of the Federal Judicial Center. The Subcommittee has conferred twice in lengthy conference calls. It has not reached the point of recommending or advising against any formal rule proposal. The Subcommittee looks forward with the rest of the Advisory Committee to further consideration of Rule 702 at the roundtable discussion that will take place among the Committee members and some invited experts on the day of the Committee's fall meeting.

While not reaching any final conclusions on whether or not to propose a rule amendment, the Subcommittee has come to some tentative resolutions on some preliminary matters. These are described briefly below:

Forensics and Overstatement

1. There have been some suggestions that the Advisory Committee should draft a lengthy Committee Note that would set forth detailed scientific standards for forensic disciplines. The Subcommittee believes that this approach would be unwise. Such a Note would go well beyond whatever textual change could be made to the rule. The Note would require significant scientific input and could run into the same controversies regarding sources and standards that arose with PCAST. And it would run the risk of becoming outmoded by scientific developments and developing forensic disciplines.

¹ The members of the Rule 702 Subcommittee are: Thomas D. Schroeder, Chair; Daniel Collins; A.J. Kramer; and Elizabeth Shapiro and Kira Antell on behalf of the DOJ. Timothy Lau and Joe Cecil of the FJC are providing assistance to the Subcommittee. Professor Daniel Capra serves as the Reporter.

2. There have been some suggestions that the Advisory Committee could propose a freestanding, detailed amendment on forensic expert evidence. The Subcommittee believes this approach could be problematic for a number of reasons:
 - a. Rule 702 was written to be malleable enough to cover all forms of expert testimony, and a specific rule would undercut that premise;
 - b. Defining the term “forensic” would be difficult and would potentially be underinclusive;
 - c. While forensic experts should be subject to the same standards as all others, there is no reason to think that they should be subject to different or heightened standards; and
 - d. The rule risks becoming outmoded if it is too detailed, and ineffectual if it is too general.
3. There have been suggestions that the Advisory Committee should sponsor a Best Practices Manual on forensic expert evidence. The Subcommittee recommends against such a project. Scientific assistance would be required, and as with the Committee Note alternative, there would be problems with staffing and input. Moreover, there are a number of treatises on the subject already, and the influence that a Best Practices Manual would have, given that it cannot be the work of the Advisory Committee itself, is not clear.
4. The Subcommittee does recommend that the Advisory Committee offer its assistance to the FJC in the preparation of the new FJC manual on forensic evidence.
5. The Subcommittee recommends that the Advisory Committee support judicial education efforts of the FJC on forensic evidence. A letter to the FJC expressing the need for judicial education on forensic evidence should be drafted.
6. The Subcommittee will continue to work with the Criminal Rules Subcommittee that is exploring changes to Rule 16 of the Federal Rules of Criminal Procedure. The Advisory Committee should consider making some formal expression of support for an amendment that would bring Rule 16 closer to the civil rule on experts.

The Subcommittee is continuing to explore the possibility of an amendment to Rule 702 that will deal with the problem of overstatement of an expert's conclusions --- such as testimony that a forensic discipline has a "zero rate of error." This amendment would not be limited to forensic expert testimony.

Attached to this report is a memorandum from the Reporter setting forth the relevant case law and a draft of what an amendment to Rule 702 regarding overstatement might look like.

The possibility of an amendment regulating overstatement will be a topic for the roundtable discussion at the fall meeting of the Advisory Committee.

Rule 702 admissibility/weight

The Subcommittee is evaluating the possibility of an amendment to Rule 702 that would emphasize that sufficiency of basis and reliable application are questions of admissibility and not weight. Members have discussed the fact that some courts are making statements that are wrong under Rule 702 --- such as stating broadly that the question of application of a method is one of weight and not admissibility. But it is more difficult to determine whether Rule 702 has been incorrectly applied in any particular case. That is because trial courts rarely say whether they are applying a Rule 104(a) or (b) standard. Thus, a court that says, "this dispute about the expert's basis is a question of weight" may still be applying the Rule 104(a) standard, because questions of weight arise even under the preponderance standard. In many of the cases, the trial court may well be applying a preponderance standard regardless of the broad statements by an appellate court or even by the trial court itself.

The Subcommittee has some concern that an amendment might not fix the problems that are seen in the cases regarding admissibility and weight. The Subcommittee remains concerned about the broad misstatements of the law in some of the cases and encourages further discussion on whether an amendment might be a useful way to alert the courts to focus on applying the preponderance standard. An amendment might also be useful in getting courts to articulate the standard of proof on which they are relying. Another possibility is to target educational efforts at the courts that are making the broad and incorrect statements of law.

Attached to this report is a memorandum prepared by the Reporter on the pertinent case law regarding admissibility/weight, which includes a possible drafting alternative.

The question of an amendment to deal with weight/admissibility questions under Rule 702 will be a topic for the roundtable discussion at the fall meeting of the Advisory Committee.

TAB 3B

FORDHAM

University School of Law

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail: dcapra@law.fordham.edu

Memorandum To: Rule 702 Subcommittee (And to the Committee for the Agenda Book)
From: Daniel J. Capra, Reporter
Re: Forensic Evidence and a Possible Amendment to Regulate Overstatement of an
Expert's Conclusions
Date: September 25, 2018

The Rule 702 Subcommittee, in a series of telephone conferences, has proposed to narrow the focus for any amendment to Rule 702 that would address forensic expert testimony. **The Subcommittee voted against the following:**

- 1) a minor amendment to the text of the rule that would serve as the excuse for a Committee Note that would a) set forth best practices for forensic experts, or b) repudiate a single citation to a case on handwriting evidence in the 6000 word Committee Note to the 2000 amendment to Rule 702;
- 2) a freestanding amendment that would impose detailed requirements for forensic expert testimony; and
- 3) an amendment to Rule 702 that would add additional requirements that would be applicable only to forensic expert testimony.

What remains, rulemaking-wise, is consideration of a possible amendment addressed to overstatement of an expert's conclusions.

This memorandum is divided into three parts. Part one is a discussion of the overstatement problem and whether an amendment might be useful. Part two is a case law digest, updated from

the one prepared for the Committee as a whole for the April meeting. Part three sets forth two drafting alternatives, and accompanying draft Committee Notes.¹

I. Is Overstatement of Results a Significant Problem?

A. Overstatement of Results in Forensics

Many speakers at the Boston College Symposium argued that one of the major problems with forensic experts is that they overstate their conclusions --- examples include testimony of a “zero error rate” or a “practical impossibility” that a bullet could have been fired from a different gun. Expert overstatement was a significant focus of the PCAST report. And a report from the National Commission on Forensic Sciences proposes that courts should forbid experts from stating their conclusion to a “reasonable degree of [field of expertise] certainty,” because that term is an overstatement, has no scientific meaning and serves only to confuse the jury. The DOJ has weighed in with a prohibition on use of the “reasonable degree of certainty” language, as well as important limitations on rates of error (as discussed below). Both the NAS and PCAST reports emphasize that forensic experts have overstated results and that the courts have done little to prevent this practice --- the courts are often relying on precedent rather than undertaking an inquiry into whether an expert’s opinion overstates the results of the forensic test.

Judge Rakoff, at the Symposium, suggested that a provision prohibiting an expert from overstating results could be added to Rule 702 --- and that this could be meaningful because the courts have not relied on any language in the existing rule to control the problem of overstatement.

Judge Rakoff’s assertion appears to be supported by the case law digest, *infra*. There are about 70 cases digested, and about 40 have colorable claims of overstatement by experts that were insufficiently regulated by the court. Thus, it would seem that there is good reason to seek to control overstatement, especially in forensic evidence cases. Such a venture would surely be more straightforward, and less science-dependent, than a rule that seeks to regulate forensic expert testimony from top-to-bottom.

B. Can Overstatement by Forensic Experts be Controlled Without an Amendment?

Assuming that overstatement by forensic experts is a problem --- a pretty good assumption looking at the case law digest --- are there other sources of regulation that might make an amendment unnecessary? Three possible sources might exist: 1) Court regulation under existing

¹ Most of the material in this memorandum has already been distributed to members of the Rule 702 Subcommittee, but there are a number of additions.

law; 2) Education efforts; and 3) DOJ efforts to regulate forensic experts. These are discussed in turn.

1. Court Regulation: The case digest demonstrates that some courts are making efforts to control overstatement. But it is only a handful that are really doing so. Many courts *think* they are doing so by prohibiting experts from testifying to a zero error rate. But those courts as an alternative are allowing experts to testify to a reasonable degree of scientific or professional certainty, which is a meaningless and yet misleading standard. Given that most courts rely on precedent in this area, and that the *best* precedent is to allow testimony to a reasonable degree of scientific or professional certainty, there seems to be little hope for meaningful regulation by the courts.

2. Education: It might be thought that the NAS report, the PCAST report, and other sources would lead to more regulation of overstatement of forensic experts. But the case digest indicates that these reports have made very little practical impact on the courts. The National Commission on Forensic Science report attacking the “reasonable degree of certainty” standard was issued several years ago² and has been widely distributed, but courts are still happily using that standard as if it has solved the problem of overstatement. Judicial training through FJC might be useful, but will it be as impactful as a rule amendment? Given the fact that courts rely heavily on precedent in evaluating forensic testimony, it would seem that for a *court* to act, a change of law will be required.

3. DOJ: Apropos of overstatement, a DOJ directive instructs Department scientists working in federal laboratories, and United States attorneys, to refrain from using the phrase “reasonable degree of scientific certainty” when testifying and to state other limitations on their results. There are a number of directives, each targeted toward a specific forensic discipline, but they all provide regulation on overstatement of results. An example is the directive regarding toolmark testimony, in pertinent part as follows:

- An examiner shall not assert that two or more fractured items were once part of the same object unless they physically fit together or when a microscopic comparison of the surfaces of the fractured items reveals a fit.
- When offering a fracture match conclusion, an examiner shall not assert that two or more fractured items originated from the same source to the exclusion of all other sources. This may wrongly imply that a fracture match conclusion is based upon statistically-derived or verified measurement or an actual comparison to all other fractured items in the world, rather than an examiner’s expert opinion.

² See <https://www.justice.gov/ncfs/file/795146/download>

- An examiner shall not assert that examinations conducted in the forensic firearms/toolmarks discipline are infallible or have a zero error rate.
- An examiner shall not provide a conclusion that includes a statistic or numerical degree of probability except when based on relevant and appropriate data.
- An examiner shall not cite the number of examinations conducted in the forensic firearms/toolmarks discipline performed in his or her career as a direct measure for the accuracy of a proffered conclusion. An examiner may cite the number of examinations conducted in the forensic firearms/toolmarks discipline performed in his or her career for the purpose of establishing, defending, or describing his or her qualifications or experience.
- An examiner shall not use the expressions “reasonable degree of scientific certainty,” “reasonable scientific certainty,” or similar assertions of reasonable certainty in either reports or testimony, unless required to do so by a judge or applicable law.

These standards addressed directly to overstatement obviously represent an important advance and they are an excellent development. *But it does not necessarily mean that there is no longer a call for a rule on overstatement.* This is so for a number of reasons:

- There are questions of implementation, as the edict has been in effect since 2016 and experts are still using the “reasonable degree” standard in many courts, according to the case digest. A case from 2018, discussed in the case digest, indicates that a ballistics expert was prepared to testify that it was a “practical impossibility” for the bullet to be fired from a different gun. And specifically there may be questions about the impact on witnesses from state labs. This is not at all to understate the DOJ efforts. It is just to say that there may be room for court regulation as a supplement to these efforts.

- Even if the “reasonable degree” language is eradicated --- and it may not be because judges may require it --- there remains debate about what an expert *can* testify to as an alternative. One can argue that courts should be controlling such an important debate, the outcome of which can literally be the difference between freedom and a prison sentence.

- Leaving protections up to the DOJ means that any failure in compliance is not actionable—even though the result might be an unjust conviction, or more likely a guilty plea that would not otherwise have been entered.

- Adding something to Rule 702 that the Department is already doing should not be burdensome on the Department. Indeed there is precedent for such an approach --- the proposed amendments to the notice provisions of Rule 404(b), according to the Department, impose no obligations on U.S. attorneys that they are not already doing. Yet there is definite value to the system in codifying those obligations, as the Committee unanimously determined.

- The Department’s reforms, as salutary as they are, would not affect overstatement by experts called by any litigants other than the government in a criminal case.

- Finally, Joe Cecil, an expert on forensic evidence, who is preparing the new FJC Manual on the subject, has provided a statement in response to the Reporter’s question about the DOJ standards. That statement indicates that the standards are a big step forward but do not answer all concerns about overstatement. Joe writes as follows:

Hi Dan,

You asked “If the DOJ standards on what forensic experts say is perfectly executed, are there still concerns about overstatement? If yes, please explain.”

The answer is yes, there are still concerns, especially regarding fingerprints and toolmarks.

First, it is important to note that the DOJ initiative will help to resolve some of the most important problems that arise in forensic science testimony. The DOJ standards will improve current practice by: (1) eliminating the use of the terms “reasonable degree of scientific certainty” and similar statements that have no scientific foundation; (2) eliminating claims that forensic techniques are free of error; (3) prohibiting forensic examiners from citing the number of examinations conducted as an indication of the accuracy of their conclusion; and, (4) offering statistical estimates without relevant and appropriate data. Monitoring forensic science testimony also will bring about greater consistency and allow early identification of emerging problems. These are important steps in strengthening the accuracy of forensic science testimony.

Nevertheless, concerns about overstatement of findings will persist. Based on the scientific assessments I have seen of forensic research on pattern matching evidence (e.g., fingerprints, toolmarks) I am confident that distinguished members of the science community will conclude that the current research does not provide a sufficient factual foundation to support a statement by a forensic examiner that a comparison of two or more specific patterns indicate that they originated from the same source --- a conclusion that is permitted under the DOJ standards.

The courts may encounter this issue when there is a *Daubert* challenge to the proffered report and testimony of a forensic examiner that concludes that a comparison of two or more patterns indicate that they originated from the same source. For example, a forensic examiner may wish to testify that the correspondence between a fingerprint found at a crime scene and the fingerprint of a suspect indicates that the suspect is the source of the fingerprint, or that toolmarks found at a crime scene indicates that a specific tool in the possession of the suspect is the source of the crime scene toolmarks. The DOJ Uniform Language for Testimony and Reports for fingerprints and toolmarks would allow such testimony. The defendant is likely to object, claiming that the proponent has not demonstrated by a preponderance of the evidence that such testimony is based on sufficient

facts or data under FRE 702(b). Alternatively, the defendant may object that the subjective opinion is not supported by empirical research and is not the product of reliable principles and methods under FRE 702(c). The court must then examine the basis for the conclusion that the forensic examiner has identified the specific source of the crime scene evidence, and determine if that opinion represents the results of a valid scientific methodology and if facts provide a sufficient basis for such testimony.

* * *

The DOJ Uniform Language for Testimony and Reports attempts to walk a fine line between allowing the forensic expert to testify to identity of the source of a crime scene sample and disavowing any certainty that this is in fact the case. * * * [T]he forensic examiner is allowed to conclude that the fingerprints or toolmarks originated from the same source. However, this conclusion is then subject to qualifications that make clear that such a conclusion should not be interpreted as indicating that the examiner has in fact identified the source of the crime scene pattern. According to the Uniform Language, a “source identification” of a toolmark means only that the examiner has seen sufficient pattern agreement to “provide extremely strong support for the proposition that the two toolmarks came from the same source and extremely weak support for the proposition that the two toolmarks came from different sources.” While this sounds as though the strength of the evidence is based on a statistical assessment, the Uniform Language makes clear that this is merely the examiner’s opinion, has no statistical foundation, and leaves open the possibility that other tools may present the same pattern of marks. The same tension is found in the Uniform Language for fingerprint identification.

[F]or these two types of pattern matching evidence, the Uniform Language permits the forensic examiner to testify that the crime scene sample came from the suspect, based only on the examiner’s subjective opinion that there is strong support for a match and weak support for no match. The Uniform Language offers no guidance on how to interpret what constitutes strong support and weak support, and disavows any suggestion that the conclusion is based on any knowledge of the frequency of different patterns in the population. Here is the relevant qualification from the Uniform Language for fingerprint examiners:

An examiner shall not assert that two friction ridge skin impressions originated from the same source to the exclusion of all other sources or use the terms ‘individualize’ or ‘individualization.’ This may wrongly imply that a ‘source identification’ conclusion is based upon a statistically-derived or verified measurement or actual comparison to all other friction ridge skin impression features in the world’s population, rather than an examiner’s expert opinion.

So under the Uniform Language forensic examiners may testify two prints originated from the same source, but not to the exclusion of all other sources since that would imply a scientific basis for the opinion. What am I missing? It is sufficient to say

that this is just the examiner's opinion with no additional support? Is that the type of "ipse dixit" justification that the Supreme Court rejected in *GE v Joiner*?

Forensic examiners' untethered opinion testimony that declares a match with no empirical basis is exactly what has raised the ire of the scientific community. The President's Council of Advisors on Science and Technology (PCAST) questioned whether such a subjective conclusion would meet the FRE 702(c) standard of a reliable principles and methods (which it termed "foundational validity"). PCAST summarized its conclusion regarding pattern matching testimony as follows:

Scientific validity and reliability require that a method has been subjected to empirical testing, under conditions appropriate to its intended use, that provides valid estimates of how often the method reaches an incorrect conclusion. For subjective feature-comparison methods, appropriately designed black-box studies are required, in which many examiners render decisions about many independent tests (typically, involving "questioned" samples and one or more "known" samples) and the error rates are determined. Without appropriate estimates of accuracy, an examiner's statement that two samples are similar—or even indistinguishable—is scientifically meaningless: it has no probative value, and considerable potential for prejudicial impact. Nothing—not training, personal experience nor professional practices—can substitute for adequate empirical demonstration of accuracy

So, I believe it is fair to say that those scientists who prepared the PCAST report will still be concerned about overstatement, even if the DOJ standards are perfectly executed.

Similarly, the scientists who participated in the fingerprint identification study by the American Association for the Advancement of Science (AAAS) are likely to continue to be concerned about overstatement. The AAAS report noted that presently there is no basis "for assessing the rarity of any particular feature, or set of features, that might be found in a fingerprint. Examiners may well be able to exclude the preponderance of the human population as possible sources of a latent print, but there is no scientific basis for estimating the number of people who could not be excluded and there are no scientific criteria for determining when the pool of possible sources is limited to a single person." The AAAS scientists are unlikely to be swayed by DOJ standards that specifically rejects the need for such statistical information as a basis for fingerprint testimony.

In fact, after the DOJ released the Uniform Language for Testimony and Reports for the Forensic Latent Print Discipline, Rush Holt, the Chief Executive Officer for the AAAS wrote to Deputy Attorney General Rod Rosenstein, expressing concern about the Uniform Language for fingerprint examiners. Holt was particularly concerned about the lack of scientific basis for the Uniform Language that allows an examiner to conclude that latent prints have a common source. The letter expressed the following concern:

There is an aspect of your Uniform Language, however, that is not in agreement with the scientific conclusions of the AAAS report. Although the Uniform

Language you put forward forbids an examiner from making the unsupportable claim that the pattern of features in two prints come from the same source to the exclusion of all others, it does allow examiners to say they “would not expect to see that same arrangement of features repeated in an impression that came from a different source.”

There is no scientific basis for estimating the number of individuals who might have a particular pattern of features; therefore, there is no scientific basis on which an examiner might form an expectation of whether an arrangement comes from the same source. The proposed language fails to acknowledge the uncertainty that exists regarding the rarity of particular fingerprint patterns. Any such expectations that an examiner asserts necessarily rest on speculation, rather than scientific evidence.

As there is no empirical basis for examiners to estimate the frequency of any particular pattern observable in a print, the term identification or, in your proposed language source identification, should not be used.

So concerns regarding overstatement will continue, at least within the science community, even if the DOJ Uniform Testimony guidelines are perfectly implemented. The core problem is the decision to allow forensic examiners in some areas to testify that he or she can determine that the defendant is the source of the crime scene evidence (i.e., source identification). There are a number of alternative forms of testimony that avoids these concerns. The AAAS report suggests the following testimony by a fingerprint examiner:

The latent print on Exhibit ## and the record print bearing the name XXX have a great deal of corresponding ridge detail with no differences that would indicate they were made by different fingers. There is no way to determine how many other people might have a finger with a corresponding set of ridge features, but it is my opinion that this set of features would be unusual.

Other forensic science agencies have disavowed the source identification standard. The Department of the Army Defense Forensic Science Center allows its fingerprint examiners to testify as follows:

The latent print on Exhibit ## and the record finger/palm prints bearing the name XXXX have corresponding ridge detail. The likelihood of observing this amount of correspondence when two impressions are made by different sources is considered extremely low.

While the subjective nature of the assessment is still a problem, this does represent a more measured statement than claiming to having identified the source of a crime scene print.

In sum, even if the DOJ Guidelines are perfectly implemented, an argument remains for an amendment to Rule 702 that would specifically preclude an expert from overstating a conclusion.

C. Should a Rule on Overstatement Apply Beyond Forensics?

While overstatement by expert in areas other than forensics is less publicized, there are strong arguments for any amendment regulating overstatement to apply to all expert testimony. Those arguments are:

1) a limit to “forensic” experts would skew Rule 702, because all current parts of the rule apply to all experts;

2) the term “forensic” is hard to define in rule text, as it goes beyond feature-comparison (for example to arson investigations) and there are disputes about just which disciplines are forensic;

3) there is no other rule of evidence that focuses specifically on a subset of witnesses;

4) if it is a good idea to require a court to regulate overstatement, it certainly can’t hurt to have that tool available outside the forensic disciplines; and

5) Most importantly, there are a number of reported cases in which an expert appears to have gotten away with a conclusion that is not fairly supported by the data, methodology and application. And there are many cases in which the courts have required an expert outside of forensics to testify to a “reasonable degree of [field of expertise] certainty.

That is, there is a problem of overstatement outside the forensic area. What follows on the next page is a case digest:

*Case Digest on Overstatement by Non-Forensic Experts*³

1. Expert Overstatement Permitted

In some federal cases, non-forensic expert opinion testimony is admitted that appears to overstate the conclusions that reliably flow from the expert's methodology. See, e.g.:

- *United States v. Chikvashvili*, 859 F.3d 285, 292-93 (4th Cir. 2017) (government expert in healthcare fraud resulting in death prosecution was permitted to testify that the misreading of patient x-rays was the “but-for cause” of two patients’ deaths and that standard medical procedures “would have averted” their deaths. Doctor also opined that one patient’s elective surgery “would have been postponed” with an accurate reading of his x-ray).
- *United States v. Tingle*, 880 F.3d 850, 855 (7th Cir. 2018) (rejecting defendant’s argument that DEA agent’s expert testimony violated FRE 704(b) where agent testified that the amount of drugs found in defendant’s residence was “definitely for distribution” and that the gun found in residence “was utilized by [the defendant] to protect himself and/or the methamphetamine and the currency.”).
- *Adams v. Toyota*, 867 F.3d 903, 916 (8th Cir. 2017) (affirming admission of expert testimony in which an engineer “ruled out” pedal misapplication as a potential cause of sudden acceleration accident).
- *United States v. Lopez*, 880 F.3d 974 (8th Cir. 2018) (affirming admission of DEA agent’s expert testimony that appellate court characterized as opining that “illegal drugs entering the market are of such high purity that it has become physically impossible even for seasoned addicts to consume large amounts of methamphetamine.”).
- *Wendell v. Glaxo Smith Kline, LLC*, 858 F.3d 1227 (9th Cir. 2017) (district court erred in excluding medical experts’ opinions that prescription drug caused the plaintiff’s rare cancer where one expert testified to “a one in six million chance” that the plaintiff would have developed the cancer without exposure to the drug).
- *United States v. Wells*, 879 F.3d 900 (9th Cir. 2018) (affirming admission of expert testimony by a tire expert to refute a murder defendant’s alibi that he was not at work at time of murders because he got a flat tire; the expert concluded that the nail in the tire “had been inserted” in the tire “manually” rather than picked up while driving).
- *United States v. Lozano*, 711 Fed. App’x 934 (11th Cir. 2017) (permitting government’s drug trafficking expert to testify that “blind mule theory” has “no factual basis”).
- *U.S. Information Systems, Inc. v. International Broth. of Elec. Workers Local Union No. 3, AFL-CIO*, 313 F.Supp.2d 213 (S.D.N.Y. 2004): An expert in antitrust economics

³ This digest is not intended to be comprehensive. It collects some representative example of cases decided within the last five years. The digest was prepared with the substantial help of Professor Liesa Richter.

testified to damages, and the opponent argued that the claims were overstated, because he used a discounting factor that was unsupported. The court held that the expert could testify, concluding that while “the accuracy of Dr. Dunbar's figures may be open to dispute, his methodology with respect to damages is sound.”

- ***Flavel v. Svedala Indus.***, 875 F.Supp. 550 (E.D.Wi. 1994)(in an age discrimination action, the fact that a statistics expert artificially inflated his findings by using employee ages as of a certain date raised a question for the jury, not the court).
- ***Etherton v. Owners Ins. Co.***, 35 F. Supp.3d 1360, 1364, 1368 (D. Colo. 2014), aff'd 829 F.3d 1209 (10th Cir. 2016) (rejecting challenge to admission of expert testimony that the plaintiff's many injuries “were entirely caused” by collision and that “every single rear-end collision that has ever occurred” is a plausible mechanism for causing lumbar disc injury).

2. Expert Overstatement Regulated

There are a number of reported cases in which it appears that courts are regulating expert attempts to overstate their results (sometimes by appellate court correction):

- ***United States v. Machado-Erazo***, 2018 WL 4000472 (D.C. Cir.) (district court erred in admitting FBI agent's expert testimony about “precise location” of cell phones “within a half mile” of a particular cell tower, but the error was harmless).
- ***United States v. Naranjo-Rosaro***, 871 F.3d 86, 96 (1st Cir. 2017) (trial court erred in allowing agent handling drug-sniffing dog to testify as a lay witness, but error was harmless where agent's testimony would have been admissible expert opinion and where the agent conceded that the dog's alerts to drugs “did not establish the presence of drugs in the house”).
- ***In re Vivendi Sec. Litig.***, 838 F.3d 223, 256 (2nd Cir. 2016) (affirming admissibility of expert testimony based upon an event study about artificial inflation in a company's stock price due to misapprehension of a company's liquidity risk; emphasizing that the expert did not purport to establish that the company's fraud *caused* the misapprehension).
- ***Nease v. Ford Motor Co.***, 848 F.3d 219, 225 (4th Cir. 2017) (reversing a verdict for the plaintiff in a product liability action due to the district court's erroneous admission of testimony by the plaintiff's expert “to a reasonable degree of engineering certainty” that the throttle on the plaintiff's truck contained a design defect that caused an acceleration accident; the expert's opinion was not supported by the information he had and the methodology he used).
- ***Rheinfrank v. Abbott Labs, Inc.***, 680 Fed. App'x 369, 376 (6th Cir. 2017) (finding no error in the district court's ruling refusing to allow the plaintiff's regulatory expert to testify that

“DepoKote was known to be the most teratogenic drug”; the expert was not in a position to evaluate the relative risks of epilepsy drugs).

- ***Abrams v. Nucor Steel Marion, Inc.***, 694 Fed. App’x 974 (6th Cir. 2017) (affirming exclusion of an opinion by a toxicological expert that persons who reside “.25 to .50 miles” from the defendant’s plant “for a period of ten years or more” will suffer harm from chronic exposure to manganese; the opinion was an overstatement).
- ***United States v. Pembroke***, 876 F.3d 812 (6th Cir. 2017) (affirming admission of expert testimony regarding cell tower location analysis because the government did not attempt to put defendant’s cell phone in a very “specific” or “precise” location, but rather attempted to show the general geographical proximity to the locations of the robberies at the pertinent times; the court stated that the disclaimers about the limits of the methodology would have been good fodder for cross-examination of the expert).
- ***United States v. Reynolds***, 626 Fed. App’x 610 (6th Cir. 2015) (affirming admission of expert testimony concerning cell tower location analysis because the agent did not purport to rely on data to place the defendant *in* the home when child pornography was downloaded, but rather used data to *exclude* the presence of other members of household during relevant times because cell phones of other individuals connected to cell towers were far away from home during downloads).
- ***Krik v. Exxon Mobile Corp.***, 870 F.3d 669, 675 (7th Cir. 2017) (affirming exclusion of a toxicological expert’s testimony that asbestos exposure is “either zero or it’s substantial; there’s no such thing as not substantial exposure,” as unsupported by dose-dependent causation of cancer).
- ***United States v. Lewisbey***, 843 F.3d 653, 659-60 (7th Cir. 2016) (affirming admission of a expert testimony about the general location of the defendant’s cell phone based on call records and cell tower data, where the district court appropriately barred the agent “from couching his testimony in terms that would suggest that he could pinpoint the exact location of Lewisbey’s phones.”).
- ***United States v. Hill***, 818 F.3d 289, 295 (7th Cir. 2016): The court held that cell site analysis expert testimony should include a “disclaimer” regarding accuracy. The expert should not “overpromise on the technique’s precision or fail to account for its flaws.” The court affirmed the admission of cell site analysis testimony by an FBI agent where the agent made it clear that the defendant’s phone records were “consistent” with him being at or near relevant locations at relevant times, but clarified that he could not state whether a phone was “absolutely at a specific address.”
- ***Murray v. Southern Route Maritime, S.A., et al.***, 870 F.3d 915 (9th Cir. 2017) (affirming the district court’s admission of expert testimony about the theory of low-voltage diffuse electrical injury, where the district court highlighted the narrow nature of the expert’s opinion about the theory, and did not permit the expert to testify that the plaintiff’s injuries were *caused* by low-voltage shock).

3. The “Reasonable Degree of Certainty” Standard in Civil Cases

A rule prohibiting overstatement in forensic evidence cases would likely result in prohibiting and expert from testifying to a “reasonable degree of [field] certainty” of a feature-comparison match. As stated above, the DOJ has abandoned the standard, it has been rejected by scientific panels, and it is a classic example of overstatement. But in civil cases, there is a complication in rejecting the reasonable degree of certainty standard. In federal civil cases, litigants frequently object that the expert testimony offered by their opponents is unreliable and insufficient due to the experts’ *failure* to opine “to a reasonable degree of certainty.” Moreover, some states appear to require a reasonable certainty standard as a matter of state substantive law -- which is controlling in diversity cases, assuming that in fact it is substantive. *See, e.g., Antrim Pharmaceutical LLC v. Bio-Pharm., Inc.*, 310 F. Supp.3d 934 (N.D. Ill. 2018) (explaining that Illinois law permits plaintiffs to recover lost profits only if they can establish them “to a reasonable degree of certainty”; finding expert testimony sufficient to establish lost profits to the requisite degree of certainty); *Day v. United States*, 865 F.3d 1082 (8th Cir. 2017) (Under Arkansas law, a medical expert must testify that “the damages would not have occurred” without the defendant’s negligence; expert’s opinion “must be stated within a reasonable degree of medical certainty or probability.”).

It is arguable whether a state’s requirement of a “reasonable degree of certainty” standard is in fact a matter of substantive law, if what it means is that an expert’s testimony to a lesser standard is inadmissible. A state that requires experts to testify to a reasonable degree of medical certainty is enforcing that “law” through a rule of evidentiary exclusion --- you can’t testify unless you say those magic words. Under Federal Rule 402, state rules of evidence cannot be used to exclude relevant evidence in a Federal Court --- the only possible sources of exclusion are the federal constitution, federal statutes, and national rules of procedure.

One possible argument is that a state law requiring reasonable certainty is a rule of *competency*, and so would be applicable to diversity cases under Federal Rule 601. But it is hard to argue that an expert’s *level of certainty* is a question of *competence*, as opposed to a question of reliability or, more likely, probative value. *Compare Legg v. Chopra*, 286 F.3d 286 (6th Cir. 2002) (state law requiring doctor testifying to a standard of care to be licensed in Tennessee or a neighboring state is a rule of competency, because it is based on the conclusion that a doctor further away does not have the competence to evaluate the Tennessee standard of care; the Tennessee rule does not conflict with Rule 702, which governs the procedural issue of the reliability of an expert’s testimony).

It would seem that the better characterization of a state’s “reasonable degree of certainty requirement” is that it is not a rule of admissibility at all, but rather a rule about the sufficiency of evidence. If characterized that way, it certainly sounds more about substance. But if that is the proper characterization, then a state court in diversity should *not* exclude experts who testify to a fact being, say, “possible” rather than “certain.” The proper ruling would be to consider the

evidence but grant summary judgment if all the plaintiff has is an expert's conclusion that causation is possible.

But assuming that a state rule imposing the reasonable degree of certainty standard is a substantive requirement, even if a misguided one, then nothing in an evidence rule can change it. So it may be that a Committee Note supporting any change should flag the issue of the possibility of substantive law requiring such a statement from an expert.⁴

Beyond the substantive limitations that might be imposed by state law, some federal courts go further and find that an expert's opinion fails *Daubert* due to its lack of certainty, while others uphold the admissibility of expert opinions *because* they are stated with the requisite degree of certainty. Other courts hold that the "magic words" of reasonable degree of certainty are not required by *Daubert* and Rule 702.

Here are some recent cases on "reasonable degree of certainty" and Daubert:

- ***Johnson v. Memphis Light, Gas & Water Div.***, 695 Fed. App'x 131 (6th Cir. 2017): The trial court excluded the expert opinion of a medical examiner that the decedent's cause of death was "probable heat stroke," after the defendant objected that the opinion was not stated to the requisite "reasonable degree of medical certainty." The Sixth Circuit found that exclusion was error, in light of the medical examiner's testimony that "probable" did not mean "possible or maybe" but instead meant "reasonable to think" and "more likely than not." In finding the medical examiner's testimony admissible under *Daubert*, the appellate court noted that, although lawyers and judges routinely use the phrase "reasonable degree of certainty", there is no "consensus" as to its precise meaning. The court noted that "reasonable degree of certainty" is a term of art in the law that has no analog for practicing physicians carrying out their professional duties. The court concluded that there is "no magic words test" for an expert's testimony in the Sixth Circuit and that experts need not attach such language to an opinion to make it admissible, nor can the phrase save an otherwise unreliable opinion from exclusion.).
- ***Wendell v. Glaxo Smith Kline, LLC***, 858 F.3d 1227 (9th Cir. 2017) (reversing exclusion of medical experts' opinions where both experts testified that their opinions were "based on a reasonable degree of medical certainty" even though they "would not satisfy the standards required for publication in peer-reviewed medical journals.").
- ***Murray v. Southern Route Maritime, S.A., et al.***, 870 F.3d 915 (9th Cir. 2017) (rejecting the defendant's argument that medical experts should have been excluded because they failed to provide "more probable than not" testimony, reasoning that the experts confirmed their opinions "to a reasonable degree of certainty on a more-probable-than-not basis").

⁴ Notably, the DOJ standards prohibiting testimony to a reasonable degree of certainty, set forth above, contain an exception for cases in which the law requires such testimony.

- ***West v. Bayer Healthcare Pharm., Inc.***, 293 F. Supp.3d 82 (D.D.C. 2018) (rejecting the defendant’s motion to exclude the plaintiff’s causation experts, as to a claim based upon bacterial contamination of pharmaceutical product, due to the experts’ alleged inability to “conclusively rule out” every other possible cause of plaintiff’s injuries; the experts’ opinions that the plaintiff’s symptoms were “more likely than not” caused by contamination were adequate; in support of its holding, the court quoted a case finding that testimony that defendant’s negligence “more likely than not” caused plaintiff’s harm “based on a reasonable degree of medical certainty” is adequate).
- ***Guzman-Fonalledas v. Hospital Espanol Auxilio Mutuo***, 308 F. Supp.3d 604 (D.P.R. 2018) (approving admission of expert testimony to a “reasonable degree of medical and surgical pathology certainty” that the plaintiff’s mistaken diagnosis constituted a significant deviation from the usual standards of medical care).
- ***Hewitt v. Metro-North Commuter Railroad***, 244 F. Supp.3d 379 (S.D.N.Y. 2017) (in the plaintiff’s suit against a railroad alleging shoulder injury suffered as a result of requirements of his job as a coach cleaner, the court approved testimony by an ergonomics expert about the ergonomic risks in the plaintiff’s job and measures that could have been taken to avoid those risk, “to a reasonable degree of ergonomic certainty”).
- ***Jordan v. Iverson Mall Ltd. Ptsp.***, 2018 WL 2391999 (D.Md.): The defendants argued that the plaintiffs’ medical expert should not have been allowed to testify because she never stated that her opinion was to a “reasonable degree of medical certainty.” The court reviewed Fourth Circuit case law, which requires the expert to have a reasonable degree of medical certainty for an opinion on causation to be admissible. But the court concluded that the Fourth Circuit case law does not require the expert to say the magic words “reasonable degree of certainty.” In this case, the court found that the expert was testifying to a reasonable degree of certainty even though she never used that term.
- ***Ernst v. City of Chicago***, 39 F. Supp.3d 1005 (N.D. Ill. 2014) (expert’s use of uncertain qualifiers, such as “might”, “possible”, “potentially”, “appear to be”, and “likely” were not sufficient to exclude opinion as speculative).
- ***Bullock v. Volkswagen Group of Amer., Inc.***, 160 F. Supp.3d 1365 (M.D. Ga. 2016) (rejecting defendants’ challenge to the admission of the plaintiff’s expert in automobile mechanics, based on the expert’s failure to express his opinions about acceleration to a “reasonable degree of scientific certainty or probability”; the court found that the expert’s trial testimony established that he held his opinions “to the requisite degree of certainty required under the law” even though he failed to use the “magic words”).
- ***Rangel v. Anderson***, 202 F. Supp.3d 1361 (S.D. Ga. 2016) (doctor’s testimony using terms like “possible” and “likely” interchangeably in describing cause of plaintiff’s injuries highlighted his lack of certainty; testimony failed to establish a reasonable degree of medical certainty and thus failed to satisfy *Daubert*).

Reporter's Comment: A movement toward abrogating the “reasonable degree of certainty” standard in civil cases could be a salutary development. The National Commission on Forensic Sciences pointed out that such a standard is “not required by *Daubert*.” The question under *Daubert* is whether an opinion is reliable and helpful, and surely an opinion can so qualify without the meaningless and confusing buzzwords of “reasonable degree of medical certainty.”

Moreover, the courts that require an expert to testify to a reasonable degree of certainty appear to be confusing admissibility of the opinion and the weight of the evidence. Assuming reliable methodology, if an expert testifies that something is possible, why would that not be admissible under Rule 702? It would certainly seem relevant and helpful. Such an opinion would be unlikely to constitute *sufficient* evidence of causation, but that is not the question to be answered on a *Daubert* motion.

All in all, an amendment to address expert overstatement on the civil side might be valuable in drawing the courts away from the reasonable degree of certainty standard.

II. Case Digest on Forensic Expert Testimony

The Committee has expressed an interest in development of a case digest on forensic expert testimony, as a way to evaluate the scope of the problem. The Reporter has prepared a digest on federal appellate cases and federal district court cases. The digests run from 2008 to date --- 2008 was picked because that was when the first challenges in the scientific community were voiced. (I threw a couple of older cases in that I wrote up for other projects).

Notes:

1. There is an asterisk in front of the new cases, i.e., those that were *not* included in the April agenda book.
2. If the case involves a court allowing overstated testimony, it is highlighted in the caption. “Overstatement” is defined herein as an opinion that might lead the jury to think that the expert was more certain, or more error-free, than the expert’s methodology can support.

A. Federal Appellate Cases on Forensic Evidence

Acid-phosphate testing: *United States v. Rodriguez*, 581 F.3d 775 (8th Cir. 2009): The court affirmed a conviction for kidnapping resulting in death, finding no abuse of discretion in permitting a government pathologist to testify about acid-phosphate tests on the victim’s body, indicating the presence of semen. The pathologist “did not invent acid-phosphate testing; he testified to attending national medical conferences and reviewing scientific literature on the topic.” The expert’s conclusion was based on living people, and the defendant pointed out that there was uncertainty about the timing of the chemical process on a corpse. But the court found that this variable went to weight and not admissibility.

Ballistics --- Overstatement Problem—testimony to a match: *United States v. Williams*, 506 F.3d 151 (2nd Cir. 2007): The court found no abuse of discretion in allowing a ballistics expert to testify to a “match.” The court’s found that the district court was not required to hold a *Daubert* hearing on the admissibility of ballistics evidence, as the district court had relied on precedent.

We think that *Daubert* was satisfied here. When the district court denied a separate hearing it went through the exercise of considering the use of ballistic expert testimony in other cases. Then, before the expert's testimony was presented to the jury, the government provided an exhaustive foundation for Kuehner's expertise including: her service as a firearms examiner for approximately twelve years; her receipt of “hands-on training” from her section supervisor; attendance at seminars on firearms identification, where firearms examiners from the United States and the international community gather to present papers on current topics within the field; publication of her writings in a peer review journal; her obvious expertise with toolmark identification; her experience examining approximately 2,800 different types of firearms; and her prior expert testimony on between 20 and 30

occasions. Under the circumstances, we are satisfied that the district court effectively fulfilled its gatekeeping function under *Daubert*.

The court did impose a qualification on admitting ballistics testimony:

We do not wish this opinion to be taken as saying that any proffered ballistic expert should be routinely admitted. *Daubert* [did not] “grandfather” or protect from *Daubert* scrutiny evidence that had previously been admitted under *Frye*. Thus, expert testimony long assumed reliable before Rule 702 must nonetheless be subject to the careful examination that *Daubert* and *Kumho Tire* require. * * * Because the district court’s inquiry here did not stop when the separate hearing was denied, but went on with an extensive consideration of the expert’s credentials and methods, the jury could, if it chose to do so, rely on her testimony which was relevant to the issues in the case. We find that the gatekeeping function of *Daubert* was satisfied and that there was no abuse of discretion.

Ballistics: *United States v. Mikos*, 539 F.3d 706 (7th Cir. 2008): The court found no error in admitting the testimony of a ballistics expert that the defendant’s revolver was one of the models that could have been the murder weapon. The expert disclosed that at least 15 other models could have fired the bullets, *so he did not overstate his findings*. The expert reliably applied the data he obtained to conclude that the rifling on the bullets did not rule out the defendant’s make and model of gun.

Ballistics --- some limitation on overstatement: *United States v. Parker*, 871 F.3d 590 (8th Cir. 2017): In a trial on charges of illegal possession of firearms, the defendant argued that the trial court erred in allowing testimony of a ballistics expert. The trial court prohibited the expert from testifying that she was “100% sure” or “certain” that the relevant guns matched the relevant shell casings. The defendant argued that the expert violated that restriction by describing the general reliability of the ballistics testing process. But the court, after reviewing the trial transcript, concluded that the expert’s testimony “stayed within the bounds set by the district court.”

Comment: By implication, this may mean that it would be error for a ballistics expert to testify to “100% certainty of a match” --- because such an opinion is not scientifically supportable. But what is not discussed in the opinion is what the expert was actually allowed to testify to. I couldn’t find a written opinion below. But it is not unlikely that the expert was allowed to testify to a reasonable degree of ballistic certainty, as that has been the solution of most courts.

Ballistics --- Overstatement--- reasonable degree of ballistics certainty: *United States v. Johnson*, 875 F.3d 1265 (9th Cir. 2017): In a felon-gun possession case, the expert testified that two bullets matched to a “reasonable degree of ballistics certainty.” The court found that this “qualification” was sufficient to justify admission of the expert testimony – i.e., the expert did not state, categorically that there was a match. The court rejected the defendant’s argument --- based on a report and recommendation from National Commission of Forensic Science --- that the

“reasonable degree of ballistics certainty” test was itself insupportable and misleading. The court did not address the Commission report but instead simply relied on lower court cases employing the standard and stated that there was “only one case in which a ‘reasonable degree of ballistics certainty’ was found to be too misleading.” That case is *United States v. Glynn*, 578 F.Supp.2d 567 (S.D.N.Y. 2008). Finally, the court rejected the defendant’s argument that ballistics is inherently unreliable and fails to satisfy the Daubert factors. But instead of rebutting the defendant’s attack on ballistics as unscientific, the court simply relied on precedent and stated that the defendant had not cited a case in which ballistics testimony was “excluded altogether.”

Comparative bullet lead analysis: *Kennedy v. Peele*, 552 Fed. Appx. 787 (10th Cir. 2014): The plaintiff sought damages for suffering a wrongful conviction. The defendant, an agent with the FBI, conducted comparative bullet-lead analysis (“CBLA”) linking the plaintiff to multiple murders. The plaintiff argued that CBLA is unreliable (an argument since validated), and that the defendant knew “there was a question regarding the scientific reliability of the lead matching theory,” but failed to disclose that the CBLA method lacked a statistical and scientific basis. The court held that the defendant was entitled to qualified immunity. It stated that it could not “ignore the fact that CBLA was widely accepted at the time of the events at issue.” And the plaintiff’s attack was on CBLA in general rather than any specific misconduct by the defendant.

*** DNA single source samples:** *United States v. Silva*, 889 F.3d 704 (10th Cir. 2018): In a felon-firearm possession case, the government called a DNA expert who testified on the basis of “single source samples” (i.e., no problem of extraction of one source from multiple sources), that she could not exclude the defendant’s profile as the donor of the samples collected from a truck and a house. The defendant argued that the testimony should have been excluded because the numbers of the samples on her digital record did not match up with the numbers on the tubes. The expert recognized the error but said it was a typo, and that the error “had nothing to do with what’s labelled on the actual tube.” The court found no error in admitting the expert’s testimony because the errors “were typographical only and did not affect her analysis and its result.” The court then stated that “errors in the implementation of otherwise-reliable DNA methodology typically go to the weight that the trier of fact should accord to the evidence and not to its admissibility.”

Comment: It is surely true that the typographical error should not render the testimony inadmissible, because the actual test was reliably conducted. Therefore the court did not need to state --- twice --- that errors in application are questions of weight on not admissibility. This wasn’t even an error in application. Or if it was, the trial judge could easily have found, by a preponderance of the evidence, that the test was reliably conducted even given the typo.

DNA Extraction: *United States v. Eastman*, 645 Fed. Appx. 476 (6th Cir. 2016): The defendant argued that polymerase chain reaction (PCR)—the process used to identify Eastman as the likely major DNA profile found on three dust masks—has no known error rate or accepted procedure for determining an error rate, and therefore should be rejected. But the court found no abuse of discretion in admitting the DNA identification. The court relied almost exclusively on precedent.

The defendant’s argument confuses the error-rate factor with an admissibility requirement. More than ten years ago, we noted that “[t]he use of nuclear DNA analysis as a forensic tool has been found to be scientifically reliable by the scientific community for more than a decade.” *United States v. Beverly*, 369 F.3d 516, 528 (6th Cir. 2004). Eastman presents no groundbreaking evidence that leads us to question that decision. At least one of our sister circuits even permits trial courts to take judicial notice of PCR’s reliability. See *United States v. Beasley*, 102 F.3d 1440, 1448 (8th Cir. 1996). Of course, a defendant may challenge sound scientific methodology by showing that its reliability is undermined by procedural error—failure to follow protocol, mishandling of samples, and so on. But Eastman did not do so here.

DNA identification: *United States v. Preston*, 706 F.3d 1106 (9th Cir. 2013): In a sexual assault prosecution, the defendant argued that the expert’s testimony regarding DNA identification should have been excluded. The court analyzed and rejected this argument in the following passage:

The district court properly applied Rule 702 to determine whether to admit the testimony of the DNA analyst. The trial judge fulfilled his “gatekeeper” role pursuant to *Daubert* and allowed the expert's testimony based on the foundation laid by the prosecutor that established the relevance and reliability of the testimony and the scientific method by which the DNA was analyzed; the DNA was subjected to a common procedure for analysis. * * * Preston argues that the “analyst went below her lab's quality threshold.” However, the expert explicitly stated that while the test conducted may have fallen below the lab's “reporting threshold,” the analysts are “allowed to go below that level to try and eliminate or exclude someone.” This is exactly what the expert did. * * *

Preston incorrectly asserts that the district court “erroneously used the DNA population statistics.” Specifically, Preston claims that the district court misinterpreted the DNA evidence when it stated that “99.8% of the general Navajo population can be excluded as possible contributors of such DNA.” The analyst testified that “99.8 percent of Navajo contributors” taken from a “population of randomly selected unrelated individuals” could be eliminated as contributors to the DNA found in TD's underwear. Preston claims that “the 99.8% statistic suggests only that this percentage of randomly selected, unrelated Navajo Native Americans is unlikely to have the exact same DNA profile as Mr. Preston—the presence or absence of alleles at only five loci would yield a significantly lower percentage.” Preston, however, has misinterpreted the analyst's statistics; the analyst eliminated 99.8% of the Navajo population based on an analysis of the sample taken from TD's underwear and not based on an analysis of Preston's DNA, and Preston provides no basis for his claim that another test, which he fails to describe, “would yield a significantly lower percentage.”

Drug identification: Overstatement, infinitesimal error rate --- *United States v. Mire*, 725 F.3d 665 (7th Cir. 2013): The court found no error in the admission of testimony by a chemist that the defendant was carrying the controlled substances cathinone and cathine. The court found the forensic testing process to be reliable. The expert relied on published literature and peer-reviewed studies to support the reliability of the methodology. The expert stated that the rate of error was “infinitesimal” --- and while that ought to raise some concern, the court found that conclusion to be a factor *supporting* reliability.

Drug identification: *United States v. Carlson*, 810 F.3d 544 (8th Cir. 2016): The court affirmed convictions for selling misbranded synthetic drugs, finding no abuse of discretion in the admission of testimony from a DEA chemist regarding the substantial similarity in chemical structure between scheduled controlled substances and the products sold by the defendants. The entirety of the court’s analysis is as follows:

The district court did not abuse its discretion by permitting Dr. Boos to testify. He testified that his conclusion was based on relevant evidence he had observed, his specialized knowledge in the field, his review of the scientific literature, and discussions with other scientists at the DEA. Although the defendants contend that Dr. Boos's testimony did not flow naturally from disinterested research, that his methodology was not subject to peer review or publication, and that his theory had no known rate of error, these objections go to the weight of Dr. Boos's testimony, not to its admissibility.

Comment: Charges of suspect motivation, lack of peer review, and no known rate of error clearly do not go to weight. The *Daubert* Court itself says that these matters affect admissibility.

EDTA testing offered by the defendant, rejected: *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007): In a habeas challenge to a conviction for multiple murders, the defendant argued that a forensic test for the preservative agent ethylene-diamine tetra-acetic acid (EDTA) on a bloody T-shirt would show that blood had been taken from a vial and planted on the shirt. The court found no abuse of discretion in the trial judge’s conclusion that the EDTA testing lacked sufficient indicia of reliability to be admissible, because it had not been subjected to peer review, “there has been no discussion of forensic EDTA testing in scientific literature since a 1997 article that headlines the need for a better analytical method,” and it is not possible to determine the error rate of EDTA testing because of the widespread presence of EDTA in the environment.

Fabric-impression analysis found unreliable in part by trial court: *United States v. Williams*, 576 F.3d 385 (7th Cir. 2009): The defendants challenged the trial court’s admission of an expert’s conclusion that an impression on a glass door at the robbery scene was left by a non-woven fabric and could have been made by a glove. The expert also sought to testify that the impression was consistent with the pair of gloves containing Williams’s DNA, but the district court

excluded that testimony because it considered the underlying science, fabric impression analysis, unreliable under *Daubert*. The defendants argued that the admitted testimony relied on the same science as the excluded testimony--fabric impression analysis--and therefore also should have been excluded. The court of appeals did not rule on the argument, finding any error to be harmless.

Fingerprint identification: Overstatement --- zero rate of error --- *United States v. Straker*, 800 F.3d 570 (D.C.Cir. 2015): The court rejected the defendant's argument that fingerprint identification, using the ACE-V method, was unreliable. The expert testified that there are two different types of error—the error rate in the methodology and human error. She further testified that there is a “zero rate of error in the methodology.” She did not articulate the rate of human error, though she acknowledged the potential for such error. The defendant argued that the failure to articulate the rate of human error in the ACE–V methodology rendered her testimony based on that methodology inadmissible. But the court disagreed, arguing that “the factors listed in *Daubert* do not constitute a definitive checklist or test” and that “[n]o specific inquiry is demanded of the trial court.” The court stated that the reliability of the ACE-V methodology was “properly taken for granted” because courts routinely find fingerprint identification based on the ACE–V method to be sufficiently reliable under *Daubert*.

* **Fingerprint Identification: Overstatement – infinitesimal error rate --- *United States v. Casanova***, 886 F.3d 55 (1st Cir. 2018): Affirming the defendant's convictions for tampering with a witness by attempting to kill him and making a false statement to a federal agent, the court held that it was not plain error to allow latent print examiner testimony to an identification. The expert, Truta, a senior criminalist in the Latent Print Unit of the Boston Police Department, testified about the history of fingerprint examinations in criminal investigations, the “ACE-V” method (analysis, comparison, evaluation, and verification) his department uses to compare fingerprints and perform identifications, and the results of analyses he performed on prints collected from the scene of the shooting. Truta identified one particular palm impression, located on a straw wrapper found in the back seat of the car in which the victim was shot, as belonging to Casanova. Witnesses had testified that Casanova was in that back seat. On cross-examination, Truta testified, “as far as I know, in the United States there are not more than maybe 50 erroneous identifications, which comparing with identifications that are made daily, thousands of identifications, the error rate will be very small.” Truta had previously testified that it would be inappropriate to claim that the rate of false-positive identifications is zero (which is at least something, I guess --- not zero but 50 in a zillion). Truta emphasized that his testimony was based on what he had read in the literature, and acknowledged that at the time of his testimony, there was “no known database of latent prints” that would permit a statistical analysis of false-positive rates for fingerprint identifications.

The defendant argued that Truta “claimed falsely that the error rate in fingerprint comparisons was effectively zero.” But the court stated that “Truta never testified that the error rate for fingerprint examinations was ‘effectively zero.’ * * * Rather, Truta testified that in light of the number of recorded errors he knew of from his own review of the literature, and the number of fingerprint identifications made daily, he expected the error rate to be ‘very small.’ He did not calculate or assert any particular error rate and he specifically cautioned that whatever the rate may

be, it would not be zero. On redirect he acknowledged that there was no statistical method generally accepted in the field for determining actual statistical probabilities of erroneous identifications. This is the classic stuff of cross-examination and redirect.”

The defendant relied on the PCAST report, and the court had this to say about that:

Casanova grounds his entire challenge on a single post-trial report that provided recommendations to the executive branch regarding the use of fingerprint analysis as forensic evidence in the courtroom. See President's Council of Advisors on Sci. and Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016). The report, issued after Casanova's trial had already ended, is not properly before this court, and in any event it does not endorse a particular false-positive rate or range of such rates.

Comment: Saying “I have read some stuff and it is, uh, about 50 mistakes in all the fingerprints ever done” is not much different from saying that the error rate is effectively zero. The court makes a big deal about the distinction but what else is a jury to take from the testimony? It’s a clear case of overstatement. Note that the testimony was from a state expert, not from the FBI.

Fingerprint identification: Overstatement --- testimony of a match --- *United States v. Pena*, 586 F.3d 105 (1st Cir. 2009): The trial judge expressed doubts about the reliability of an expert’s fingerprint identification, because the governing protocol used no specific minimum number of points to confirm a match. The defendant argued that the ACE-V method was unreliable because it involved merely a visual comparison of the two prints, the trooper conducting the initial analysis knew that the inked print was taken from a suspect, and the trooper made no diagrams, charts, or notes as part of his evaluation. But the judge relied on precedent, describing the case law as “overwhelmingly in favor of admitting fingerprint experts under virtually any circumstance.” The trial judge essentially imposed the burden on the defendant to present data to overcome the uniform precedent, and held that the defendant did not satisfy that burden by producing a (Fordham) law review article questioning latent fingerprint identification as being impermissibly subjective. The court of appeals found no abuse of discretion, given the precedent allowing the use of fingerprint identification.

Fingerprint identification: Overstatement --- testimony of a match --- *United States v. John*, 597 F.3d 263 (5th Cir. 2010): The court found no abuse of discretion in allowing a fingerprint expert to testify to a “match.” It recognized that the methodology is subjective, because “there is no universally accepted number of matching points that is required for proper identification.” But it relied on precedent holding that the method was “testable, generally accepted, and sufficiently reliable and that its known error rate is essentially zero.” The defendant pointed out that the expert’s opinion had not been subjected to blind verification, but the court responded that no case law holds that blind verification is required.

Fingerprint testimony: Overstatement --- testimony that the methodology was error-free: *United States v. Watkins*, 450 Fed. Appx. 511 (6th Cir. 2011): The defendant relied on the 2009 NAS report to argue that latent fingerprint identification (the ACE-V method) is unreliable and should have been excluded. The examiner had testified that the method was 100% accurate. But the court found no error. It stated that the error rate “is only one of several factors that a court should take into account when determining the scientific validity of a methodology. These factors include testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique’s operation, and general acceptance in the relevant scientific community.” At the *Daubert* hearing in this case, the fingerprint examiner testified about custody-control standards, generally accepted standards for latent fingerprint identification, peer review journals on fingerprint identification, and the system of proficiency testing within her lab. The court “decline[d] to hold that her allegedly mistaken error-rate testimony negates the scientific validity of the ACE-V method given all the other factors that the district court was required to consider.”

Comment: The court seems to say that because the methodology is sufficiently reliable, it is a question of weight when the expert says it is error-free. This makes no sense. Surely a methodology can be reliable by a preponderance of the evidence and yet have a rate of error. Why can’t the court allow the testimony about the procedure, but preclude the expert from testifying that it is error-free? It would seem that highlighting the problem of overstatement --- as an admissibility requirement --- might get courts to focus more on it and not leave it to the jury to sort out.

Fingerprint identification: Overstatement, testimony of a match and an infinitesimal error rate: *United States v. Herrera*, 704 F.3d 480 (7th Cir. 2013): upholding the use of latent fingerprint matching the court noted that the expert received “extensive training” and that “errors in fingerprint matching by expert examiners appear to be very rare.” It conceded that latent fingerprint matching is “judgmental rather than scientifically rigorous because it depends on how readable the latent fingerprint is and also on how distorted a version of the person’s patent fingerprint it is.” But it compared fingerprint-matching favorably to another form of subjective matching --- eyewitness identification. It stated that “[o]f the first 194 prisoners in the United States exonerated by DNA evidence, none had been convicted on the basis of erroneous fingerprint matches, whereas 75 percent had been convicted on the basis of mistaken eyewitness identification.”

Comment: The comparison of fingerprint-matching and eyewitness identification is a false one, as Judge Edwards has pointed out. They are not comparable because a fingerprint-matcher touts his expertise and testifies to a match with a reasonable degree of scientific certainty.

Fingerprint identification: *United States v. Calderon-Segura*, 512 F.3d 1104 (9th Cir. 2008): This is an unusual case in which the defendant challenged fingerprint identification testimony which found a match when comparing two inked thumb-print exemplars. The court

noted that the defendant's challenge related to questions about *latent* fingerprints, whereas the reliability and admissibility of comparison of two inked fingerprints is "well-established." The court emphasized that the defendant made no showing that the exemplars "lacked clarity, were fragmented, or contained any other defects or artifactual interference that might call into question the accuracy or reliability of their identification."

Fingerprint identification --- Overstatement, testimony of a match: *United States v. Baines*, 573 F.3d 979 (10th Cir. 2009): The court found that the trial court did not abuse discretion in admitting expert testimony that a latent fingerprint matched the fingerprint of the defendant that was taken when he was arrested. The defendant argued that fingerprint analysis is unreliable under *Daubert*, because comparison of a latent print to a known print is essentially a subjective evaluation, with no rate of error established, and the only verification is done by a second investigator who is usually closely associated with the first investigator. The court recognized that there are "multiple questions regarding whether fingerprint analysis can be considered truly scientific in an intellectual, abstract sense" but declared that "nothing in the controlling legal authority we are bound to apply demands such an extremely high degree of intellectual purity." The court stated that "fingerprint analysis is best described as an area of technical rather than scientific knowledge." Turning to the *Daubert/Kumho* factors, the court recognized that fingerprint analysis was subjective, and that there was really no peer review of the process. As to rate of error, the court concluded that whatever the flaws in the studies conducted on false positives, "the known error rate remains impressively low." As to the factor of general acceptance, the defendant argued that fingerprint analysis had not been accepted in any unbiased scientific or technical community, and that its acceptance by law enforcement and fingerprint analysts should be considered irrelevant. But the court disagreed, noting that the Court in *Kumho* "referred with apparent approval to a lower court's inquiry into general acceptance into the relevant expert community" and also referred to testing "by other experts in the industry." The court concluded that while acceptance by a community of unbiased experts "would carry greater weight, we believe that acceptance by other experts in the field should also be considered. And when we consider that factor with respect to fingerprint analysis, what we observe is overwhelming acceptance."

* **Fingerprint identification, likely inadmissible: *United States v. Watkins*, 880 F.3d 1221 (11th Cir. 2018):** In an illegal reentry prosecution, the government called an expert to testify to a fingerprint identification. The court of appeals found that the trial court "likely erred" in admitting the testimony but found any error to be harmless. The court did not discuss the particulars. It simply concluded that the fingerprint analyst's testimony was "probably not reliable" because the analyst did not specifically testify about her scientific methods and her testimony may not have been based on sufficient facts or data."

Fingerprint identification: Overstatement, testimony of a match: *United States v. Scott*, 403 Fed. Appx. 392 (11th Cir. 2010): The defendant challenged the expert's use of the ACE-V method. The court simply relied on precedent to reject the challenge. In *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005), the court had concluded that the error rate of latent fingerprint examination was infinitesimal, and that latent fingerprint examiners follow a uniform

methodology. The *Abreu* court also gave significant weight to the fact that latent fingerprint methodology was generally accepted --- by the field of latent fingerprint examiners (which is not a large surprise). The *Scott* court concluded as follows:

Although there is no scientifically determined error rate, the examiner's conclusions must be verified by a second examiner, which reduces, even if it does not eliminate, the potential for incorrect matches. The ACE-V method has been in use for over 20 years, and is generally accepted within the community of fingerprint experts. Based on this information, the district court did not commit an abuse of discretion by concluding that fingerprint examination is a reliable technique.

Footwear-impression testimony allowed --- Overstatement, zero error rate: *United States v. Mahone*, 453 F.3d 68 (1st Cir. 2006): The court found no abuse of discretion when a government witness was permitted to testify as an expert on footwear-impression identification, even though she was not qualified through the International Association for Identification --- and despite the fact that the expert testified that the methodology had a zero error rate. The expert relied on the ACE-V method (analysis, comparison, evaluation, and verification) for assessing footwear impressions. The defendant argued that the ACE-V method “utterly lacks objective identification standards” because: 1) there is no set number of clues which dictate a match between an impression and a particular shoe; 2) there is no objective standard for determining whether a discrepancy between an impression and a shoe is major or minor; and 3) the government provided “absolutely no scientific testing of the premises underlying ACE-V.” The court essentially relied on precedent to find no abuse of discretion:

From the outset, it is difficult to discern any abuse of discretion in the district court's decision, because other federal courts have favorably analyzed the ACE-V method under *Daubert* for footwear and fingerprint impressions. See *United States v. Allen*, 207 F.Supp.2d 856 (N.D.Ind.2002) (footwear impressions), aff'd, 390 F.3d 944 (7th Cir.2004); *United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir.2004) (favorably analyzing ACE-V method under *Daubert* in latent fingerprint identification case); *Commonwealth v. Patterson*, 445 Mass. 626, 840 N.E.2d 12, 32-33 (2005) (holding ACE-V method reliable under *Daubert* for single latent fingerprint impressions).

Footwear-impression analysis --- Overstatement--- testimony of a match--- *United States v. Turner*, 287 Fed. Appx. 426 (6th Cir. 2008): the defendant appealed the district court's denial of his motion to exclude the boot-print analysis of the government's expert. The court found no error. The court noted that both the government and defense expert testified that photographic analysis was recognized as a valid method of shoe-print analysis within the scientific community. The government expert testified that the government lab methods were tested by an independent agency once during the year, and that he had never failed a proficiency test. Also, the government presented evidence indicating that a book entitled *Footwear Impression Evidence* by William J. Bodziak stated that “[p]ositive identifications may be made with as few as one random identifying characteristic.” The court rejected arguments that an electrostatic method should have been used, and that the four points of comparison used by the government expert were insufficient to conclude

that the boot and the print on the glass matched. It stated that “the government and defense experts disagreed as to whether the photographic or the electrostatic method would be better to use on the boot print at issue--not whether the photographic method was a valid method, tested and accepted by the larger scientific community. In addition, the record reveals that the experts also disagreed about the number of points of comparison necessary for a positive match between the boot and the print. These disputes go to the weight of the evidence rather than its admissibility.”

Comment: Shouldn't a question of the necessary number of points of comparison be decided by the judge? That is the critical aspect of the methodology itself; if not that, it is at least a critical question about the application of the methodology. The court, in throwing up its hands and leaving questions about the methodology to the jury, appears to be using the Rule 104(b) standard, in violation of Rule 702.

Footwear-impression testimony --- Overstatement--- testimony of a match: *United States v. Smith*, 697 F.3d 625 (7th Cir. 2012): The defendant argued that the trial court erred in admitting footwear-impression testimony by an FBI examiner. The expert testified that the left Nike shoe worn by the defendant at the time of the robbery made the partial impression on the piece of paper recovered from the tellers' counter at the bank and that the impressions left on the bank carpet were “consistent with” the shoes worn by defendant Smith at the time of his arrest. The court found no error. It relied on prior precedent predating the scientific reports challenging the footprint methodology. See *United States v. Allen*, 390 F.3d 944, 949–50 (7th Cir. 2004). The court stated that “In *Allen*, we affirmed the admission of footprint analysis testimony where the expert testified that ‘accurate comparisons require a trained eye; the techniques for shoe-print identification are generally accepted in the forensic community; and the methodologies are subject to peer review.’” In this case the FBI Examiner testified that the four-step approach he used is employed by forensic laboratories throughout the United States, in Canada, and in thirty other countries. He also explained that there have been peer reviews of the methodology, published in several books and articles. And he explained in detail how he applied this methodology to the footprint impressions recovered at the bank. This was enough to establish that the testimony met the criteria of Rule 702.

Comment: Assuming the footprint methodology is reliable, the fact that subjective judgment is required means that there is a rate of error. Therefore, while it seems correct to allow the expert to testify that a footprint is “consistent with” the defendant’s shoe, it is surely an overstatement to say that the defendant’s shoe is the one that made a partial impression on a piece of paper.

Gun residue testing upheld: *United States v. Stafford*, 721 F.3d 380 (6th Cir. 2013): In a felon-firearm prosecution, the defendant challenged gunshot-residue evidence. He argued that the testing is imprecise and that there is no consensus in the discipline as to how many particles must be identified in order to find a positive for residue. But the court found that the expert’s test had revealed five particles, and that this was more than the minimum allowed by the most stringent standard used by experts in the field. The defendant also argued that he could have been exposed to gunshot residue without ever having fired a gun. The court conceded that this was so, but

concluded that this affected the probative value of the test result, not the reliability of the conclusion that five particles of gunshot residue were found on the defendant's hands.

* **Handwriting: *United States v. Mallory***, 2018 U.S. App. LEXIS 24683 (6th Cir. Aug. 30, 2018): Defendants were convicted on charges arising from a scheme to steal Fewlas's sizeable estate by forging a signature on his will. On appeal, Defendants McKnight and Pioch objected to the trial court's admission of testimony by government handwriting expert Olson, who testified that the signature on the forged will was "probably" not Fewlas's, but instead a "simulation" performed by someone else. The court held that the district court did not abuse its discretion in admitting Olson's handwriting analysis. Citing *Daubert*, *Kumho Tire*, and Sixth Circuit precedent, the court found that the district court faithfully applied these legal standards in deeming Olson's handwriting analysis to be reliable, and affirmed the general reliability of expert handwriting analysis.

The court relied most heavily on *United States v. Jones*, the handwriting case that was cited in the Committee Note to the 2000 amendment to Rule 702 --- the citation that some people have argued opened the gate to admission of unreliable forensic evidence. The court's analysis of *Jones*, *Daubert*, and *Kumho* is as follows:

The reliability of expert handwriting analysis has come before our court before. In *United States v. Jones*, our court upheld the admissibility of such testimony. 107 F.3d 1147, 1161 (6th Cir. 1997). In so holding, *Jones* explained that handwriting analysis is not a science *per se*. Handwriting analysts "do not concentrate on proposing and refining theoretical explanations about the world," as scientists do. Instead, handwriting analysts "use their knowledge and experience to answer the extremely practical question of whether a signature is genuine or forged." Handwriting analysts see things in handwriting that laypeople do not—both because of analysts' training in the minutiae of loops, swoops, and dotted 'i's, and because of the volume of handwriting they inspect—and therefore assist the trier of fact by bringing their training and experience to bear. Thus, while handwriting analysis may not boast the "empirical" support underpinning scientific disciplines, it is nevertheless "technical" or "specialized" knowledge that, subject to thorough gatekeeping, is a proper area of expertise.

Our court decided *Jones* without the benefit of *Kumho Tire*. In *Kumho Tire*, the Supreme Court clarified that the *Daubert* factors may also be useful in scrutinizing non-scientific expertise. * ** [T]he *Kumho* Court referenced handwriting analysis as an area where strict *Daubert*-type analysis might be less appropriate, indicating that "the relevant reliability concerns may focus upon personal knowledge or experience." Since *Jones* predated *Kumho Tire*, it did not apply the *Daubert* factors in evaluating the handwriting analysis at issue. Still, *Jones*'s focus on handwriting analysts' experience-based expertise is consistent with *Kumho Tire*, even though *Daubert*-type inquiries may also be appropriate in evaluating such testimony.

The court then proceeded to consider the trial court's review of the handwriting expert's opinion in this case.

Here, the district court faithfully applied *Daubert*, *Jones*, and *Kumho Tire* in deeming Olson’s handwriting analysis admissible. The court conducted thorough *voir dire* to ascertain Olson’s experience and methodology. Olson testified to his thirty-one years’ experience as an ink chemist and forensic document examiner at the IRS National Forensic Laboratory, during which he has performed countless handwriting analyses and testified in court on multiple occasions. He explained that his laboratory is accredited by an international organization that polices general standards practiced throughout the discipline. In addition, Olson walked through the principles and basic approach he used in performing his analysis. To perform the analysis, Olson studied approximately ninety-one known examples of Fewlas’s signature. From those samples, he discerned various unique characteristics, many of which he then found lacking in the signature on the forged will. As Olson explained, this approach embodies two precepts—no two people write exactly alike, and no one person writes exactly the same every time—which he represented as having been tested in various studies and experiments. *See United States v. Prime*, 431 F.3d 1147, 1153 (9th Cir. 2005) (affirming admission of handwriting expert citing one of the same studies). Those studies and experiments, according to Olson, further establish that his mode of analysis is highly accurate. Moreover, Olson testified that his laboratory requires document examiners to review each other’s work, and that in this case, another document examiner not only reviewed his work but independently verified his opinion. *See Prime*, 431 F.3d at 1153 (highlighting similar review and verification); *accord United States v. Crisp*, 324 F.3d 261, 271 (4th Cir. 2003). Based on this testimony, the district court did not abuse its discretion in deeming Olson’s testimony reliable.

The defendants argued that the trial court erred in referring to handwriting as a “science.” But the court had this to say about that:

Handwriting analysis, of course, is not a science—*Jones* makes that much clear. The district court’s loose language in describing handwriting analysis as a science, however, was more of an afterthought to otherwise thorough gatekeeping. The court’s *voir dire* demonstrates that, rather than viewing handwriting analysis as a science, it sought to ascertain whether Olson’s experience-based expertise was reliable. * * *

Reporter’s comment: The court’s analysis indicates that the reference to *Jones* in the Committee Note is not a serious problem. That is because *Kumho* itself paves the way for admission of handwriting testimony as a technical rather than scientific skill. The Committee Note essentially tracks *Kumho* to that effect. One can argue that the real problem of handwriting evidence is the distinct possibility of *overstatement* --- for example, testifying that it is scientific, or has a zero rate of error. In this case, no such testimony was given. The expert only testified that a forgery was “probable.”

Handwriting Identification (and fingerprinting): *United States v. Dale*, 618 Fed. Appx. 494 (11th Cir. 2015): The court found no error in admitting latent fingerprinting and handwriting identification. It relied solely on precedent. It did not consider any of the recent challenges to these methodologies:

We have held that fingerprint analysis utilizes scientifically reliable methodology, and Dale cites to no binding authority holding that the methodology applied in this case was scientifically unreliable. See *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005) (per curiam) (fingerprint evidence is reliable scientific evidence, satisfying the Daubert criteria for admissibility).

Dale's assertion that handwriting analysis is not reliable scientific evidence is without merit and has been squarely foreclosed by this court's precedent. See *United States v. Paul*, 175 F.3d 906, 909–10 & n.2 (11th Cir. 1999) (finding that the argument that handwriting analysis does not qualify as reliable scientific evidence is meritless).

Post-Mortem Root Banding of Hair: *Restivo v. Hesseman*, 846 F.3d 547 (2nd Cir. 2017): In an unusual case, Restivo was convicted of murder, exonerated by DNA, and sued police officers for malicious prosecution. The victim's hair was found in Restivo's van and Restivo contended that an officer took hair from the victim at an autopsy and then planted it in the van. Experts testified that the hair in the van exhibited post-mortem root banding (PMBR) which will not be found unless the hair was on a dead body for a number of hours. The parties conceded that if the victim was ever in the van, she was still alive. Thus, Restivo sought through expert testimony to prove the existence of PMBR on the hairs found in the van in support of his theory that they were planted after the autopsy. The trial court found that certain aspects of PMBR had not been established to "a reasonable degree of scientific certainty" [which is a standard that scientists don't use and that the National Commission on Forensic Science has rejected]. But the trial court nonetheless admitted the testimony as non-scientific testimony that was reliable under *Kumho Tire*. The trial court found that the experts were using the same degree of intellectual rigor in reaching their opinion as they would in their real life as experts. The court also found that the rate of error was low, and that the experts' opinions were consistent with the academic literature. The court of appeals found no abuse of discretion.

Toolmark examination --- no error to exclude: *United States v. Smallwood*, 456 Fed. Appx. 563 (6th Cir. 2012) On interlocutory appeal, the government challenged the trial court's order excluding the proposed testimony of its toolmark examiner. The trial court reasoned that she did not have the skill and experience with knife marks to reliably make the required subjective determination. The government argued that although the Association of Firearms and Toolmark Examiners ("AFTE") theory lacks an objective standard, competent firearms toolmark examiners still operate under standards controlling their profession, and the fact that the expert had less experience with knife toolmarks than with firearms toolmarks was not a valid reason to preclude her testimony. But the court found no error, relying in part on the NAS report.

The court noted that the AFTE guidelines provide that a qualified examiner may determine that there is a match between a tool and a tool mark when there is "sufficient agreement" in the pattern of two sets of marks --- meaning that "it exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with agreement demonstrated by toolmarks known to have been produced by the same tool." The court noted that because toolmark determinations "involve subjective qualitative judgments" the accuracy of an examiner's assessment "is highly dependent on skill and training." The court concluded that the

expert's opinion that there was sufficient agreement between her test marks and the puncture marks found in the tires of a vehicle was "unreliable under the AFTE's own standard because she has virtually no basis for concluding that the alleged match exceeds the best agreement demonstrated between tool marks known to have been produced by different tools."

* **Toolmarks:** *United States v. Wells*, 879 F.3d 900 (9th Cir. 2018): The court affirmed convictions for murder, finding no abuse of discretion in allowing a government forensic tire expert to testify that a nail in a tire found in the defendant's truck had been manually inserted into the tire, undermining the foundation of the defendant's alibi that he had picked up a nail while driving to work on the morning of the murders. The defendant argued that the tire expert's testing caused destruction of the evidence, but the court found that the testing neither destroyed nor substantially altered the tire or the nail.

In an effort to identify an alleged perpetrator for formal accusation, the Government took reasonable actions in evaluating [the defendant's] stated alibi, followed industry standards, and documented all steps in [the government's tire expert's] report. [The defendant's tire expert] then had full access to all photographs, testing, methodology, and reports from the Government's nail and tire experts, in addition to the nail and tire themselves.

[The defendant's tire expert] could have, and indeed *did*, launch extensive challenges to [the government's tire expert's] tests and conclusions. As *Daubert* confirmed, '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Furthermore, as found in the district court, [the defendant] can only speculate as to whether his own expert would have reached any different conclusions as to the condition, location, or angle of the nail while still in the tire.

B. Federal District Court Cases on Forensics

Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Cerna*, 2010 WL 3448528 (N.D. Cal.): The court allowed ballistics testimony that was based on a method approved by the Association of Firearms and Toolmark Examiners (AFTE). The court stated that in February 2007, it had ruled in *United States v. Diaz*, 2007 WL 485967 that the AFTE theory, as applied by the SFPD crime lab, was sufficiently reliable under *Daubert*. It concluded that “[n]o new developments since the *Diaz* ruling cast sufficient doubt on the reliability of the AFTE theory such that expert testimony must be kept from the jury simply because it is based on the AFTE theory.” The court conceded that the 2009 NAS report highlighted the weaknesses and subjectivity of ballistics feature-comparison. But it concluded that these weaknesses “do not require the automatic exclusion of any expert testimony based on the AFTE theory. The weaknesses highlighted by the NAS report—subjectivity in a firearm examiner’s identification of a ‘match’ and the absence of a precise protocol—are concerns that speak more to an individual expert’s specific procedures or application of the AFTE theory, rather than the universal reliability of the theory itself.” Thus, the NAS report did not “undermine the proposition that the AFTE theory is sufficiently reliable to at least be presented to a jury, subject to cross-examination.”

The court reviewed Judge Rakoff’s opinion in *Glynn*, which focused on the problem of overstatement and limited the expert’s conclusion to “more likely than not.” The court argued that the *Glynn* limitation was “not appropriate as it suggests that the expert is no more than 51% sure that there was a match.” The court concluded that the standard previously used in *Diaz*—that a bullet or casing came from a particular firearm to a “reasonable degree of certainty in the ballistics field”—would be used.

Ballistics: *United States v. Sleugh*, 2015 WL 3866270 (N.D. Cal. 2015): The court allowed a ballistics expert to testify. The defendant argued that photographs of the two shell casings appeared dissimilar to a layperson’s eye. This did not trouble the court, because the defendant “conceded Smith is highly qualified and did not point out any flaws in Smith’s methodology that would render his resulting opinion unreliable.” The court emphasized that the expert had reached only limited conclusions, and accurately rendered those limitations — he stated that his comparison only pointed to the possibility that a firearm of the class depicted was used during the shooting, and conceded that many others may have been used instead.

Comment: This seems to be a relatively rare case in which a ballistics expert seeks to keep the testimony within the bounds of what the methodology can support.

* **Ballistics – NAS Report – Overstatement – testimony of a match:** *Jackson v. Vannoy*, 2018 U.S. Dist. LEXIS 46297 (E.D. La.): In a habeas challenge to a conviction for second degree murder, the petitioner raised a claim of actual innocence, offering the NAS Report as “new reliable evidence” not presented at trial to undermine the toolmark expert’s conclusions. Specifically, the

firearms expert examined two nine-millimeter cartridge casings and two nine-millimeter bullets recovered from the crime scene, and concluded that the casings and bullets were each fired from the same weapon. The petitioner argued that the NAS Report called into question the ability of toolmark analysis to individuate shell casings. The court denied the petition for writ of habeas corpus, concluding that the NAS Report was not new evidence and was insufficient to show that it was more likely than not that no reasonable juror would have convicted the petitioner.

Ballistics: Limitation on Overstatement: *United States v. Willock*, 696 F. Supp. 2d 536 (D. Md. 2010): The defendant moved to exclude the testimony of a ballistics expert. The court denied the motion, “consistent with every reported federal decision to have addressed the admissibility of toolmark identification evidence.” The court noted, however, that “in light of two recent National Research Council studies that call into question toolmark identification’s status as ‘science,’ * * * toolmark examiners must be restricted in the degree of certainty with which they express their opinions.” In response to this ruling, the government stated that “it would not seek to have [its expert] state his conclusions with any degree of certainty.”

Ballistics: Overstatement---testimony of a match: *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.): The court rejected a challenge to testimony that a shell casing matched the defendant’s gun. It relied exclusively on precedent, stating that “[m]atching spent shell casings to the weapon that fired them is a recognized method of ballistics testing. Other than the argument raised by magazine articles cited by the defense and an out-of-state federal district court ruling, [Judge Rakoff’s ruling in *Glynn*] the Court has not found a case from the Fifth Circuit which shows that [the ammunition expert’s] findings are unreliable. On the contrary, firearm comparison testing has widespread acceptance in this Circuit.”

Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Otero*, 849 F. Supp. 2d 425 (D.N.J. 2012): The court denied a motion to exclude the government’s expert on the subject of firearms and toolmark identification. The court allowed the expert to testify to a reasonable degree of ballistics certainty. It addressed the impact of the NAS report:

The Government has demonstrated that Deady’s proffered opinion is based on a reliable methodology. The Court recognizes, as did the National Research Council in *Strengthening Forensic Science in the United States: A Path Forward*, that the toolmark identification procedures discussed in this Opinion do indeed involve some degree of subjective analysis and reliance upon the expertise and experience of the examiner. The Court further recognizes, as did the National Research Council’s report, that claims for absolute certainty as to identifications made by practitioners in this area may well be somewhat overblown. The role of this Court, however, is much more limited than determining whether or not the procedures utilized are sufficient to satisfy scientists that the expert opinions are virtually infallible. If that were the requirement, experience-based expert testimony in numerous technical areas would be barred. Such an approach would contravene well-settled precedent on the district court’s role in evaluating the admissibility of expert testimony.

Ballistics: limiting overstatement of results: *United States v. Taylor*, 663 F. Supp. 2d 1170 (D.N.M. 2009): The court allowed ballistics testimony, but limited it in several respects, relying on the NAS report. The court stated that “[b]ecause of the seriousness of the criticisms launched against the methodology underlying firearms identification, both by various commentators and by Defendant in this case, the Court will carefully assess the reliability of this methodology, using *Daubert* as a guide.” The court noted that NAS concluded that ballistics methodology was weak on the *Daubert* factor of standards and controls, because “the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates.”

The court noted that Judge Rakoff, in *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008), resolved one of the problems of ballistics testimony “by sending the case back for retrial and ordering that the ballistics opinions offered at the retrial may be stated in terms of ‘more likely than not,’ but nothing more.” The court adopted the reasoning in *Glynn*, concluding that the firearms identification testimony is admissible under Rule 702 and *Daubert*, but imposing limitations on that testimony.

Because of the limitations on the reliability of firearms identification evidence discussed above, [the expert] will not be permitted to testify that his methodology allows him to reach this conclusion as a matter of scientific certainty. [The expert] also will not be allowed to testify that he can conclude that there is a match to the exclusion, either practical or absolute, of all other guns. He may only testify that, in his opinion, the bullet came from the suspect rifle to within a reasonable degree of certainty in the firearms examination field.

Ballistics: *United States v. Sebborn*, 2012 WL 5989813 (E.D.N.Y.): The court denied a motion to exclude ballistics testimony. It recognized that there are legitimate questions about the validity of ballistics, and discussed the NAS report and Judge Rakoff’s opinion in *Glynn*:

The comparison of test bullets and cartridges to those of unknown origins involves “the exercise of a considerable degree of subjective judgment.” *Glynn*, 578 F.Supp.2d at 573. First, some subjectivity is involved in the examination of the evidence, which is done visually using a comparison microscope. * * * In addition, the standards employed by examiners invite subjectivity. The AFTE theory of toolmark comparison permits an examiner to conclude that two bullets or two cartridges are of common origin, that is, were fired from the same gun, when the microscopic surface contours of their toolmarks are in “sufficient agreement.” In part because of this reliance on the subjective judgment of the examiners, the AFTE Theory has been the subject of criticism. For example, in a 2009 report, the National Research Council of the National Academy of Sciences (the ‘NRC’) observed that AFTE standards acknowledged that ballistic comparisons “involve subjective qualitative judgments by examiners and that the accuracy of examiners’ assessments is highly dependent on their skill and training.”

In *Glynn*, Judge Rakoff found that ballistics identification had garnered sufficient empirical support as to warrant its admissibility. Accordingly, he permitted the ballistics expert to testify, but limited the degree of confidence which the expert was permitted to express with respect to his findings. Opining that the expert would “seriously mislead the jury as to the nature of the expertise involved” if he testified that he had matched a bullet or casing to a particular gun “to a reasonable degree of ballistic certainty,” Judge Rakoff limited the expert to stating that it was “more likely than not” that the bullet or casing came from a particular gun. Accordingly, *Glynn* does not support the argument that the government’s ballistics expert should be entirely precluded from testifying.

The court concluded that Judge Rakoff’s ruling in *Glynn* “may support a request to limit the degree of confidence which the expert can express with respect to his findings.” But the defendant had moved for exclusion and not limitation. Because the motion did not argue for a specific limitation, the court did not address that question. The court ultimately relied on case law to conclude that ballistics methodology is reliable.

Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Ashburn*, 88 F. Supp. 3d 239 (E.D.N.Y. 2015): The defendant challenged ballistics testimony pursuant to the AFTE methodology. He argued for exclusion and, if not, limitation on the expert’s conclusion. The court denied the motion to exclude and granted the motion to limit the conclusion. The court first addressed the findings of the NAS Report:

In 2009, the National Academy of Sciences published a comprehensive report on the various fields of forensic science. National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009) [hereinafter ‘NAS Report’]. With respect to toolmark and firearms identification, the NAS Report found that the field suffers from certain “limitations,” including the lack of sufficient studies to understand the reliability and repeatability of examiners’ methods and the inability to specify how many points of similarity are necessary for a given level of confidence in the result. According to the NAS Report, “[a] fundamental problem with toolmark and firearms analysis is the lack of a precisely defined process.” Still, the NAS Report concluded that “[i]ndividual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable.”

The NAS Report, which criticized the lack of scientifically defined standards in the field, concluded that individual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable.

On the *Daubert* factors, the court concluded that 1) the “AFTE methodology has been repeatedly tested”; 2) “The AFTE itself publishes within the field of toolmark and firearms identification.”; 3) “Studies have shown that the error rate among trained toolmark and firearms examiners is quite low” (citing studies finding error rates between 0.9% and 1.5%); 4) “the

AFTE's 'sufficient agreement' standard is the field's established standard * * * but the fact that a standard exists does not necessarily bolster the AFTE methodology's reliability or validity, as it remains a subjective inquiry"; and 5) the AFTE theory "has been widely accepted in the forensic science community."

But the court was persuaded that given the subjectivity involved in ballistics feature-comparison, an instruction limiting the expert's testimony was appropriate. "Given the extensive record presented in other cases, the court joins in precluding this expert witness from testifying that he is 'certain' or '100%' sure of his conclusions that certain items match. * * * [T]he court will limit LaCova to stating that his conclusions were reached to a 'reasonable degree of ballistics certainty' or a 'reasonable degree of certainty in the ballistics field.'"

Comment: The court was influenced by the NAS report to put a limit on how the expert expressed his conclusion to the jury. But the court did not mention a separate NAS report that advocates abolition of the fake standard of "a reasonable degree of certainty."

Ballistics: Limitation imposed on overstatement--- *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008): Judge Rakoff found that the field of ballistics is not scientific because its underlying premises have not been validated empirically, and the methodology is based on subjective assessments. But he found that the methodology was sufficiently reliable to be admissible under *Kumho*. However, because of the subjectivity inherent in the field, Judge Rakoff determined that he could not permit an expert to testify that he was "certain" of a match or that there was "no rate of error." These iterations presented a risk of overstatement of the actual results. Judge Rakoff determined that the expert would be limited to testifying that the bullet "more likely than not" was fired from a particular gun. The *Glynn* opinion is discussed in many of the annotations on ballistics in this digest.

Ballistics: *United States v. Barnes*, 2008 WL 9359653 (S.D.N.Y.): The defendant challenged ballistics testimony, relying on the assertions in the NAS Report that ballistics methodology is subjective and has not been scientifically validated. The court rejected the defendant's arguments and denied the motion for a *Daubert* hearing. It stated that "ballistics evidence has long been accepted as reliable and has consistently been admitted into evidence." The court downplayed the critique in the Report, arguing that its purpose "was to assess the possibility of developing a national ballistics database and the feasibility of capturing by computer imaging technology the toolmarks left on discharged bullets and shell casings. The report was not aimed at assessing the procedures used in firearms identification or the degree to which firearms toolmarks are unique, and the report disclaims any motive to impact the question of ballistics evidence in courts. . . . This report, while no doubt useful for the commissioned purpose and not irrelevant to the issue of reliability and admissibility of firearms identification evidence, does not identify any new evidence undermining the core premises upon which ballistics analysis is based." The court was not asked to make a ruling on the confidence-level that the expert could testify to.

Ballistics --- Overstatement --- 100% Certainty: *United States v. Casey*, 928 F. Supp. 2d 397 (D.P.R. 2013): The defendant requested that the court limit the testimony of the government's firearm expert, relying on several district court opinions restricting ballistics evidence based upon the NAS report. The court denied the motion. The expert was prepared to testify that he was 100% certain of a match. The government presented a sworn statement from the Chair of the group that prepared the NAS report, stating that its purpose "was not to pass judgment on the admissibility of ballistics evidence in legal proceedings, but, rather, to assess the feasibility of creating a ballistics data base." The court concluded that it would remain "faithful to the long-standing tradition of allowing the unfettered testimony of qualified ballistics experts."

Comment: If it has been established by scientists that there is no such thing as an error-free methodology, how is it permissible for an expert to say they are 100% certain? There was also a long-standing tradition of "unfettered" testimony on bite-marks and probably on leeches before that. That doesn't make it reliable.

* **Ballistics: Overstatement --- Reasonable degree of ballistics certainty:** *United States v. Simmons*, 2018 U.S. Dist. LEXIS 18606 (E.D.Va.): The court held that ballistics was not a science because the process of identification was based on subjective judgment. But the court also held that ballistics identification, when independently verified, satisfied the standards of Rule 702 as reliable technical testimony. The defendant argued that the expert was contaminated by confirmation bias---because she was told that numerous cases were connected, was congratulated by the prosecution for her work in other cases, and had numerous detailed conversations with prosecutors and law enforcement agents about the status of the investigation, the nature of the crimes, and the need to link the various items of evidence to each other. But the court held that the bias of a witness was a question for the jury.

On the question of the meaning of an identification, the government proffered two possible conclusions:

The Government has suggested as appropriate such statements of certainty as "given her training, experience, and knowledge of the field, combine with requirement that all identifications be verified by a second examiner, her opinion is that the likelihood that another tool could have produced an identified toolmark is so low as to be a practical, but not absolute, impossibility." Alternatively, the Government suggests that if asked, Ms. Moynihan would qualify the certainty of her conclusions with a phrase similar to "a reasonable degree of certainty in the ballistics field."

The court rejected the "almost impossible to be wrong" standard on the ground that "there is no meaningful distinction between a firearms examiner saying that 'the likelihood of another firearm having fired these cartridges is so remote as to be considered a practical impossibility' and saying that his identification is 'an absolute certainty.'" But the court found that the reasonable degree of certainty standard was just fine --- relying on precedent. The court summed up with an ode to precedent:

Defendants concede, as they must, that no court has ever *totally* rejected firearms and toolmark examination testimony. * * * This Court's survey of federal courts in our sister circuits indicates that firearms and toolmark examination has and continues to be routinely accepted by courts pursuant to Fed. R. Evid. 702, *Daubert*, and its progeny, albeit with some limitations regarding statements of certainty and the requirement that certain prerequisites be satisfied. *See e.g., United States v. Casey*, 928 F. Supp. 2d 397 (D.P.R. 2013) (declining to follow sister courts who have limited expert testimony based on the 2008 and 2009 NAS reports and finding that the Committee(s) who authored such reports specifically stated that the purpose of the reports was not to weigh in on admissibility of firearm toolmark evidence) and encouraging a return to the previous tradition of unfettered admissibility of a firearm examiner's expert testimony without qualification of the expert's degree of certainty); *United States v. Taylor*, 663 F. Supp. 2d 1170 (D.N.M. 2009) (holding that expert could testify, in his opinion, using pattern-based methodology, if such methodology was subject to peer review, that the bullet came from suspect rifle to within "reasonable degree of certainty in the firearms examination field"); *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008) (determining that although firearm toolmark examination is not a science, it is a field that is ripe for expert testimony because it is "technical" or "specialized" and the level of certainty could be expressed as "more likely than not" but nothing more); *United States v. Diaz*, 2007 U.S. Dist. LEXIS 13152, 2007 WL 485967 (N.D. Cal. 2007) (permitting the firearms examiner to testify, but could only testify that a particular bullet or cartridge case was fired from a firearm to a "reasonable degree of certainty in the ballistics field"); *United States v. Monteiro*, 407 F.Supp.2d 351 (D. Mass. 2006) (stating that the appropriate standard is "reasonable degree of ballistic certainty"). For reasons detailed herein, the Court declines Defendants' invitation to depart from this long-standing tradition favoring admissibility

Comment: In dealing with the defendant's arguments about confirmation bias, the court relied on some of the many cases holding generally that the bias of a witness is a credibility question for the jury. But there is a difference between impeachment-bias and confirmation bias. Impeachment bias is that the witness has a motive to falsify testimony at trial. Confirmation bias is that the expert has information in advance of the testing so that she knows what the outcome of a test ought to be before doing it. That bias goes to application of the method, and should, under Rule 702(d), be considered an admissibility question.

Finally, this is another court that thought it did a good job of protecting the defendant from overstated conclusions. But the solution was allowing the expert to testify to a reasonable degree of ballistics certainty --- and that is a standard that has been rejected by scientists, as being both meaningless and misleading.

Ballistics: Overstatement --- testimony of a match: *United States v. Wrensford*, 2014 WL 3715036 (D.V.I.): The court allowed a ballistics expert to testify to a match. It noted that "although the comparison methodology and the sufficient agreement standard inherently involves the subjectivity of the examiner's judgment as to matching toolmarks the AFTE theory is testable on the basis of achieving consistent and accurate results." The court relied heavily on precedent. It found that the method of comparison was peer reviewed by validation studies published in the

journal of the Association of Firearm and Toolmark Examiners. The court found the method was generally accepted --- in the field of firearm and toolmark experts. It also relied on the fact that results must be confirmed by a second firearm examiner. The court also concluded, on the basis of the expert's assertion, that the rate of error was "close to zero." Finally the court rejected the argument that the subjectivity inherent in the process was sufficient grounds for excluding an expert's opinion:

Despite the subjectivity inherent in the AFTE standards, courts have nevertheless uniformly accepted the methodology as reliable, albeit sometimes with limitations. [Citing *Glynn*]. Although the AFTE identification theory involves subjectivity, its underlying foundation confirms that it does not involve the kind of subjective belief or unsupported speculation that runs afoul of *Daubert*. In line with the weight of the case law, the Court finds that the subjectivity inherent in firearms examination is not a bar to its admissibility.

Bite mark (mis)identification: *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036 (N.D. Ill. 2015): The plaintiff was convicted of rape and assault. At his trial two bite mark experts testified that it was the defendant who bit the victim. He was eventually exonerated and brought a civil rights action against the dentists. The court granted summary judgment for the dentists. On the question of bite mark evidence, the court discussed the NAS report and other articles, and concluded that it is "doubtful that 'expert' bite mark analysis would pass muster under Federal Rule of Evidence 702 in a case tried in federal court." But the court noted that nonetheless "state courts have regularly accepted bite mark evidence—including in all three States in the Seventh Circuit." So the question was not whether bite mark evidence is now found to be unreliable, but whether was, at the time of the defendant's trial, so outrageous as to amount to a malicious use of unreliable evidence. The defendant argued that the dentist's opinions in this case were so far outside the norms of bite mark matching, such as they were in 1986, that their testimony violated due process. But the court determined that while the experts overstated their conclusions and made analytical errors, nothing they did rose to the level of a due process violation.

* **Blood spatter: *Camm v. Faith*, 2018 WL 587197 (S.D. Ind.):** This was a civil action seeking damages after the plaintiff was tried and acquitted of murdering his spouse and two children. Among other things, the plaintiff challenged the reliability of high velocity impact blood spatter evidence on the plaintiff's shirt, confirming that the plaintiff was close to the victims when they were murdered. The court granted summary judgment for the defendants, noting that "while [the plaintiff] contends that the field of blood spatter analysis is fraudulent, Indiana courts have consistently found blood spatter analysis to be an acceptable science."

Chemical traces: **Limits on Overstatement --- *United States v. Zajac*, 749 F. Supp. 2d 1299 (D. Utah 2010):** The defendant was charged with bombing a library, and he moved to exclude expert testimony regarding trace evidence --- the consistency between the adhesives on the bomb and those found at the defendant's residence. The court noted that the 2009 NAS Report found problems with current forensic science standards in many areas, including paint examination. "While this case pertains to adhesives rather than paints, both are polymers that require

microscopic examination, instrumental techniques and methods, and scientific knowledge for proper identification. Thus, the NAS Study is instructive here and lends support to the efficacy of [the expert's] tests." The court stated that *Daubert* did not require the expert to "conduct every conceivable test to determine consistency with absolute certainty. Instead, her tests had to be reliable rather than merely subjective and speculative." The expert in this case used four different instruments to determine consistency, and while that did not go to the level of confidence specified that the defendant desired, "*Daubert* does not require a validation study on every single compound tested through these instruments." The court noted that the instruments were designed to analyze many compounds and "there is no evidence before the court that Michaud misapplied techniques or methods when she conducted her analysis." Ultimately the court concluded that the tests were sufficient for the expert to be able to opine on the visual, chemical, and elemental consistency between the adhesives on the bomb and those found at the defendant's residence. *However, the court held that the expert could not testify to a conclusion that the adhesives came from the same source, as that would be overstating the results.*

Chromatography: *United States v. Tuzman*, 2017 WL 6527261 (S.D.N.Y.): In a securities fraud prosecution, the defendant sought to call a forensic chemist to testify that certain entries in a notebook were made after the fact --- in 2015 rather than between 2008-12. The expert performed (1) a physical examination of the notebook entries; (2) a Thin Layer Chromatography test of the ink used to make the entries, which is designed to determine whether the same ink was used to make the entries; and (3) a Solvent Loss Ratio Method ("SLRM") analysis using Gas Chromatography/Mass Spectrometry ("GC/MS") testing, which is designed to date the use of the ink. The government objected to the SLRM process used by the expert. The government conceded that the process could be used to date ink, but argued that the expert failed to reliably apply the method. The court agreed with the government:

The Court concludes that Dr. Lyter's failure to use basic quality control protocols—including those required in the two papers he purportedly relies on—demonstrates that he lacks "good grounds" for his conclusions. *Amorgianos*, 303 F.3d at 267-69 (upholding trial court's determination that proposed expert testimony was unreliable because expert witness "failed to apply his own methodology reliably"). * * *

Here, Dr. Lyter did not use a GC/MS machine dedicated exclusively to ink analysis, despite the clear instruction in one of the two articles on which he relies "that accurate quantitative results can only be obtained if the GC-MS system is devoted for ink analysis only." He also did not test paper blanks, even though both papers on which he relies underscore the importance of performing tests on paper blanks to rule out contamination. These departures from the methodology on which Dr. Lyter purportedly relies demonstrate that his analysis is not "reliable at every step." *Amorgianos*, 303 F.3d at 267; *Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765, 773 (7th Cir. 2014) ("[A]n expert must do more than just state that he is applying a respected methodology; he must follow through with it.").

Dr. Lyter has not provided any justification for these substantial deviations from the methodology he claims to have followed, other than his subjective belief that these

quality control protocols are unnecessary. Precedent makes clear, however, that an expert is not free to deviate—without justification—from the requirements of a methodology he claims to have followed.

Comment: This is an excellent example of proper application of Rule 702(d). Reliable application is treated as a Rule 104(a) question. The court notes what should be the obvious point that unreliable application of reliable methodology leads to an unreliable conclusion.

DNA identification, mixed samples: *United States v. Hayes*, 2014 WL 5470496 (N.D. Cal.): The court rejected a challenge to PCR/STR DNA identification, as applied to mixed samples. The court stated that “the use of PCR/STR technology to analyze a mixed-source forensic sample is neither a new or novel technique or methodology. *Robinson v. Hedgpeth*, 2013 WL 6185027, at * 19 (C.D.Cal. 2013). Hayes has not cited any legal or scientific authority to the contrary.”

Comment: The PCAST report constitutes “scientific authority to the contrary” regarding the subjectivity that is part of the process of extracting DNA from a mixed source. (Though it was published after this case.)

DNA identification --- Low Copy Number: *United States v. Sleugh*, 2015 WL 3866270 (N.D. Cal. 2015): The court rejected the defendant’s motion to exclude an expert who would testify to a match based on Low Copy Number DNA sample. The court reasoned as follows:

The defendant argues that, as a matter of law, low copy number DNA samples produce inherently unreliable comparison results and, therefore, must be excluded from evidence or, in the alternative, warrant a *Daubert* hearing in all circumstances to determine whether the resulting findings were reliable. The defendant has not provided any binding authority—or, indeed, any legal authority—finding as a matter of law that a small sample size results in data that is inherently unreliable. At most, the defendant’s authority suggests there may be a correlation between sample size and the frequency of stochastic effects—randomized errors resulting from contamination that could potentially render a comparison unreliable. See *McCluskey*, 954 F.Supp.2d at 1277 (“LCN testing carries a greater potential for error due to difficulties in analysis and interpretation caused by four stochastic effects: allele drop-in, allele drop-out, stutter, and heterozygote peak height imbalance.”); see also *United States v. Morgan*, 53 F.Supp.3d 732, 743 (S.D.N.Y.2014) (“Although the presence of stochastic effects tends to correlate with DNA quantity, it is possible that a 14–pg sample may exhibit fewer stochastic effects than a 25–pg sample and therefore provide better results.”). However, as the defendant’s own authority explains, the critical inquiry remains whether there is evidence of unreliability (e.g., stochastic effects) in a particular case; there is no per se rule regarding sample size as called for by the defendant.

To rebut the defendant's reliability challenge on this basis, the government offered assurances that its serologist had not observed any stochastic effects. The defendant has had access to the serologist's report and hundreds of pages of underlying data for some time, and has not put forth a contrary proffer or evidence of unreliability in this specific

case. Under such circumstances, and in light of the limited scope of the challenge and the general admissibility of DNA comparison testing, the Court finds no need to hold a *Daubert* hearing on this question on the present record.

DNA--- Low Copy Number and Combined Probability Index: *United States v. Williams*, 2017 WL 3498694 (N.D. Cal. 2017): The court rejected the defendant’s motion to exclude DNA identification from mixed samples, derived from a Low Copy Number DNA sample. The court reasoned as follows:

Gordon urges me to apply the rationale of *United States v. McCluskey*, 954 F.Supp.2d 1224 (D.N.M. 2013), in which the court excluded DNA testing results derived from a low copy number (LCN) DNA sample. The *McCluskey* court excluded the LCN test results based on several factors, including the lab’s lack of certification and validation of its LCN testing. See also *United States v. Morgan*, 53 F.Supp.3d 732, 736 n.2 (S.D.N.Y. 2014) (discussing *McCluskey*’s reasoning in excluding the LCN data, and ultimately ruling LCN DNA test results admissible). * * * In deciding to exclude the LCN evidence, the court was careful to articulate its basis for exclusion—not merely the use of an LCN DNA sample, but rather, the lab’s methodology in interpreting that sample. * * * [T]he critical inquiry is whether the lab utilized reliable testing methods.

Gordon cannot point to any evidence that Kim failed to abide by established protocol. Instead, he challenges the assumptions underlying her interpretation of the data. Gordon has all the information he needs regarding Kim’s analysis to cross-examine her at trial. It would be improper to exclude such evidence from the purview of the jury when the lab utilized reliable methods that meet the standards under *Daubert*.”

But the court excluded other lab results using enhanced methods for DNA identification, where the lab used a Combined Probability Index (CPI) statistical model to enhance and interpret the samples. The court found three problems with this methodology:

First, [the] testing generated results below the stochastic threshold, which indicates the possibility of allelic dropout. * * * [T]he mere presence of results below the stochastic threshold indicates that some degree of randomness, and therefore questionable reliability, exists. Second, [the analyst] used two enhanced detection methods to account for the small amount of DNA available for testing. He testified that the lab protocol recommended using one or the other, but he chose to do both because he was “starting with low-template copy DNA.” The enhanced detection methods were individually validated, but he “[didn’t] recall” whether they were validated for use at the same time. * * * Third, SERI applied the CPI statistical model on complex mixed samples in an unreliable and untestable manner. Added to the other issues, this is an insurmountable problem. * * * SERI analysts failed to adhere to their own lab protocol or take any notes documenting their decision-making process. And they cannot point to any objective criteria guiding their methodology. [The analyst] repeatedly testified that his decisions were “very subjective” and based on his training and experience. “[N]othing in either *Daubert* or the Federal Rules of Evidence

requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.” *Joiner*.

* **DNA identification --- PCR/STR: *Floyd v. Bondi***, 2018 WL 3422072 (S.D. Fla.): In a habeas challenge to convictions for kidnapping and sexual battery, the petitioner alleged ineffective assistance of counsel for failing to subject the government’s DNA evidence to meaningful adversarial testing. The court rejected this argument and denied the petition for writ of habeas corpus, concluding that the PCR/STR DNA testing used in this case is generally accepted in the scientific community. It stated as follows:

The State’s expert testified that she did autosomal STR, PCR testing. She further testified that this testing technique is used worldwide, has been subject to peer review, and is generally accepted in the scientific community. She also said that it was used and accepted by laboratories everywhere and is supported by scientific literature. She sent the material to another lab for Y-STR testing, by which only the DNA on the male chromosome would be analyzed. She said that Y-STR testing is PCR testing. Y-STR testing eliminates the female DNA, is equally effective when it is only a mixture of two people, and can use a smaller amount of DNA. DNA evidence is not new or novel and both are generally accepted in Florida so long as the testing procedures are properly conducted. * * * As a result, had counsel objected to the DNA expert, it is unlikely that the trial court would have sustained the objection.

* **DNA identification: *United States v. Jackson***, 2018 WL 3387461 (N.D. Ga.): In a robbery prosecution, the defendant moved to exclude DNA evidence implicating him. The DNA sample obtained from the defendant matched the DNA obtained from a black ski mask found at the scene of the robbery. The defendant argued that this evidence was not admissible because the government failed to show that the collection methods were proper or reasonably based on scientific principles. The court denied the defendant’s motion, and refused to conduct a *Daubert* hearing. The court concluded as follows:

Defendant has offered no reason to suspect that the mask was contaminated. Additionally Defendant Jackson’s objections speak to the weight of the evidence and not the well-established reliability of the DNA testing methodology and process. *See United States v. Warnock*, 2015 WL 7272208 (N.D. Ga.). Defense counsel will have further opportunity to cast doubt on the evidence and testimony through cross-examination at trial. Though a court’s decision of whether to conduct a *Daubert* hearing is discretionary, the Court does not view it necessary on this issue, as the reliability of the [Georgia Bureau of Investigation’s (“GBI”)] DNA testing methods are “properly taken for granted.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S 137, 152 (1999). Here, the GBI forensic biologist’s specialized knowledge will help the trier of fact understand the evidence by explaining the DNA testing process; the testimony is based on the sufficient facts and data; the testimony is based on widely accepted DNA testing methods; and the lab report makes clear that the forensic biologist reliably applied the aforementioned accepted methods to specific facts

here, that is the comparison of the mask and the cheek swabs. Under Rule 702, the Government's forensic biologist may present expert testimony as to the DNA evidence.

Comment: The court talks about questions of weight but here it is pretty clearly in a Rule 104(a) sense. The court makes specific findings that the expert had sufficient facts and reliably applied the methodology. And the methodology and "process" are found to be sound. All this looks like an application of Rule 104(a)

DNA Identification: *United States v. Williams*, 2013 WL 4518215 (D. HI.): A forensic examiner's report found the victim's DNA on certain items in the defendant's house. He moved to exclude the testimony on the ground that source attribution methodologies are unreliable and therefore run afoul of *Daubert*. The court denied the motion, relying on precedent.

The court agrees with those other decisions finding that the source attribution determination is based on methods of science that can be adequately explained, and that the jury should decide what weight to give this evidence based on these dueling expert opinions. See, e.g., *United States v. McCluskey*, — F.Supp.2d —, 2013 WL 3766686, at *44 (D. N.M. June 20, 2013) (determining that this 'battle of experts' regarding source attribution is for the jury to resolve); *United States v. Davis*, 602 F.Supp.2d 658, 683–84 (D.Md.2009) (determining that expert may opine that defendant was the source of the samples where the RMP calculation was sufficiently low to be considered unique) The court therefore rejects that *Daubert* prevents the government from providing testimony that to a reasonable degree of scientific certainty, several samples collected from Defendant's residence are from Talia.

DNA Identification: *United States v. Davis*, 602 F. Supp. 2d 658 (D. Md. 2009):The defendant moved to exclude DNA test results and requested a *Daubert* hearing. He contended that the expert used a method called low copy number (LCN) testing, and argued that identification from an LCN sample is not a validated scientific methodology. The court made a factual finding that the expert did not use LCN testing, but rather used the generally accepted PCR/STR analysis. So no *Daubert* hearing was necessary.

DNA identification: *United States v. Williams*, 2010 WL 188233 (E.D. Mich.): The defendants moved to exclude the government expert's proposed blood identification DNA testimony. The defendants argued that the expert employed a valid procedure to reach an unfounded conclusion. The court held that the testimony was admissible, because it is "well-settled that the principles and methodology underlying DNA testing are scientifically valid" and "DNA expert testimony has been widely approved by the courts as a valid procedure for making identification of blood samples." The court held that the defendants' attack on the expert's conclusion did not raise a *Daubert* question, because *Daubert* held that the gatekeeper's focus must be on the methodology and not the conclusion. In this case, "[e]ven if matching two out of thirteen loci does not provide conclusive evidence that the bloodstain at the house was that of the victim, it would seem to provide at least some evidence. The procedures from which this

conclusion was drawn are scientifically sound; if Defendants want to challenge Hutchison's conclusion, they are free to do so by cross-examining Hutchison or offering their own expert.”

Comment: It is true that the *Daubert* Court stated that the focus of the gatekeeper should be on methodology and not conclusion. But then in *Joiner*, the Court recognized that the gatekeeper must look at the conclusion as well --- and exclude the opinion if there is an “analytical gap” between methodology and conclusion. And Rule 702 (after 2000) *definitely* requires the court to scrutinize the expert’s conclusion --- in order to determine that a reliable methodology was *reliably applied*.

The court seems to treat the question of application (two out of thirteen loci) as a question of weight under Rule 104(b). How is the jury supposed to understand whether that is a valid application?

DNA Identification, including Low Copy Number testing: *United States v. McCluskey*, 954 F. Supp. 2d 1224 (D.N.M. Jun. 20, 2013): The defendant moved to exclude DNA test results, challenging the reliability of PCR/STR and LCN (low copy number) testing. The motion was denied in part and granted in part. The court found that the PCR/STR method of DNA typing is reliable under Rule 702, but the government had not carried its burden of demonstrating the reliability of LCN testing.

As to PCR/STR Methodology, the court noted that this was the only forensic method found to be scientific in the NAS report. The court stated that “it is clear that the PCR/STR method can be and has been extensively tested, it has been subjected to peer review and publication, there is a low error rate according to NRC (2009), and there are controls and standards in place.” And it was also generally accepted.

As to low copy number (LCN) Testing --- which is a way of testing DNA that has become degraded or is only a small sample --- the court observed that “PCR/STR analysis of low-level DNA has been tested, and has been found to exhibit stochastic effects rendering the DNA profiles unreliable.” Moreover peer review and publications “have raised serious questions about the reliability of testing low amounts of DNA and accounting for stochastic effects.” And the reliability of LCN testing is not generally accepted in the relevant scientific community.

DNA Identification ---- LCN testing: *United States v. Morgan*, 53 F. Supp. 3d 732 (S.D.N.Y. 2014): The defendant was charged with felon-firearm possession. He moved to exclude any evidence of low copy number (“LCN”) DNA test results of samples taken from the gun at issue. The court denied the motion, concluding that the methods of LCN DNA testing that the New York City Office of the Chief Medical Examiner (“OCME”) employed are sufficiently reliable to satisfy *Daubert*. The court stated that “[a]though the Court in *United States v. McCluskey* ruled LCN testing evidence from a New Mexico lab to be inadmissible, its finding rested, at least partially, on that lab’s lack of certification and validation of its LCN testing.” [In fact that was only a very small part of the *McCluskey* court’s reasoning.] The court held that the government “has

clearly established that [the] validation studies are scientifically valid and bear a sufficient analytical relationship to their protocols. Thus, Morgan's objections go to the weight to be accorded to the evidence, not to its admissibility. * * * Although OCME could have conducted more validation studies with degraded or crime-stain mixture samples, under *Daubert*, scientific techniques need not be tested so extensively as to create an absolute certainty in their reliability. Thus, additional validation studies using crime-stain or degraded mixture samples might have bolstered the strength of OCME's conclusions, but are not prerequisites to a finding of reliability sufficient to satisfy the *Daubert* test.”

Comment: It should be noted that there are allegations that the LCN process was never properly validated by the Office of the Chief Medical Examiner. The process appears to have been abandoned by OCME. See *DNA Under the Scope, and a Forensic Tool Under a Cloud*, *New York Times*, 2/27/16.

* **DNA identification – FST testing:** *United States v. Jones*, 2018 WL 2684101 (S.D.N.Y. June 5, 2018): In a robbery prosecution, the defendant moved to exclude evidence at trial produced by the Forensic Statistical Tool (“FST”), a software program used to examine DNA evidence and put quantitative weight to qualitative conclusions about that DNA evidence. The Office of the Chief Medical Examiner in New York (“OCME”) compared the defendant’s DNA profile to a DNA sample from a blue latex glove collected during the investigation of the robbery and concluded that the defendant “could not be ruled out” as a contributor. Using the FST, the OCME next calculated the probability that the defendant was a contributor to the sample collected from the glove. The FST revealed that there was very strong support that the defendant and two unknown persons contributed to the DNA mixture found on the glove, rather than three unknown, unrelated persons. The defendant sought to exclude expert testimony related to the FST and the OCME’s conclusions with regard to the glove. The court denied the defendant’s motion to exclude evidence produced by the FST, determining that the methods of the FST that the OCME employed were sufficiently reliable to satisfy the *Daubert* standard and Federal Rule of Evidence 702 --- even though OCME is the only lab in the country to employ FST methodology. The court described the process as follows:

At a high level, the FST is a software program that OCME uses to examine DNA evidence and put quantitative weight to qualitative conclusions about that DNA evidence. To achieve this goal, the FST calculates a statistic—a likelihood ratio (‘LR’)—which is a ratio of two different probabilities. In the numerator is the probability of a set of data conditional on one hypothesis; in the denominator is the probability of the same set of data conditional on a mutually exclusive hypothesis. For forensic DNA applications, the data are the alleles found in the evidence sample, the hypothesis in the numerator is that of the prosecutor (H_p), and the hypothesis in the denominator is that of the defense (H_d). The LR is a measure of the support for the prosecution hypothesis relative to that of the defense. If the LR is greater than one, H_p is better supported by the data than H_d ; if the LR is less than one, H_d is better supported by the data than H_p . For single source evidence profiles, the H_p is typically that a particular suspect is the source of the crime scene DNA and H_d is that an unknown, unrelated person is the source of that DNA. For two-person evidence profiles, there are more options for H_p and H_d For three-person evidence profiles, there are even more

possibilities, as up to two known contributors may be included in either or both hypotheses. The number of contributors in the two hypotheses need not be the same and a known contributor that is included in either the numerator or the denominator does not need to be included in the other.

OCME is the only laboratory in the United States that uses the FST for the purpose of analyzing DNA evidence and generating a result to use against a criminal defendant in a criminal case in court. As to the blue latex glove, * * * using the FST, the criminalist * * * calculated the probability that Jones was a contributor to the sample collected from the blue latex glove—*i.e.*, the LR. The LR revealed that the DNA mixture found on the glove swabs is approximately *1340 times more probable* if the sample originated from [Jones] and two unknown, unrelated persons than if it originated from three unknown, unrelated persons.

The court found the admissibility of FST evidence under *Daubert* and Rule 702 to be a question of first impression. But it relied on the fact that state courts have repeatedly admitted FST evidence as reliable, even under the *Frye* standard. The Government identified more than forty state court decisions that have rejected challenges to the reliability of FST. The parties identified only one state court decision that found the FST to be inadmissible: *People v. Collins*, 15 N.Y.S.3d 564 (Sup. Ct. 2015). But the court found that a number of courts have explicitly rejected *Collins*. The court also noted that defendants have offered exculpatory results under FST and these have been admitted in state courts. *See, e.g., People v. Garcia*, 963 N.Y.S.2d 517, 523 (Sup. Ct. 2013) (explaining that “[l]ikelihood ratios are expressed by OCME using the FST in terms of strength that are accepted by the scientific community as generally reliable, and actually favored the suspect in over one third of 300 separate cases resulting in 511 likelihood ratios reviewed by OCME in 2012”).

The defendant argued that FST analysis could not reach the standard of general acceptance because it was employed in only one laboratory in the world. But the court found this argument essentially irrelevant given the prior case law. It concluded as follows:

Each of the assumptions incorporated into the FST—including allelic drop-out and drop-in rates—has been the subject of the exhaustive testing, validation, peer-review, accreditation, auditing, and other review processes described above. Moreover, the fact that the components of the FST—*e.g.*, LR statistical analysis and Bayesian mathematics—are generally accepted militates in favor of a finding in this particular case that the FST is generally accepted.

The FST has been rigorously tested and subjected to peer review. OCME performed validation studies of its methods, published those studies in a peer-reviewed journal, and the DNA Subcommittee approved the FST testing for use in criminal casework. To the extent that Defendant disagrees on how the FST was applied in this particular case, he can address those concerns at trial by putting on expert testimony and cross-examining witnesses, allowing the jury to make any such determination as to the application of the FST.

Comment: The court’s point in the last quoted paragraph, to the effect that questions of application go to weight, is probably not in violation of Rule 702(d). The court was quite convinced of the reliability of the methodology and the principles employed. In the context of its decision, the court seems to be saying that any flaws in application do not take the test below the preponderance line, and so are questions for the jury. But it does go to show how difficult it is to figure out the weight/admissibility question, which exists for both 104(a) and 104(b) determinations.

What about the possibility of overstating the results? In this case, if the court is right about the software, then the results – 1340 times higher probability --- are not overstated. The question is not how high the number is per se, but whether the number is higher than what is supported by the methodology.

DNA Identification: *United States v. Wrensford*, 2014 WL 1224657 (D.V.I. 2014): The court held that the PCR/STR method of DNA analysis is scientifically valid, and thus meets the standards of reliability established by *Daubert* and Rule 702.

Fingerprints: Overstatement --- testimony of a match --- *United States v. Cerna*, 2010 WL 3448528 (N.D. Cal.): The court held that the ACE–V method of latent fingerprint identification, “if properly applied, is sufficiently reliable under *Daubert*.” The court allowed the expert to testify to a “match.” The court recognized that the NAS report “points out weaknesses in the ACE–V method” but stated that “these weaknesses do not automatically render the ACE–V theory unreliable under *Daubert*. Instead, the weaknesses highlighted by the NAS report—the lack of specificity of the ACE–V framework and its vulnerability to bias—speak more to an individual expert’s application of the ACE–V method, rather than the universal reliability of the method.”

Fingerprints: Overstatement --- testimony of a match --- *United States v. Love*, 2011 WL 2173644 (S.D. Cal.): The court denied a motion to exclude an expert’s conclusion that the defendant’s fingerprints matched fifteen latent prints. It recognized that “the NAS Report called for additional testing to determine the reliability of latent fingerprint analysis generally and of the ACE–V methodology in particular” and that the Report “questions the validity of the ACE–V method.” But the court concluded that “*Daubert*, *Kumho*, and Rule 702 do not require absolute certainty.” Instead, “they ask whether a methodology is testable and has been tested.” The court concluded that “latent fingerprint analysis can be tested and has been subject to at least a modest amount of testing—some of which, like the study published in May 2011, was apparently undertaken in direct response to the NAS’s concerns.” The court also noted that “the ACE–V methodology results in very few false positives” and that “despite the subjectivity of examiners’ conclusions, the FBI laboratory imposes numerous standards designed to ensure that those conclusions are sound.” Concluding on the NAS report, the court stated that “[i]nstead of a full-fledged attack on friction ridge analysis, the report is essentially a call for better documentation, more standards, and more research.”

Fingerprints ---PCAST Report: *United States v. Casaus*, 2017 WL 6729619 (D. Colo.): The defendant moved to exclude latent fingerprint identification evidence, challenging the reliability of the ACE-V method. The court denied the motion. (The opinion does not mention the level of certainty that the expert proposed to testify to.) The defendant relied heavily on the PCAST report, but the court relied on precedent:

To support his contentions that the ACE-V method is per se unreliable, Defendant Casaus relies heavily on a 2016 report created by President Obama’s Council of Advisors on Science and Technology, wherein the Council criticized latent fingerprint examinations. This Court, however, is bound by established Tenth Circuit precedent concluding otherwise—that fingerprint comparison is a reliable method of identifying persons and one that courts have consistently upheld against a *Daubert* challenge. * * * Although the Court understands that further research and intellectual scrutiny into the reliability of fingerprint evidence would be all to the good, the Court agrees with the conclusion of the Tenth Circuit that to postpone present in-court utilization of this “bedrock forensic identifier” pending such research would be to make the best the enemy of the good.

Fingerprints: **Overstatement --- testimony of a match --- *United States v. Shaw*, 2016 WL 5719303 (M.D. Fla.): In a felon-firearm possession prosecution, the government offered a fingerprint expert to analyze a latent fingerprint on a firearm, using the ACE-V method. The expert concluded that it matched the defendant’s known fingerprint. The court found the expert’s testimony to be admissible. The court relied on precedent:**

[F]ederal courts have routinely upheld the admissibility of fingerprint evidence under *Daubert*. In this case, Maurice’s analysis followed ACE-V a formal and established fingerprint methodology that has been allowed by courts for over twenty years. Her work was reviewed by another crime scene/latent print analyst who verified Maurice’s conclusions. Although there does not appear to be a scientifically determined error rate for ACE-V methodology, courts have found that the ACE-V method is reliable and it is generally accepted in the fingerprint analysis community.

Fingerprints: **Overstatement --- testimony of a match --- *United States v. Campbell*, 2012 WL 2373037 (N.D. Ga.): The court denied a motion to exclude expert testimony that the defendant’s fingerprint matched a latent print. The defendant cited the NAS critique on fingerprint methodology. The court relied on precedent:**

[C]ourts have rejected this precise argument [that latent fingerprint analysis is unreliable] and have concluded that while there may be a need for further research into fingerprint analysis, this need does not require courts to take the “drastic step” of excluding a “long-accepted form of expert evidence” and “bedrock forensic identifier.” *Stone*, 2012 WL 219435, at *3 (quoting *United States v. Crisp*, 324 F.3d 261, 268, 270 (4th Cir.2003)); see also *United States v. Cerna*, 2010 WL 3448528 (N.D.Cal.) (noting that the “NAS report may be used for cross-examination or may offer guidance for fact-specific challenges,” and

that the methodology “need not be perfect science to satisfy *Daubert* so long as it is sufficiently reliable”); *United States v. Rose*, 672 F.Supp.2d 723, 725–726 (D.Md.2009).

* **Fingerprints – Overstatement --- Testimony of a Match; PCAST and NAS Reports:** *United States v. Kimble*, 2018 U.S. Dist. LEXIS 138988 (S.D. Ga.): In a prosecution for bank robbery, the defendant sought to exclude expert testimony that a latent fingerprint recovered from the getaway vehicle matched the defendant’s right middle fingerprint. The court denied the defendant’s request for a *Daubert* hearing. The defendant cited the PCAST and NAS Reports in challenging the reliability of fingerprint analysis, but the court relied on precedent and on an addendum to the PCAST Report, which speaks favorably about recent developments in latent fingerprinting. The court concluded that critiques of fingerprint analysis go to the weight of the evidence, not its admissibility.

The Government’s fingerprint expert used the Analysis, Comparison, Evaluation, and Verification (‘ACE-V’) methodology in comparing Kimble’s known fingerprints to the print lifted from the getaway vehicle. Numerous federal courts have held that that method of fingerprint comparison is widely recognized as reliable in both the scientific and judicial communities. *United States v. John*, 597 F.3d 263, 274-75 (5th Cir. 2010) (because fingerprint evidence is sufficiently reliable to satisfy Rule 702, a district court may dispense with a *Daubert* hearing); *United States v. Pena*, 586 F.3d 105, 111 (1st Cir. 2009) (district court did not err in declining to hold a *Daubert* hearing before admitting fingerprint evidence); *United States v. Crisp*, 324 F.3d 261 (4th Cir. 2003) (describing latent fingerprint methodology as a ‘long-accepted form of expert evidence’ and ‘bedrock forensic identifier’ relied upon by courts for the past century); *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005); *United States v. Scott*, 403 F. App’x 392, 398 (11th Cir. 2010).

Kimble is challenging the application of fingerprint analysis science to the specific examinations conducted in this case. * * * [T]he scientific validity and reliability of the ACE-V methodology is so well established that it is not necessary for a district court to conduct a *Daubert* hearing prior to the admission of such expert evidence at trial. [citing a bunch of case law] He can expose any weaknesses in the Government expert’s application of ACE-V methodology on cross examination without the court having to expend its scarce judicial resources conducting a pretrial hearing.

Fingerprints --- after PCAST --- Overstatement --- testimony to a match: *United States v. Bonds*, 2017 WL 4511061 (N.D. Ill.): The court upheld the use of latent fingerprint identification under the ACE-V method. The expert was allowed to testify to a match. The defendant argued that ACE-V is not a reproducible and consistent means of determining whether two prints have a common source and that ACE-V’s false positive rate is too high to justify reliance on it in a criminal trial. He relied on the PCAST report, which raises concerns about the subjective nature of fingerprint analysis and calls for efforts to validate the methodology through black box studies. But the court relied on precedent to reject the PCAST findings. It noted that the defendant’s arguments have been rejected by the Seventh Circuit in *Herrera, supra*, which noted that the

“methodology requires recognizing and categorizing scores of distinctive features in the prints, and it is the distinctiveness of these features, rather than the ACE-V method itself, that enables expert fingerprint examiners to match fingerprints with a high degree of confidence.” The court stated that “[a]lthough the PCAST Report focuses on scientific validity, the Court agrees with *Herrera’s* broader reading of Rule 702’s reliability requirement.” The court also noted that the PCAST report was not completely negative on latent fingerprint analysis, as PCAST concluded that “latent fingerprint analysis is a foundationally valid subjective methodology—albeit with a false positive rate that is substantial and is likely to be higher than expected by many jurors based on longstanding claims about the infallibility of fingerprint analysis.” The court concluded that “[a]lthough the PCAST Report suggested that accurate information about limitations on the reliability of the evidence be provided, this information concerning false positive rates, in addition to the other concerns raised in the PCAST Report * * * goes to the weight of the fingerprint evidence, not its admissibility. Bonds will have adequate opportunity to explore these issues on cross-examination.”

Fingerprints—Overstatement --- testimony to a match: *United States v. Rose*, 672 F. Supp. 2d 723 (D. Md. 2009): In a carjacking prosecution, the defendant challenged the admissibility of fingerprint evidence identifying him as the source of two latent prints recovered from the victim’s Mercedes and one latent print recovered from the murder scene. The court addressed the findings of the NAS report:

The [2009 NAS] Report identified a need for additional published peer-reviewed studies and the setting of national standards in various forensic evidence disciplines, including fingerprint identification. While the Report quoted a paper by Haber and Haber, the defendant’s proposed experts in this case, in which the Habers found no “available scientific evidence of the validity of the ACE-V method,” the Report itself did not conclude that fingerprint evidence was unreliable such as to render it inadmissible under Fed. R. Evid. 702. “[T]he Habers’ criticism of fingerprint methodology from their perspective as human factors consultants does not outweigh the contrary conclusions from experts within the field as evidenced by caselaw and the amicus brief in this case.”

Fingerprints: Overstatement --- testimony to a match --- *United States v. Stone*, 848 F. Supp. 2d 714 (E.D. Mich. 2012): The court admitted expert testimony finding a match with a latent fingerprint. The defendant raised the NAS report, but the court was “unpersuaded that the NAS Report provides a sufficient basis to exclude Mr. Wintz’s testimony.” The court relied on case law prior to the NAS Report. It noted that “in *United States v. Crisp*, the Fourth Circuit acknowledged the need for further research into fingerprint analysis, 324 F.3d at 270, but concluded that the need for more research does not require courts to take the ‘drastic step’ of excluding a ‘long-accepted form of expert evidence’ and ‘bedrock forensic identifier.’” The court stated that “[w]holesale objections to latent fingerprint identification evidence have been uniformly rejected by courts across the country.”

Fingerprints: Overstatement --- error rate of 30 out of a zillion --- *United States v. Gutierrez-Castro*, 805 F. Supp. 2d 1218 (D.N.M. 2011): The government sought to introduce an expert's testimony about the methods and practices of inked fingerprint analysis. The expert compared several examples of fingerprints obtained from the defendant and would testify that all the fingerprints belong to the defendant. The court permitted the testimony, relying heavily on the Tenth Circuit's decision in *United States v. Baines*, 573 F.3d 979 (10th Cir. 2009) (supra). The court stated that fingerprint analysis is used throughout the country and that "there have been over a hundred years of empirical validation to support fingerprint analysis, although it has not been scientifically established that fingerprints are unique to each individual." The court acknowledged that the NAS Report calls into question ACE-V methodology, and concluded that its conclusions cut against admissibility under the *Daubert* peer review factor. The court found that the low rate of error weighed in favor of admissibility. The expert testified that error rates do exist, though it is hard to determine an error rate. He stated that there have been approximately thirty documented misidentifications in the last thirty or forty years out of millions of fingerprints. Finally, the court concluded that the *Daubert* factor of standards and controls was met because there are "standards that guide and limit the analyst in the exercise of subjective judgments."

Comment: The expert's testimony that the rate of error is 30/millions is wildly off, as shown in the PCAST report.

* **Fingerprints – PCAST and NAS Reports --- prohibiting testimony of zero error rate but no discussion of an alternative : *United States v. Pitts***, 2018 WL 1116550 (E.D.N.Y. Feb. 26, 2018): In a prosecution for attempted bank robbery, the defendant moved to exclude expert testimony that latent fingerprints recovered from a withdrawal slip at the crime scene were a match to the defendant. The court denied the motion. With regard to latent fingerprint analysis, the court noted that the PCAST and NAS Reports raise a number of concerns:

First, error rates are much higher than jurors anticipate. PCAST Report at 9-10 (noting that error rates can be as high as one in eighteen); Jonathan J. Koehler, *Intuitive Error Rate Estimates for the Forensic Sciences*, 57 *Jurimetrics J.* 153, 162 (2017) (noting that jurors estimate the error rate to be one in 5.5 million)). Second, the NAS Report concluded that the ACE-V method lacks scientific credibility, stating that: "We have reviewed available scientific evidence of the validity of the ACE-V method and found none." NAS Report at 143. Defendant also suggests that fingerprint analysts typically testify that the methodology has a zero or near zero error rate. See Mot. at 10 (citing *United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir. 2004) ('[S]ome latent fingerprint examiners insist that there is no error rate associated with their activities.... This would be out-of-place under Rule 702.')). These analysts reason that errors are either human or methodological, and, in the absence of human error, the methodology of fingerprint analysis is 100% accurate. See Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 *J. Crim. L. & Criminology* 985, 1034-49 (2005) ('More Than Zero'). Finally, Defendant contends that the critiques in the PCAST Report and NAS Report demonstrate that fingerprint analysis has not gained widespread acceptance among the relevant community.

As to these arguments the court first noted that the PCAST report eventually was more favorable to latent fingerprint analysis, given the empirical studies that have recently been done. The court stated that while the PCAST report “reinforced the need for empirical testing of fingerprint analysis and other forensic methods, noting that ‘experience and judgment alone—no matter how great—can *never* establish the validity or degree of reliability of any particular method,’ it also ‘applaud[ed] the work of the friction-ridge discipline’ for steps it had taken to confirm the validity and reliability of its methods.”

Ultimately the court relied heavily on precedent:

Fingerprint analysis has long been admitted at trial without a *Daubert* hearing. *United States v. Stevens*, 219 Fed.Appx. 108, 109 (2d Cir. 2007) * * *; *United States v. Salameh*, 152 F.3d 88, 128-129 (2d Cir. 1998) (affirming admission of fingerprint evidence); *See also United States v. Avitia-Guillen*, 680 F.3d 1253, 1260 (10th Cir. 2012) (‘Fingerprint comparison is a well-established method of identifying persons, and one we have upheld against a *Daubert* challenge.’).

The Court finds the government’s citation to *United States v. Bonds*, 2017 WL 4511061 (N.D. Ill.) instructive. The court in *Bonds* reviewed the same arguments presented here: that the PCAST Report renders fingerprint analysis inadmissible.

Finally, the court addressed the possibility that the expert would overstate the meaning of the results. It noted that the government had averred that its fingerprint experts would not testify that fingerprint analysis has a zero or near zero error rate.

While the government concedes that experts at one time claimed that the error rate was zero, recent guidance instructs experts to have familiarity with error rates and the steps taken to reduce error rates, and “not [to] state that errors are inherently impossible or that a method inherently has a zero error rate.” (Nat’l Institute of Standards and Tech., *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (2012), <http://www.nist.gov/oles/upload/latent.pdf> (last visited Feb. 26, 2017)). Thus, Defendant’s critiques appear to be misplaced.

The court emphasized, in conclusion, that it was not holding that fingerprint analysis is *per se* admissible.” It observed that the PCAST and NAS Reports “note a number of areas for improvement among the forensic sciences, and a number of courts have criticized forensic sciences as potentially lacking in the ‘science’ aspect.” However, the defendant, by simply relying on these reports, had not made a sufficient showing “that his critiques go to the admissibility of fingerprint analysis, rather than its weight.” [Which, given everything in the opinion, looks like an application of Rule 104(a).]

Comment: In discussing the question of overstatement, the court was happy that the experts were not going to testify to a zero rate of error. That is good, but there is no discussion in the opinion of what kind of confidence level and error rate the experts were going to testify to. If the expert just says it is a match, with no indication of the meaning of that conclusion, it is arguably not much better than testimony about a zero rate of error.

Arguably, this is the kind of case where an amendment to Rule 702 that prohibits overstatement of results might focus the court on what the expert should be allowed to say.

* **Fingerprints – Defendant’s expert prohibited from testifying that experts exaggerate their results:** *United States v. Pitts*, 2018 U.S. Dist. LEXIS 34552 (E.D.N.Y. Mar. 2, 2018): In a prosecution for attempted bank robbery, the government moved to exclude the testimony of the defendant’s fingerprint expert, Dr. Cole. The court granted the government’s motion, concluding that Dr. Cole’s testimony would not assist the trier of fact, and that excluding his testimony would not deprive the defendant of the right to use the PCAST and NAS Reports to cross-examine the government’s experts.

The Court is not convinced that Dr. Cole’s testimony would be helpful to the trier of fact. The only opinion Defendant seeks to introduce is that fingerprint examiners “exaggerate” their results and exclude the possibility of error. However, the government has indicated that its experts will not testify to absolutely certain identification nor that the identification was to the exclusion of all others. Thus, Defendant seeks to admit Dr. Cole’s testimony for the sole purpose of rebutting testimony the government does not seek to elicit. Accordingly, Dr. Cole’s testimony will not assist the trier of fact to understand the evidence or determine a fact in issue.

The court argued further that a defense expert was not necessary, because there was literature about error rates on which the defense could rely – most importantly, the PCAST report. The court stated that the defendant “identifies no additional information or expertise that Dr. Cole’s testimony provides beyond what is in these articles and does not explain why cross-examination of the government’s experts using these reports would be insufficient.”

Comment: This result shows the importance of having an admissibility requirement that specifically prohibits overstatement of results. The court was essentially treating the possibility of overstatement as a question of weight that could be dealt with on cross-examination.

As stated above, the fact that the experts were not going to testify to zero rate of error is insufficient to guard against the risk of overstatement. The court seems to think that the problem is solved by any language other than zero rate of error.

Next, it is difficult to accept the court’s assumption that cross-examination with reports will be as effective as an expert witness for the defense. And it seems unfortunate that prosecution forensic experts are admitted and defense experts are excluded in the same case.

* **Fingerprints – Question of application of the method:** *United States v. Lundi*, 2018 WL 3369665 (E.D.N.Y. July 10, 2018): In a robbery prosecution, the defendant moved to exclude expert testimony that the defendant was the source of latent fingerprints recovered at the crime scene, and the government moved to preclude the defendant’s fingerprint expert from testifying.

The defendant, relying on the PCAST Report, did not argue that the ACE-V method itself is flawed, but instead argued that the government's expert failed to use the ACE-V method and therefore should be precluded from testifying. The court denied the defendant's motion, concluding that the government sufficiently established that the method was used, and therefore that the defendant's challenges go to the weight of the evidence, not admissibility.

The court --- the judge that issued the opinions in *Pitts, supra* --- evaluated the government's expert as follows:

Defendant argues that the government's expert testimony as to fingerprint analysis should be excluded in this case because the government has not shown that the multistep ACE-V method for analyzing fingerprints was used by its proposed expert, Detective Skelly. However, the government points to concrete indicators of how the ACE-V method actually was followed by Detective Skelly. Defendant does not argue that the method itself is flawed. Indeed, Defendant relies upon the addendum to the *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016) report of the President's Council of Advisors on Science and Technology, which recognizes the ACE-V method as scientifically valid and reliable. * * * This Court is not persuaded that Defendant's challenges go to the admissibility of the government's fingerprint evidence, rather than to the weight accorded to it. Moreover, as this Court noted in *Pitts*, fingerprint analysis has long been admitted at trial without a *Daubert* hearing. The Court sees no reason to preclude such evidence here.

The defendant's expert was the same witness that the court excluded in *Pitts, supra*. As in *Pitts*, the court found that the expert could not testify to overstatement, because, once again, the government witnesses were not going to testify to a zero rate of error. Unlike in *Pitts*, however, the defense expert in this case proposed to testify to the reliability of fingerprint examinations and the "best practices" to be followed when conducting such examinations. But once again the court found the PCAST and other reports to be sufficient fodder for cross-examination of the government's experts, and so concluded that the expert's testimony would not be helpful.

Comment: At least on the admissibility/weight question, the court seems correct. While questions of application go to admissibility, and the defendant argued that the expert did not apply the ACE-V method, the government countered with evidence that he actually did apply the method. Thus, any questions of proper application are in the nature of a swearing match, and thus are matters of weight.

Again it seems problematic for the court to hold: 1) that a promise not to testify to zero rate of error completely solves the problem of overstatement; and 2) that an expert in the defendant's case is not helpful because the defendant can use reports cross-examine experts in the government's case.

Fingerprints: Overstatement --- testimony to a match--- *United States v. Myers*, 2012 WL 6152922 (N.D. Okla. Dec. 11, 2012): The court allowed an expert to testify to a fingerprint match, using the ACE-V method. The court relied heavily on *Baines, supra*. The court ticked off the *Daubert* factors:

1. *Testing*: “Gorges has undergone demanding training culminating in proficiency examinations, followed by further proficiency examinations at regular intervals during her career. Thus, Gorges’ testing is commensurate with the training undergone by fingerprint analysts employed by the FBI and other law enforcement agencies all over the world, and is sufficient to weight the first *Daubert* factor in favor of admissibility.”

2. *Peer Review and Publication*: The court cited a report of the Office of the Inspector General (OIG), which is an updated analysis of the FBI’s fingerprint identification procedures. “Although the peer review contained in the report is not strictly scientific peer review of the ACE–V methodology contemplated by independent peer review of true science, it is sufficient to lend credibility to the methodology. Gorges also testified that, pursuant to TPD protocol, both positive and negative identifications are subject to verification. Again, although review by a secondary examiner is not the independent peer review of true science, it again lends credibility to the ACE–V methodology, especially where the review is sometimes blindly done.”

3. *Error Rates*: “Gorges stated that a trained, competent examiner using the ACE–V method properly should not make a misidentification. Therefore, this factor also weighs slightly in favor of admissibility.”

4. *Standards and Controls*: “As Gorges testified, several steps of the analysis require subjective judgments. Although subjectivity does not, in itself, preclude a finding of reliability, the reliance on subjective judgments may weigh against admissibility. However, Gorges also testified that the extensive training and testing that she undergoes makes the subjective analysis more exacting. When defendant asked whether two examiners might view the print differently or examine a print differently in the analysis step, Gorges stated that, while two examiners might notice different areas of the print, an examiner following the standard operating procedures, or the ACE–V method in the TPD, would not have a lot of leeway. Therefore, the fourth factor weighs both for and against admissibility.”

5. *General Acceptance*: “Gorges testified that ACE–V is currently utilized by the FBI. She also stated that it is the most reliable standard or protocol. Because fingerprint analysis has achieved overwhelming acceptance by experts in Gorges’ field, and because ACE–V is accepted as the most reliable methodology, this final factor weighs in favor of admissibility.”

Comment: There are many challengeable assertions in the court’s application of the *Daubert* factors. To take what is probably the most important: the *Daubert* Court’s reference to testing goes to whether the *method* can be verified empirically. That methodology-based focus is different from whether the *expert* is trained.

Fingerprints: Overstatement --- testimony to a match: *United States v. Aman*, 748 F. Supp. 2d 531 (E.D. Va. 2010): In an arson prosecution, the defendant moved to exclude the expert’s testimony that the latent fingerprints and palmprints from the crime scene matched the defendant’s known prints. He attacked the validity of the expert’s Analysis-Comparison-Evaluation-Verification (“ACE-V”) method for fingerprint identification. The court rejected the motion. It provided a helpful analysis of the reliability concerns attendant to fingerprint identification methodology. But ultimately it found that these concerns, about subjectivity and the lack of validation with empirical evidence, were questions of weight and not admissibility:

The ACE–V method is not without criticism. Although fingerprint examination has been conducted for a century, the process still involves a measure of art as well as science. . . . The NRC Report [Strengthening Forensic Science in the United States: A Path Forward (2009)] devotes significant attention to friction ridge analysis, noting the “subjective” and “interpret[ive]” nature of such examination. Additionally, the examiner does not know, *a priori*, which areas of the print will be most relevant to the given analysis, and small twists or smudges in prints can significantly alter the points of comparison. This unpredictability can make it difficult to establish a clear framework with objective criteria for fingerprint examiners. And unlike DNA analysis, which has been subjected to population studies to demonstrate its precision, studies on friction ridge analysis to date have not yielded accurate population statistics. In other words, while some may assert that no two fingerprints are alike, the proposition is not easily susceptible to scientific validation.

Furthermore, while fingerprint experts sometimes use terms like “absolute” and “positive” to describe the confidence of their matches, the NRC has recognized that a zero-percent error rate is “not scientifically plausible.”

The absence of a known error rate, the lack of population studies, and the involvement of examiner judgment all raise important questions about the rigorousness of friction ridge analysis. To be sure, further testing and study would likely enhance the precision and reviewability of fingerprint examiners’ work, the issues defendant raises concerning the ACE–V method are appropriate topics for cross-examination, not grounds for exclusion. [T]he fact that ACE–V involves judgment does not render the method unreliable for *Daubert* purposes.

Fingerprints (Palmprints): Overstatement --- testimony to a match --- *United States v. Council*, 777 F. Supp. 2d 1006 (E.D. Va. 2011): The defendant moved to exclude an expert’s testimony that known palm prints collected from the defendant matched a latent palmprint on a handgun. He relied on the NAS report that critiqued fingerprint methodology as subjective and lacking a scientific basis. The court rejected the defendant’s arguments, concluding the “friction ridge analysis has gained [acceptance] from numerous forensic experts and law enforcement officials across the country. See *Crisp*, 324 F.3d at 269 (holding a district court was ‘within its discretion in accepting at face value the consensus of expert and judicial communities that the

fingerprint identification technique is reliable’).” The court stated that the NAS report has “usefully pointed out areas in which standards governing friction ridge analysis should continue to develop” but that its critique was “insufficiently penetrating to warrant the exclusion of Dwyer’s testimony.”

Comment: It is hard to believe that dispositive weight should be given to general acceptance by members of the field, and law enforcement officials. That is like voting for yourself in an election, and you get the dispositive vote.

Fire Investigation: *United States v. Aman*, 748 F. Supp. 2d 531 (E.D. Va. 2010): In an arson prosecution, the defendant moved to exclude the expert’s testimony that a fire was deliberately set. The court found that the expert had employed a reliable methodology in accordance with the National Fire Protection Agency’s Guide for Fire and Explosion Investigations (“NFPA 921”). NFPA 921 was developed by the Technical Committee on Fire Investigations, which includes dozens of fire investigators from local, state, and national agencies. NFPA 921–2. The court stated that NFPA 921 “has been peer-reviewed and is generally accepted in the community of fire investigators.” The court described the methodology established by NFPA 921 --- which looks very much like the ACE-V method applied to fingerprints and handwriting:

The general methodology NFPA 921 recommends for investigating the cause of a fire is essentially the well-known “scientific method” of generating and testing hypotheses. This methodology consists of seven steps: (1) identify the problem; (2) define the problem; (3) collect data; (4) analyze the data; (5) develop a hypothesis; (6) test the hypothesis; and (7) following any repeated rounds of refining and testing the hypothesis, select the final conclusion. * * * The guide also requires an investigator to consider and to exclude nine specific non-arson causes for multiple, non-communicating fires before reaching a conclusion that the fire was incendiary. NFPA 921 also details how fire patterns, burn damage, and other evidence can help explain the cause and origin of a fire.

The court relied on peer review and general acceptance. It noted that no rate of error for the methodology had been established, but stated that “a known error rate is not strictly required under *Daubert*. The court also relied heavily on precedent:

Courts examining the reliability of NFPA 921 have recognized that the methodology is a “peer reviewed and generally accepted standard in the fire investigation community.” *Travelers Prop. & Cas. Corp. v. GE*, 150 F.Supp.2d 360, 366 (D.Conn.2001); see also *Royal Ins. Co. of Am. v. Joseph Daniel Constr., Inc.*, 208 F.Supp.2d 423, 426 (S.D.N.Y.2002) (finding the NFPA 921 standards sufficiently reliable under *Daubert*). Indeed, the Fourth Circuit affirmed the exclusion of a fire investigator’s conclusion where the investigator failed to follow NFPA 921 and rule out “all other reasonable origins and causes” of the fire. *Bryte v. Am. Household, Inc.*, 429 F.3d 469, 478 (4th Cir.2005).

Finally, the court discussed the NAS report and its criticism of arson investigation as being a non-scientific inquiry:

Defendant points out that in 2009, the National Research Council of the National Academy of Sciences published a report criticizing, among other forensic fields, arson investigation. See Nat'l Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, at 173 (2009) (“NRC Report”) (noting, inter alia, that “much more research is needed on the natural variability of burn patterns and damage characteristics and how they are affected by the presence of various accelerants”). As an initial matter, the NRC Report does not recommend barring fire investigators from offering opinions in court based on the use of the NFPA 921 methodology. Moreover, while an important contribution to the evaluation of numerous forensic fields, the report does not bind federal courts. In any event, although the NRC sensibly suggests that further development of the principles and methods of fire investigation would improve the precision of such experts' findings, the NRC's critique does not change the result that, for all of the reasons already stated, the NFPA 921 methodology is sufficiently reliable to withstand *Daubert* scrutiny. Accordingly, Robbins' testimony is admissible under *Daubert* and Rule 702, Fed.R.Evid., and defendant's various concerns about the NFPA 921 methodology and Robbins' application of it are properly reserved for cross-examination, and do not justify wholesale exclusion of Robbins' testimony.

Footprint identification --- Overstatement --- testimony to a match: *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.): The court rejected a challenge to footprint analysis, relying mainly on precedent:

Footprint analysis is not a new concept and expert testimony on footwear comparisons has been admitted in courts in the United States. [The footprint expert] established that the theory and technique of footwear comparisons have been tested; that the techniques for shoe-print identification are generally accepted in the forensic community, and that the science of footwear analysis has by now been generally accepted. The expert shoe print testimony was based on specialized knowledge and would aid the jury in making comparisons between the soles of shoes found on or with the Defendant and the imprints of soles found on surfaces at the crime scene.

Gunshot residue: *United States v. North*, 2017 WL 5508138 (N.D. Ga.): The defendant moved to exclude expert testimony on gunshot residue. The court denied the motion. The court noted that the defendant “does not cite any authorities or other information that the GSR analysis is unreliable, non-scientific, or that it does not have broad acceptance in the forensic community.” The defendant cited the NAS and PCAST reports but the court observed that nothing in any of those reports cast doubt on the largely mechanical process of determining gunshot residue. The court also relied on the fact that other courts “have admitted expert testimony regarding GSR testing similar to that which it intends to be offered at this trial in this case.” The court concluded that to the extent the defendant sought to attack the credibility and accuracy of the results of the GSR analysis, “these matters can be the subject of vigorous cross examination, presentation of contrary evidence, and careful instructions on the burden of proof.”

Handwriting: Overstatement --- testimony to a match --- *United States v. Yass*, 2008 WL 5377827 (D. Kan.): The defendant argued that handwriting analysis must be excluded under Rule 702 because it is not based on a reliable methodology reliably applied. The court found the evidence admissible, relying almost exclusively on precedent:

Federal appellate courts have been unanimous in approving expert testimony in the field of handwriting analysis. Rather than to exclude handwriting analysis as “junk science,” as urged by defendant, the Court finds the process of handwriting analysis sufficiently reliable to satisfy *Daubert* and the Federal Rules of Evidence and declines to depart from the clear majority of courts weighing in on the issue. Moreover, despite the uneven treatment of handwriting experts by district courts, every appellate court to have considered the issue of handwriting testimony has held that the expert’s ultimate opinion was admissible.

Handwriting: Overstatement --- testimony of no match --- *Boomj.com v. Pursglove*, 2011 WL 2174966 (D. Nev.): The court rejected a challenge to testimony of a handwriting expert that certain handwriting was not the defendant’s. It relied heavily on the fact that “[t]he Ninth Circuit and six other circuits have already addressed the admissibility of handwriting expert testimony and determined that handwriting expert testimony can satisfy the reliability threshold.” It concluded that “handwriting analysis is a tested theory, it has been subject to peer review and publication, there is a known potential rate of error and there are standards controlling the technique’s operation, and it enjoys general acceptance within the relevant scientific community.”

Comment: That conclusion appears to be an overstatement in several respects. Handwriting analysis is not even close to being scientific, so it can’t really enjoy general acceptance within a relevant scientific community; the data on rate of error on handwriting is that experts are not much more accurate than laypeople; and there are no consistent standards and controls in the field. Nor is there an empirical basis for the premise that each person’s handwriting is unique.

Handwriting: Overstatement – testimony to a match --- *United States v. Brooks*, 2010 WL 291769 (E.D.N.Y.): The court rejected a *Daubert* challenge to handwriting identification, relying exclusively on precedent:

Even though the district court in *United States v. Oskowitz*, 294 F.Supp.2d 379, 383–384 (E.D.N.Y.2003) partially limited a handwriting expert's testimony, the Second Circuit has “never held that a handwriting expert may not offer an opinion on the ultimate question of authorship.” *A.V. by Versace, Inc.*, 2006 U.S. Dist. LEXIS 62193 at *269 fn. 14. In fact, no Second Circuit district court has wholly excluded “the testimony of a handwriting expert based on a finding that forensic document examination does not pass the *Daubert* standard.” *Id.* And, the Second Circuit itself has routinely alluded to expert handwriting analysis without expressing any discomfort as to its admissibility. *See, e.g., United States*

v. Tin Yat Chin, 371 F.3d 31, 39 (2d Cir.2004) (referring to defendant's proffer of a handwriting expert); *United States v. Badmus*, 325 F.3d 133, 138 (2d Cir.2003) (discussing government's use of expert testimony to identify defendant's handwriting on series of documents).

Handwriting --- excluded: *Almeciga v. Center for Investigative Reporting*, 2016 WL 2621131 (S.D.N.Y.): Judge Rakoff rejected the opinion of a handwriting expert that a signature on a release was forged. His analysis is extensive. He noted that while courts were originally skeptical of allowing handwriting experts to testify, the practice became prevalent after the Lindbergh case. But he also noted that in the last few years some courts have become more skeptical, because “even if handwriting expertise were always admitted in the past (which it was not), it was not until *Daubert* that the scientific validity of such expertise was subject to any serious scrutiny.” Judge Rakoff observed that in the Second Circuit, “the issue of the admissibility and reliability of handwriting analysis is an open one. See *United States v. Adeyi*, 165 Fed.Appx. 944, 945 (2d Cir.2006) (“Our circuit has not authoritatively decided whether a handwriting expert may offer his opinion as to the authorship of a handwriting sample, based on a comparison with a known sample.”) As such, the Court is free to consider how well handwriting analysis fares under *Daubert* and whether Carlson's testimony is admissible, either as ‘science’ or otherwise.”

Judge Rakoff found that the ACE-V process of handwriting identification was not even close to being a scientific methodology. He applied the *Daubert* factors:

Testing: To this Court's knowledge, no studies have evaluated the reliability or relevance of the specific techniques, methods, and markers used by forensic document examiners to determine authorship * * *. For example, there are no studies that have evaluated the extent to which the angle at which one writes or the curvature of one's loops distinguish one person's handwriting from the next. Precisely what degree of variation falls within or outside an expected range of natural variation in one's handwriting—such that an examiner could distinguish in an objective way between variations that indicate different authorship and variations that do not—appears to be completely unknown and untested. Ditto the extent to which such a range is affected by the use of different writing instruments or the intentional disguise of one's natural hand or the passage of time. Such things could be tested and studied, but they have not been; and this by itself renders the field unscientific in nature. * * * Until the forensic document examination community refines its methodology, it is virtually untestable, rendering it an unscientific endeavor.

Peer Review and Publication: Of course, the key question here is what constitutes a “peer,” because, just as astrologers will attest to the reliability of astrology, defining “peer” in terms of those who make their living through handwriting analysis would render this *Daubert* factor a charade. While some journals exist to serve the community of those who make their living through forensic document examination, numerous courts have found that the field of handwriting comparison suffers from a lack of meaningful peer review by anyone remotely disinterested.

Rate of Error: There is little known about the error rates of forensic document examiners. * * * Certain studies conducted by Dr. Moshe Kam, a computer scientist commissioned by the FBI to research handwriting expertise, have suggested that forensic document examiners are moderately better at handwriting identification than laypeople. For example, in one such study, the forensic document examiners correctly identified forgeries as forgeries 96% of the time and only incorrectly identified forgeries as genuine .5% of the time, while laypeople correctly identified forgeries as forgeries 92% of the time and incorrectly identified forgeries as genuine 6.5% of the time. * * * Although such studies may seem to suggest that trained forensic document examiners in the aggregate do have an advantage over laypeople in performing particular tasks, not all of these results appear to be statistically significant and the methodology of the Kam studies has been the subject of significant criticism. * * * [I]n a 2001 study in which forensic document examiners were asked to compare (among other things) the “known” signature of an individual in his natural hand to the “questioned” signature of the same individual in a disguised hand, examiners were only able to identify the association 30% of the time. Twenty-four percent of the time they were wrong, and 46% of the time they were unable to reach a result.

Standards and Controls: The field of handwriting comparison appears to be entirely lacking in controlling standards, as is well illustrated by Carlson's own amorphous, subjective approach to conducting her analysis here. At her deposition, for example, when asked “what amount of difference in curvature is enough to identify different authorship,” Carlson vaguely responded, “[y]ou know, that's just a part of all of the features to take into context, so I wouldn't rely on a specific stroke to determine authorship.” Similarly, when asked at the *Daubert* hearing how many exemplars she requires to conduct a handwriting comparison, Carlson testified:

You know, that's really—that has been up for debate for a long time. I know that a lot of document examiners, myself included, I would prefer—I ask for a half a dozen to a dozen. That at least gives me a decent sampling. Others request 25 or more. I feel like if you get too many signatures you have got so much information it is overwhelming and you tend to get lost in it.

Nor is there any agreement as to how many similarities it takes to declare a match. * * * And because there are no recognized standards, it is impossible to compare the opinion reached by an examiner with a standard protocol subject to validity testing. Furthermore, there is no standardization of training enforced either by any licensing agency or by professional tradition, nor a single accepted professional certifying body of forensic document examiners. Rather, training is by apprenticeship, which in Carlson's case, took the form of a two-year, part-time internet course, involving about five to ten hours of work per week under the tutelage of a mentor she met with personally when they were “able to connect.”

General Acceptance: [H]andwriting experts certainly find general acceptance within their own community, but this community is devoid of financially disinterested parties. * * * A more objective measure of acceptance is the National Academy of Sciences' 2009 Report, which struck a cautious note, finding that while “there may be some

value in handwriting analysis,” “[t]he scientific basis for handwriting comparisons needs to be strengthened.” The Report also noted that “there may be a scientific basis for handwriting comparison, at least in the absence of intentional obfuscation or forgery”—a highly relevant caveat for present purposes [because the contention in this case was that the defendant was *trying* to make a signature look forged]. This is far from general acceptance.

Judge Rakoff concluded that “[f]or decades, the forensic document examiner community has essentially said to courts, ‘Trust us.’ And many courts have. But that does not make what the examiners do science.

Judge Rakoff then considered whether the testimony could be qualified as “technical knowledge” that would assist the jury under *Kumho*. But he found that “the subjectivity and vagueness that characterizes Carlson's analysis severely diminishes the reliability of Carlson's methodology.” He concluded as follows:

Several courts that have found themselves dubious of the reliability of forensic document examination have adopted a compromise approach of admitting a handwriting expert's testimony as to similarities and differences between writings, while precluding any opinion as to authorship. See, e.g., *Rutherford*, 104 F.Supp.2d at 1192–94. That Solomonic solution might be justified in some circumstances, but it cannot be here where the Court finds the proffered expert's methodology fundamentally unreliable and critically flawed in so many respects. * * * It would be an abdication of this Court's gatekeeping role under Rule 702 to admit Carlson's testimony in light of its deficiencies and unreliability. Accordingly, Carlson's testimony must be excluded in its entirety.

* **Handwriting – PCAST and NAS Reports --- Overstatement---- testimony to a match:** *United States v. Pitts*, 2018 WL 1116550 (E.D.N.Y. Feb. 26, 2018): In a prosecution for attempted bank robbery, the defendant moved to exclude expert testimony that handwriting on a withdrawal slip at the crime scene was a match to the defendant's. The court denied the motion. The defendant relied heavily on Judge Rakoff's decision in *Almeciga*, *supra*, but the court relied on other precedent and determined that *Almeciga* was factually distinguishable. The court noted that *Almeciga* involved analysis of a forgery, “which is a more difficult handwriting analysis with a higher error rate.” The court also noted that the expert in *Almeciga* “performed her initial analysis without any independent knowledge of whether the ‘known’ handwriting samples used for comparison belonged to the plaintiff.” Third, “the expert conflictingly claimed that her analysis was based on her ‘experience’ as a handwriting analyst, but then claimed in her expert report that her conclusions were based on her ‘scientific examination’ of the handwriting samples.” Given these differences, the court found *Almeciga* “inapposite and unpersuasive.”

The court then went to other precedent in which the ACE-V method of latent fingerprint analysis had been admitted:

The Second Circuit Court of Appeals has not addressed directly the admissibility of handwriting analysis. * * * Courts in this district, however, routinely admit handwriting

evidence. *See, e.g., United States v. Tarantino*, 2011 WL 1113504, at *7-8 (E.D.N.Y. Mar. 23, 2011) ('Subject to *voir dire* of the analyst's expert qualifications, the Court will permit the analyst to describe for the jury the similarities and differences between the Defendant's exemplar and the handwritten notes.');

United States v. Brooks, 2010 WL 291769, at *3 (E.D.N.Y. Jan. 11, 2010) ('[H]andwriting analysis is sufficiently reliable under *Daubert* and [Rule 702].');

United States v. Jabali, 2003 WL 22170595, at *2 (E.D.N.Y. Sept. 12, 2003) (citation omitted) ('Blanket exclusion [of handwriting analysis] is not favored, as any questions concerning reliability should be directed to weight given to testimony, not its admissibility.').

The court noted that the defendant had not demonstrated any flaws in the government expert's analysis. Rather, the defendant's push was for wholesale exclusion, which the court found not viable given all the precedent:

As the Second Circuit has recognized, handwriting analysis is one area in which a juror, in some, but not all cases, may be as adept as an expert at comparing handwriting samples. *See United States v. Tarricone*, 21 F.3d 474, 476 (2d Cir. 1993) ('[The] jury could, on its own, recognize that the handwriting on the throughput agreement was not Barberio's.'). Therefore, there is little reason to be concerned that a jury will place undue weight on the expert's ultimate opinion without carefully scrutinizing the basis for his conclusion. Given the liberal standard under *Daubert* and Rule 702 and the numerous cases in this district and circuit admitting expert opinion testimony regarding handwriting analysis, preclusion is neither appropriate nor warranted.

Comment: It is notable that in its argument for admissibility, the government relied in its brief on the citation to a handwriting case in the Committee Note to the 2000 amendment to Rule 702. According to the government, the Committee Note provides that "experience is a basis for qualifying an expert" --- which it surely does so provide --- and "specifically reference[s] handwriting experts as an example of experts qualified based on experience." The court did not rely on this citation specifically, but did note it in its opinion. It can be argued that the government made too much of a single citation, written 9 years before the NAS report and 15 years before the PCAST report.

Handwriting: *DRFP L.L.C. v. Republica Bouvariana De Venezuela*, 2016 WL 3996719 (S.D. Ohio 2016): In a suit on promissory notes, with an allegation of forgery, the defendants offered the testimony of a handwriting expert. The expert did not testify to a "match" but rather to probabilities. The court rejected the plaintiff's motion to exclude the expert, relying on precedent.

Skye argues that Browne's methodology is inherently subjective and empirically unreliable. Skye points to Browne's own testimony that handwriting analysis is not scientific, it is not capable of empirical testing, all persons vary their signatures from one time to the next, no data can establish the frequency with which stylistic details recur in a person's signature, and it is impossible for Browne to determine his own error rate. Each of these critiques focuses on handwriting evidence in general, rather than on Browne's

credentials or his specific methodology. The Sixth Circuit, however, has squarely ruled that handwriting analysis falls into the ‘technical, or other specialized knowledge’ component of Federal Rule of Evidence 702. *U.S. v. Jones*, 107 F.3d 1147, 1157-59 (6th Cir. 1997).

As in *Jones*, Browne’s specific testimony in this case outlined the procedure that he uses when comparing a questioned signature with a known one. He then focused on enlargements of the signatures at issue in this case and described to the finder of fact, in some detail, how he reached his ultimate conclusions. His testimony enabled the factfinder to observe firsthand the parts of the various signatures on which he focused. As a result, the Court credits Browne’s expert testimony as well as his conclusions that: there is definite evidence that Puigbó’s signatures on the Notes are forgeries; there is a strong probability that the Fontana’ signatures on the Notes are forgeries; and it is probable that Cordero’s signatures on the Notes are forgeries.

Handwriting --- handprinting, excluded: *United States v. Johnsted*, 30 F. Supp. 3d 814 (W.D. Wis. 2013): The defendant moved to exclude the report and expert testimony of the government’s handwriting analyst, who would opine that the hand printing on the communications at issue belonged to the defendant. The court granted the motion (!) ruling that “the science or art underlying handwriting analysis falls well short of a reliability threshold when applied to hand printing analysis.” The court concluded that the government’s showing “indicates only that current standards of analysis are the same for handwriting and hand printing, not that they should be. The absence of such evidence might be less important if a consensus existed that hand printing and handwriting can reliably be analyzed in the same way, but that is not the case.” It stated that “the limited testing that exists is inconclusive as to the reliability of hand printing analysis. Thus, while the government appears to be technically correct that standards exist controlling the technique’s operations * * * that fact does not tend to establish reliability without some evidence that those standards are actually appropriate in the hand printing context.” The court also noted that peer review and publication regarding hand printing was limited. The court concluded as follows:

The proffered expert testimony here . . . does not even qualify as the ‘shaky but admissible’ variety. It is testimony based on two fundamental principles, one of which has not been tested or proven, and neither of which have been proven sufficiently reliable to assist a lay jury beyond its own ability to assess the similarity and differences in the hand printing in this case.

Comment: While the court’s exclusion was specific to hand *printing*, it was no fan of handwriting comparison either. The court argued that there are two fundamental premises of handwriting identification that have not been validated. The court explained as follows:

The government cites to a number of studies as demonstrating that handwriting is unique, including some showing that twins's writings were individualistic and others demonstrating computer software's ability to measure selected handwriting features. Defendant contends that these studies are problematic, and that even one

of the government's own studies states that “the individuality of writing in handwritten notes and documents has not been established with scientific rigor.” *
* *

Even accepting that studies have adequately tested the first principle—that all handwriting is unique—the government does not dispute the troubling lack of evidence testing or supporting the second fundamental premise of handwriting analysis. Even more troubling is an apparent lack of double blind studies demonstrating the ability of certified experts to distinguish between individual's handwriting or identify forgeries to any reliable degree of certainty. This lack of testing has serious repercussions on a practical level: because the entire premise of interpersonal individuality and intrapersonal variations of handwriting remains untested in reliable, double blind studies, the task of distinguishing a minor intrapersonal variation from a significant interpersonal difference—which is necessary for making an identification or exclusion—cannot be said to rest on scientifically valid principles. The lack of testing also calls into question the reliability of analysts's highly discretionary decisions as to whether some aspect of a questioned writing constitutes a difference or merely a variation; without any proof indicating that the distinction between the two is valid, those decisions do not appear based on a reliable methodology. With its underlying principles at best half-tested, handwriting analysis itself would appear to rest on a shaky foundation. See *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 509 (7th Cir.2003) (noting that among courts, “there appears to be some divergence of opinion as to the soundness of handwriting analysis”).

Paint Identification: Overstatement --- testimony to a match --- *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.): The court rejected a challenge to an expert’s forensic paint analysis. It stated: “The Standard Guide for Forensic Paint Analysis and Comparison of the American Society for Testing and Materials [ASTM], which [the paint expert] relied on in her testing, is widely accepted by engineers and other professionals in the field of materials testing. [Her] testimony is sufficiently reliable and relevant and may assist the trier of fact in understanding the evidence or determining a fact in issue, as required by Rule 702.”

Toolmarks --- Expert unqualified: *United States v. Smallwood*, 2010 WL 4168823 (W.D. Ky.): the defendant moved to exclude the government’s expert testimony that the knife found by law enforcement was the knife that slashed the tires of a vandalized vehicle. The court granted the motion, finding that the witness was unqualified --- the witness was a firearms expert, not a toolmarks expert. The court provided some helpful background:

According to The Association of Firearm and Tool Mark Examiners (‘AFTE’), a match is determined if a “specific set of [tool marks] demonstrates sufficient agreement in the pattern of two sets of marks.” See National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (hereinafter “Strengthening”). AFTE standards acknowledge that these decisions involve subjective qualitative judgments and that the accuracy of examiners’ assessments is “highly

dependent on their skill and training.” * * * Even with new technology, “the decision of the [tool mark] examiner remains a subjective decision based on unarticulated standards.”

By AFTE’s own standard, there is no reliability in the instant case. While Gerber is most likely an expert in firearm identification, that expertise cannot be transferred to other marks. * * * Given the subjective nature of firearm and tool mark identification, the relative frequency of firearm cases compared to tool mark cases—and knife cases in particular—necessarily makes a tool mark identification less reliable than a firearm identification. This goes directly to the “skill and experience an examiner is expected to draw on.” Strengthening, pg. 155.

Similar to polygraphs, it is important for this Court to thoroughly examine the underlying reliability of a tool mark identification before allowing expert testimony at trial. * * * A thorough examination of the facts and science present in this case must lead to a finding of unreliability and exclusion.

III. Drafting Alternatives

This section presents two drafting alternatives. Alternative 1 adds an admissibility requirement to address overstatement of conclusions. Alternative 2 combines the first alternative with the addition of the preponderance standard that is addressed in the separate admissibility/weight memorandum.

A. Alternative 1 --- Overstatement Regulation.

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; ~~and~~
- (d) the expert has reliably applied the principles and methods to the facts of the case; and
- (e) the expert does not overstate the conclusions that may reasonably be drawn from the principles and methods used.

[Or: the expert accurately states the conclusions that may reasonably be drawn from the principles and methods used.]

[Or: the expert accurately states the bases for the opinion and the limitations relating to the results of any examinations or methods used.]

Comments:

The first alternative for (e) is a negative while the other requirements are positive. But I ran this by the restylists and they liked it. They preferred it in negative form. Bryan Garner wrote: “I like the explicitness of ‘does not overstate.’ It’s a good example of where a negative works better.”

The second alternative is in the positive. The term “accurately states” may be easier to apply than “does not overstate.”

The third alternative was suggested by Judge Patti Saris, who participated in the Boston College conference and who was an advisor to PCAST. She notes that the proposal is taken from

the language of the National Commission on Forensic Science, which is quoted in the draft Committee Note, below. There may well be a benefit in tracking that language, which has been approved by a scientific panel --- and use of that language could be a good integration between the text and the Committee Note. The difference between the second and third alternative is not great. It's just a bit of a different focus. The second alternative focuses on the accuracy of the conclusion whereas the third alternative focuses on the bases of the opinion and any necessary limitations. It's two ways of approaching the same thing.

The differences, and relative merits, of each of these alternatives should be a good topic for conversation at the Roundtable discussion.

Draft Committee Note

Rule 702 has been amended to provide that an expert may not overstate the conclusions that can reasonably be drawn from the principles and methods used by the expert. Experience shows that even when experts use reliable methodology and apply it reliably, some experts state the opinion in terms that overstate the results that the expert could reliably reach. For example, an expert may testify that something is a fact even though it is only the expert's opinion. Or an expert may express a degree of certainty that the methodology does not support. Even when experts reliably apply reliable principles and methods to arrive at opinions, testimony that overstates their conclusions undermines the purposes of the Rule. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically claims by an expert that a particular process is "infallible" or "error-free."

The amendment applies to all experts but it has special relevance to testimony of forensic experts. A forensic expert who testifies to a "zero error rate" or to some other claim of infallibility will by definition be overstating the results of the forensic inquiry. The amendment requires the expert to accurately inform the factfinder of the meaning of the results found by the expert. This will ordinarily include a fair assessment of the rate of error of the methodology employed, as well as other relevant limits inherent in the methodology.

In particular, claims that an expert expresses an opinion to a "reasonable degree of [scientific/medical/forensic] certainty" should be prohibited under the amendment. That phrase has no scientific meaning and is misleading. See National Commission on Forensic Science, *Testimony Using the Term "Reasonable Scientific Certainty"*, <https://www.justice.gov/ncfs/file/795146/download> ("Rather than use 'reasonable...certainty'

terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases for that opinion (e.g., the underlying information, studies, observations) and the limitations relating to the results of the examination.”). Examples of properly verified conclusions, when supported by the data and methodology, include statements such as “cannot be ruled out” or “more likely than not.” Of course this amendment does not bar testimony that is required by substantive law.

B. Alternative B --- Combining Overstatement Regulation With Articulation of the Preponderance Standard of Proof.⁵

Rule 702. Testimony by Expert Witnesses.

For a witness to testify as an expert in the form or an opinion or otherwise, the court must find the following requirements to be established by a preponderance of the evidence: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form or an opinion or otherwise, if:

(a) the ~~expert's~~ witness's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; ~~and~~

(d) the ~~expert-~~ witness has reliably applied the principles and methods to the facts of the case- ;

(e) the witness is qualified as an expert by knowledge, skill, experience, training, or education; and

(f) the witness does not overstate the conclusions that may reasonably be drawn from the principles and methods used

[Or: the expert accurately states the conclusions that may reasonably be drawn from the principles and methods used.]

[Or: the expert accurately states the bases for the opinion and the limitations relating to the results of any examinations or methods used.]

;

Comments:

1. For reasons discussed in the admissibility/weight memo, the qualifications standard was moved into an admissibility requirement, and put after the reliability factors, so as not to disrupt electronic searches regarding Rule 702(a)-(d). The overstating regulation is put at the very end

⁵ The question of amending Rule 702 to specify that the requirements of the rule are matters of admissibility for the court is discussed in an accompanying memo in the agenda book.

because logically it surely comes after qualification. (Restylists are arguing that qualification is conceptually higher up on the list --- which is true but it is placed where it is to minimize disruptions.)

2. You might wonder why “expert” is changed to “witness” in 702(a) and (d). That is because, when you bring qualifications down as a separate subdivision, you can’t start that subdivision with the word “expert”. If so, it would read “the expert is qualified as an expert.” You have to be qualified before you are called an expert.

Draft Committee Note

Rule 702 has been amended in two respects. First, the rule now clarifies and emphasizes that the admissibility requirements set forth in the Rule must be established by a preponderance of the evidence. *See* Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States*, 483 U.S. 171 (1987). But unfortunately many courts have held that the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment. There is no intent to raise any negative inference as to the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702, specifically, was made necessary by the courts that have ignored it when applying that Rule.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will likely raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert’s basis *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any remaining attack by the opponent will go only to the weight of the evidence.

Secondly, Rule 702 has been amended to provide that an expert may not overstate the conclusions that can reasonably be drawn from the principles and methods used by the expert. Experience shows that even when experts use reliable methodology and apply it reliably, some experts state the opinion in terms that overstate the results that the expert could reliably reach. For example, an expert may testify that something is a fact even though it is only the expert’s opinion. Or an expert may express a degree of certainty that the methodology does not support. Even when experts reliably apply reliable principles and methods to arrive at opinions, testimony that overstates their conclusions undermines the purposes of the Rule. Just as jurors are unable to

evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically claims by an expert that a particular process is “infallible” or “error-free.”

The amendment applies to all experts but it has special relevance to testimony of forensic experts. A forensic expert who testifies to a “zero error rate” or to some other claim of infallibility will by definition be overstating the results of the forensic inquiry. The amendment requires the expert to accurately inform the factfinder of the meaning of the results found by the expert. This will ordinarily include a fair assessment of the rate of error of the methodology employed, as well as other relevant limits inherent in the methodology.

In particular, claims that an expert expresses an opinion to a “reasonable degree of [scientific/medical/forensic] certainty” should be prohibited under the amendment. That phrase has no scientific meaning and is misleading. See National Commission on Forensic Science, *Testimony Using the Term “Reasonable Scientific Certainty”*, <https://www.justice.gov/ncfs/file/795146/download> (“Rather than use ‘reasonable...certainty’ terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases for that opinion (e.g., the underlying information, studies, observations) and the limitations relating to the results of the examination.”). Examples of properly verified conclusions, when supported by the data and methodology, include statements such as “cannot be ruled out” or “more likely than not.” Of course this amendment does not bar testimony that is required by substantive law.

TAB 3C

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Memorandum To: Rule 702 Subcommittee (And to the Committee, for the Agenda Book)
From: Daniel Capra, Reporter
Re: Rule 702(b) and (d) --- weight and admissibility questions
Date: October 1, 2018

The Committee has agreed to continue consideration of the possibility of an amendment to Rule 702 that would emphasize that the questions of sufficiency of basis (subdivision (b)) and reliability of application (subdivision (d)) are questions of admissibility and not weight. The Chair appointed a Rule 702 Subcommittee to study this matter and report to the Committee.

This inquiry into Rule 702 is necessitated by the fact that a fair number of courts appear to have not read the Rule as it is intended. The Rule provides that the requirements of sufficient basis and reliable application must be treated as questions of admissibility, and so must be established by a preponderance of the evidence under Rule 104(a).

This memo is divided into three parts.¹ Part One provides a basic discussion of admissibility and weight, as related to the court's determinations under Rules 104(a) and 702. Part Two provides an extensive discussion of the case law cited in the article that raised the question of admissibility and weight as applied to Rules 702(b) and (d).² Part Three sets forth a possible amendment and Committee Note.

I. Basic Discussion of Admissibility and Weight.

In one sense, the distinction between admissibility and weight is easy. Admissibility means that the challenge to the evidence is decided by the judge. Weight means the challenge to the evidence is left to the jury. It is also relatively straightforward to understand the burden of proof for most admissibility determinations --- the judge must be convinced by a preponderance of the

¹ An earlier version of this memo was submitted to the Rule 702 Subcommittee to assist it in its review. This memo is slightly updated from the earlier version.

² That article, which was included in prior agenda books, is Bernstein and Lasker, "Defending *Daubert*: It's Time to Amend Federal Rule of Evidence 702," 57 William & Mary L. Rev. 1 (2015).

evidence that the requirement is met. That preponderance of the evidence construction of Rule 104(a) was adopted by the Supreme Court in *Bourjaily v. United States*, 483 U.S. 171 (1987) (requiring that the government prove more likely than not that the defendant and declarant are members of the same conspiracy before the jury may consider hearsay offered under the coconspirator exception). And specifically with respect to Rule 702, in *Daubert* the Court stated the following:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.

509 U.S. at 592 (1993).

In footnote 10, the *Daubert* Court stated that under Rule 104(a), “[t]hese matters should be established by a preponderance of proof.” (citing to *Bourjaily*).

This Rule 104(a) preponderance requirement is substantially higher than the admissibility requirement for questions of conditional relevance under Rule 104(b). Under Rule 104(b), if the relevance of one fact is conditioned on the existence of another, the standard for proving the existence of the conditional fact is a *prima facie* case --- enough for a reasonable juror to find that the fact exists. *Huddleston v. United States*, 485 U.S. 681 (1988).

So when in 2000 the admissibility requirements of sufficient basis and reliable application were added --- new subdivisions (b) and (d) respectively --- the clear intent and effect was that the court would have to find these factors met by a preponderance of the evidence before the expert could testify. The Committee determined that the questions of sufficiency and application must be subject to gatekeeping, just like the question of reliable methodology. The Committee concluded that an opinion with insufficient basis or improper application would be unreliable, and the reliability of an expert’s opinion could not be left to juror comprehension. Therefore a court stating that challenges to sufficiency or application are generally questions of weight and not admissibility would be misreading and misapplying Rule 702.

All that said, the fact remains that the weight/admissibility question can be subtle. A ruling that some disputes are questions of weight is not necessarily a misapplication of Rule 702/104(a). That is because *even under 104(a) there are disputes that will go to weight and not admissibility*. The Supreme Court recognized this in *Daubert*. After imposing the Rule 104(a) gatekeeper standard to the question of reliable methodology, the Court turned around and said that cross-examination and jury consideration are the ways to treat “shaky but admissible” expert testimony. That questions of weight arise under Rule 104(a) is also recognized by the Committee Note to the 2000 amendment, which provides as follows:

When a trial court, applying this amendment, rules that an expert’s testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries*,

Inc., 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents “do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.” See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by “a recognized minority of scientists in their field.”); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir. 1998) (“*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.”).

* * *

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on “sufficient facts or data” is not intended to authorize a trial court to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.

Because there remain questions of weight under Rule 104(a), one must be cautious in jumping to the conclusion that a court is ignoring Rule 702/104(a) when it states something like “the defendant’s challenges to the expert’s opinion present questions of weight and not admissibility.” That is a different statement than a broader one such as “challenges to the sufficiency of an expert’s basis raise questions of weight and not admissibility.” And even where that broader statement is made, the focus must be on what the challenges are and what the court has found in terms of the expert’s basis, methodology and application. That is to say, a court that makes the broader statement might actually have found that basis and application were more likely than not satisfied --- the fact that the court makes an overbroad, generalized statement is not ideal, but it’s only dictum if the court actually ended up finding the standards met by a preponderance.

The analysis of weight and admissibility works differently under Rule 104(a) and 104(b). Under Rule 104(b), the court simply has to decide whether there is enough for a reasonable person to believe that the expert has a sufficient basis and a proper application of methodology. Once the court finds that low standard to be met, then any arguments about the weakness of the opinion on these matters go to weight. Under Rule 104(a), the judge has to find more likely than not that the expert’s basis is sufficient and that the expert’s application is reliable. After that, any contrary arguments or quibbles go to weight.

Here is an example of a Rule 104(a) application of admissibility and weight that appears to be correct: *United States v. Silva*, 889 F.3d 704 (10th Cir. 2018), was a felon-firearm possession

prosecution. The government called a DNA expert who testified on the basis of “single source samples” that she could not exclude the defendant’s profile as the donor of the samples collected from a truck and a house.³ The defendant argued that the testimony should have been excluded because the numerals of the samples that she recorded on her digital record were not identical to the numbers on the tubes containing the samples. The expert explained that the errors identified by the defendant were typographical only and did not affect her analysis or the result. She relied on the last two digits of each case number to verify the samples. She entered these numbers in her digital records correctly each time, and mistyped only the first two digits, which indicated the year. She also explained that the errors in the digital record did not appear on the labels affixed to the test tubes she actually kept in front of her during her analysis. She focused on keeping the test tubes in order.

Under these circumstances, the court was correct to hold that the trial court did not err in concluding that the expert reliably applied accepted DNA analysis to the samples. Her only error was in recording the first two digits of the sample number; there was no error in applying the methodology. These typos therefore did not affect the court’s finding that the expert had more likely than not reliably applied a reliable methodology. Of course the defendant was free to raise these errors on cross-examination and argument, to show that the expert was not being as careful as she could be --- meaning that the typo-related challenge went to weight and not admissibility. That is what the court said --- “these challenges are questions of weight and not admissibility.” But this is *not* a holding that the matter of reliable application is always or even often a question of weight and not admissibility. It is a holding that if the court finds reliable application by a preponderance, any residual doubts are questions of weight and not admissibility. (Though it would be very helpful if the court actually stated on the record that it was applying Rule 104(a).)

Contrast an expert testifying to the results of a water sample, using standard testing procedures --- but using an instrument that has been contaminated or not calibrated, or using chemicals that have expired. A court applying a Rule *104(b)* analysis might say that these flaws, while troubling, would not prevent a juror from concluding that the result is reliable, and so the attack on the procedures will go to weight. (That court would also likely make a generalized statement like “questions of application of the method go to weight and not admissibility). But a court applying a Rule 104(a) analysis is likely to exclude the testimony. Under Rule 104(a) it would be exceedingly difficult to find more likely than not that using bad equipment and bad chemicals is a reliable application of the standard method.

³ “Single source” means that there was no problem of extracting a sample from other samples; the process of abstraction raises questions of reliability according to the PCAST report.

II. Case Law Stating that Questions of Sufficiency and/or Application are Generally Questions of Weight and not Admissibility.

Previous memos on this subject have cited to case law and set forth parentheticals indicating that a fair number of courts appear to be treating sufficiency of basis and/or reliability of application as questions of weight and not admissibility. Most of the cases discussed were taken from the article that gave rise to the Committee's inquiry. At the suggestion of the Chair of the Subcommittee, I have looked through these cases in some detail. What follows is my discussion of those cases, and a few others that I found while working on those cases.

As stated above, a criticism is not warranted simply because the court has asserted that a particular challenge is one that should be left for the jury. That might well occur under the Rule 104(a) standard. The question is whether the challenge is serious enough that it should disqualify the testimony because the proponent has not established, by a preponderance of the evidence, that the basis is sufficient and the application is reliable. Unfortunately, whether the court did or did not apply Rule 104(a) remains unarticulated in the cases below. Because the courts generally don't discuss the standard of proof they are applying, there is a question in many of the cases whether they are or are not properly applying the rule. This raises the question whether an amendment would work to change rulings like those set forth below.

A. Circuit Court Opinions

Milward v. Acuity Specialty Products Group, Inc., 639 F.3d 11 (1st Cir. 2011): This case has been cited as the poster child for the rejection of Rules 702(b) and (d) as admissibility requirements. The plaintiff's expert concluded that exposure to benzene could cause APL, the rare type of leukemia suffered by the plaintiff. The trial judge excluded the expert's testimony after a four-day hearing, concluding that "Dr. Smith's proffered testimony that exposure to benzene can cause APL lacks sufficient demonstrated scientific reliability to warrant its admission under Rule 702." The court of appeals reversed. It stated that "it is up to the jury to decide whether to accept his opinion that exposure to benzene can cause APL."

To begin its analysis, the court actually quoted the amended Rule 702 --- so you would think the court would follow it. The court also emphasized that *Joiner* requires a look not only at methodology but application. But the court also emphasized the language from *Daubert* that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."⁴ Of course that phrase is a tautology because it assumes that the evidence *is* admissible.

⁴ It's no wonder that there is so much confusion as to the proper standard in this area, given the fact that *Daubert* itself is schizophrenic. On the one hand, it establishes a gatekeeper function specifically under Rule 104(a). On the

In *Milward* the expert reached a conclusion as to general causation by employing a “weight of the evidence” approach, which the court described as “a mode of logical reasoning often described as inference to the best explanation, in which the conclusion is not guaranteed by the premises.” Under this approach, the expert must (1) identify an association between an exposure and a disease, (2) consider a range of plausible explanations for the association, (3) rank the rival explanations according to their plausibility, (4) seek additional evidence to separate the more plausible from the less plausible explanations, (5) consider all of the relevant available evidence, and (6) integrate the evidence using professional judgment to come to a conclusion about the best explanation. The court recognized that the approach requires the use of judgment, similar to that employed in a differential diagnosis.

Part of what the expert relied on was a conclusion that all subtypes of the leukemia had a common etiology. The district court rejected this assumption, on the ground that chromosomal abnormalities differed among the subtypes. The district court also, suffice to say, challenged a number of the assumptions used by the expert as being not generally accepted. Essentially the district court ruled that the expert’s assumptions were “plausible” but highly disputed in the field and not “based on sufficient facts and data to be accepted as a reliable scientific conclusion.” The used of the term “plausible” is comparable to Rule 104(b) --- a jury might find it reliable. But the trial court, in rejecting “plausibility,” was saying it was not convinced by a preponderance that the expert had sufficient facts or data for his conclusion.

The court of appeals saw it differently, declaring that “[t]he alleged flaws identified by the court go to the weight of Dr. Smith’s opinion, not its admissibility” and that “[t]here is an important difference between what is *unreliable* support and what a trier of fact may conclude is *insufficient* support for an expert’s conclusion.” That is essentially a ruling that the expert has to satisfy Rule 702(c) (reliable method) by a preponderance of the evidence, but not Rule 702(b) (sufficient facts or data). This invalid distinction is apparent in the court’s statement that “when the factual underpinning of an expert’s opinion is weak it is a matter affecting the weight and credibility of the testimony --- a question to be resolved by the jury.” For this proposition, the court cites case law that preceded the 2000 amendment to Rule 702.

On the other hand, the court at some points rightly takes the trial court to task for exceeding the Rule 104(a) gatekeeper role. For example, the court found that some of the trial court’s critiques were based on a “mistake” in understanding the weight of the evidence methodology. The court explained:

The court treated the separate evidentiary components of Dr. Smith’s analysis atomistically, as though his ultimate opinion was independently supported by each. For example, the court referred to “Dr. Smith’s opinion that because benzene metabolites inhibit topo II and because some classes of topo II inhibitors appear to have a causal relationship to APL, therefore benzene has a causal relationship to APL.” This overstates

other, it rejects the *Frye* test as too conservative and it emphasizes the solution of cross-examination and argument at trial.

Dr. Smith's conclusion as to the topo II evidence, and is indicative of an error in the court's understanding of the nature of Dr. Smith's analysis.

In Dr. Smith's weight of the evidence approach, no body of evidence was itself treated as justifying an inference of causation. Rather, each body of evidence was treated as grounds for the subsidiary conclusion that it would, if combined with other evidence, support a causal inference. The district court erred in reasoning that because no one line of evidence supported a reliable inference of causation, an inference of causation based on the totality of the evidence was unreliable.

In other words, the trial court failed to understand the methodology that the court of appeals found to be reliable by a preponderance. The appellate court can be interpreted as saying that if properly understood, both the methodology and its application satisfied Rule 104(a).

So the bottom line appears to be that *Milward* is an example of: 1) an *appellate* court erring in reversing a trial court's determination that the plaintiff had failed to show sufficient facts or data by a preponderance of the evidence; and 2) a trial court erring in failing to find, under Rule 104(a), that the expert used a reliable methodology, reliably applied. It's all pretty complicated, however, and query whether an amendment which adds Rule 104(a) to the text would have helped these two courts sort it out.

It should also be noted that the First Circuit has precedent that clearly hews to Rule 104(a) on the question of sufficient facts or data --- i.e., the circuit is not in routine violation of the Rule. *See, e.g., Pelletier v. Main Street Textiles, LP*, 470 F.3d 48 (1st Cir. 2006) (holding that a safety expert was properly excluded because “in the absence of a personal inspection of the facilities or equipment at issue, Twomey would have had insufficient information on which to base his opinion”; citing Rule 702(b)).

United States v. Tavares, 843 F.3d 1(1st Cir. 2016): The court rejected the defendant's argument that a police officer's conclusion about the rate of useable fingerprints from examined firearms was based on an insufficient foundation. The expert testified that the records of his department over nine years indicated that useable prints were found on only 16% of firearms, and that this figure was roughly equivalent to his personal experience in examining hundreds of guns. The defendant argued that there was an insufficient foundation for the expert's opinion --- i.e., a failure under Rule 702(b) --- because the expert's estimation was seat-of-the-pants and there was no indication that the police records were reliable. The defendant noted that an unsupervised intern had compiled the data from the police records. But the court found the police records to be sufficiently reliable, noting that “the report was the latest iteration in ordinary course of a type of statistical compilation that the Unit had periodically produced on earlier occasions. These past reports were kept by the Unit in the ordinary course of its operations and were based on data that the Unit had collected and maintained in spreadsheets over a number of years.” The court ultimately concluded: “we think that any question about the factual underpinnings of Auclair's opinion goes to its weight, not to its admissibility.”

Comment: The weight/admissibility mantra here is not necessarily a rejection of Rule 702(b) or the Rule 104(a) standard. The opinion seems best interpreted as the court saying that the police reports, together with the officer's experience, *were* more likely than not sufficient evidence upon which to render the opinion about fingerprints. Thus, the fact that the endpoint data was compiled by an intern was a matter for the jury. Indeed, given the testimony that the expert actually provided, it is hard to come out any other way. All the expert said was that the compiled police records show a particular rate and that his experience was roughly in accord. For that opinion, all you need is the records and the experience. It is hard to argue that the government, for that opinion, has not satisfied Rule 702(b)/104(a).

Walker v. Gordon, 46 Fed. App'x 691, 696 (3rd Cir. 2002): The plaintiff brought an excessive force claim and moved to exclude the defendant's expert. The trial court found that the plaintiff's complaint was about the expert's factual basis and not about methodology, and on that ground refused to hold a *Daubert* hearing. The defendant's expert concluded that the plaintiff was likely psychotic during the relevant time period. The plaintiff argued that the expert relied only on (a) a review of Walker's medical and psychiatric records, including evaluations of Walker's mental health within hours of the incident in question, and (b) a personal examination of Walker's mental status. The court of appeals declared broadly that questions about the sufficiency of the expert's basis are for the jury and not for the court under *Daubert*. It stated that "because [plaintiff] objected to the application rather than the legitimacy of [the expert's] methodology, such objections were more appropriately addressed on cross-examination and no *Daubert* hearing was required."

But there is reason to think that this broad pronouncement is dictum and that the expert's basis was in fact sufficient under Rule 104(a). The court implied as much in the following passage:

Indeed, even if it were appropriate for the District Court to examine the sufficiency of the data to support an expert's conclusion, Walker concedes that Defendants' version of the disputed facts, such as those regarding Walker's attempted public exposure, would in fact support Dr. Toborowsky's conclusions. Again, factual disputes are for the jury, and Walker was perfectly free to explore on cross-examination the reliance placed by Dr. Toborowsky on the disputed facts and to argue to the jury that, if it rejected the underlying factual premises of his report, it should also reject Dr. Toborowsky's expert opinion on Walker's mental state.

Comment: It surely cannot be true under Rule 702(b) that a *Daubert* hearing can be denied simply because the opponent's attack goes only to sufficiency of basis. In that sense, the above case is problematic. But on the facts the expert really does seem to be relying on a sufficient basis, more likely than not, and the fact that the expert could have looked at other sources *does* seem to present

a question of weight and not admissibility under Rule 104(a). It can be argued that an amendment might have an affect on the statements of law, but not the result, in this case.

United States v. Gipson, 383 F.3d 689, 696 (8th Cir. 2004): The defendant was convicted of bank robbery in part on the basis of DNA identification of a DNA sample extracted from a hat worn by the robber. The expert used the STR (short tandem repeat) methodology. The defendant conceded that this was a reliable methodology but challenged the Profiler Plus and Cofiler multiplex kits that the expert used. The court drew a distinction between “on the one hand, challenges to a scientific methodology, and, on the other hand, challenges to the application of that methodology.” It stated that “when the application of a scientific methodology is challenged as unreliable under *Daubert* and the methodology itself is otherwise sufficiently reliable, outright exclusion of the evidence in question is warranted only if the methodology was so altered by a deficient application as to skew the methodology itself.” The court relied on pre-2000 authority for this proposition. It did not cite Rule 702 at all. The court found that there was nothing so fundamentally unreliable about the Profiler Plus and Cofiler multiplex kits that their use would result “in a material alteration of the STR method itself.”

Comment: The standard of “so bad that it would result in a material alteration of the methodology itself” is the kind of description that sounds like Rule 104(b) --- reasonable minds could not differ as to unreliability. It could be argued, however, that the articulation of such a standard is dictum in this case because the use of the kits more likely than not was a reliable application of the method.

Bresler v. Wilmington Trust Co., 855 F.3d 178 (8th Cir. 2017): The dispute was over a complicated life insurance policy for a rich guy. The expert testified to the amount of shortfall in the policy caused by the defendant’s refusal to fund it. The trial court allowed the expert to testify. The defendant argued that the expert used the wrong figures to determine the cost of insurance; used an invalid interest spread to project a future shortfall; and improperly discounted a shortfall to present value. To the extent the challenge went to the sufficiency of the expert’s factual basis, (i.e., using the wrong figures as a basis) the Eighth Circuit cited its mantra that “questions regarding the factual underpinnings of the expert witness’s opinion affect the weight and credibility of the witness’s assessment, not its admissibility.” To the extent the challenge was to application (using an invalid interest spread and improper discounting) the Eighth Circuit cited its mantra that under *Daubert*, “courts may not evaluate the expert witness’s conclusion itself, but only the underlying methodology.”

Comment: The court does not cite 702 at all. It relies exclusively on *Daubert*, which does not treat the problem of the sufficiency of an expert’s data or the reliability of application. Moreover, the court focuses on *Daubert* to the exclusion of *Joiner*. The Court in *Daubert* stated, as this court does, that the gatekeeper function is focused on

methodology and not conclusion. But thereafter in *Joiner* the Court recognized that a reliable methodology comes to naught unless it is reliably applied.

On the merits, it seems that the gatekeeper function is not working if the expert uses the wrong figures to do the calculation. The same goes for using an invalid interest spread and improper discounting. It appears that the flaws were significant enough to require exclusion under Rule 104(a).

Kuhn v. Wyeth, 686 F.3d 618 (8th Cir. 2012): Plaintiffs suffering from breast cancer sued the manufacturer of a hormone therapy drug, Prempro. The plaintiff's expert sought to testify that short-term use of Prempro could cause breast cancer. The trial court excluded the testimony as insufficiently reliable. The court of appeals reversed.

To start with, the court quoted Rule 702 as amended. But it also cited *Daubert's* language about vigorous cross-examination, and the 2000 Committee Note's point that "[w]hen a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable." (Which is an unobjectionable proposition --- the opinion doesn't have to be correct, just more likely than not based on sufficient data and a reliable application of a reliable methodology).

One dispute was over the relevance of a study conducted by the National Institutes of Health, which found increased risk of breast cancer from *long-term use* of Prempro (over three years), but a *reduced* risk for a shorter exposure. The court of appeals found, correctly, that the plaintiff did not have the burden of showing that this study was unreliable. Rather, the burden was to show "that Dr. Austin arrived at his contrary opinion in a scientifically sound and methodological fashion. If they can meet that burden, the question becomes one for the jury to decide." (A correct description of how it should work under Rule 104(a)). The court found that the plaintiff's expert adequately explained why the study was not dispositive of short-term exposure -- because it wasn't designed to obtain any information about short-term exposure, and accordingly did not follow up on lag-time and other factors relevant to short-term exposure:

Dr. Austin replied that the WHI study was an ideal study design—"the gold standard for what it was designed for"—but that it was designed to show what effect E+P had on heart disease. He explained that although the study monitored incidents of breast cancer, the women were not selected to test whether Prempro causes breast cancer. According to Dr. Austin, this resulted in a study population that was at a much lower risk because (1) the study discouraged the participation of women with moderate menopausal symptoms and (2) the participants had a longer gap time between menopause and beginning hormone therapy treatment than women who begin hormone therapy on their own volition. Dr. Austin went on to explain that, despite its shortcomings, the study showed that E+P causes breast cancer. The study still showed that after five years, the E plus P group had a statistically significantly higher risk, and so high that they had to stop the study. In light

of this testimony and its supporting evidence, Dr. Austin's reliance on the WHI study to prove general causation does not foreclose his opinion that the study did not accurately assess the risk of breast cancer associated with the short-term use of Prempro.

To reach his conclusion, the plaintiff's expert also relied on "observational studies." The court goes into an extensive analysis of those studies and finds that while they are not perfect, they collectively give good grounds on which the expert could rely. The defendants argued that the plaintiff cherry-picked those studies and ignored the many studies that showed no connection between short term exposure to Prempro and breast cancer. On the cherrypicking question, the court concluded that "Dr. Austin has presented reliable epidemiological evidence to support his opinion that short-term use of Prempro increases the risk of breast cancer. There may be several studies supporting Wyeth's contrary position, but it is not the province of the court to choose between the competing theories when both are supported by reliable scientific evidence." It contrasted a case in which an expert ignored *all* the extant studies in favor of a completely different methodology.

Comment: Like some of the other cases above, the Rule 104(a)/(b) question is a mixed bag. The court seems to be applying a Rule 104(a) standard to the expert's distinguishing and also relying on the NHI study --- the expert's explanation seems more than just plausible; it seems scientifically sound. But the use of the observational studies (which seem pretty lame) and more importantly the rejection of all of the other studies without even explaining why (which is essentially cherry-picking) looks very much like a Rule 104(b) approach to sufficiency of facts or data. And this difference is important, because a more rigorous analysis would have resulted in exclusion of the testimony.

It should also be noted that Judge Loken dissented on the ground that the majority was not sufficiently deferent to the trial court's ruling. There seems to be a lot of merit in that view.

United States v. Finch, 630 F.3d 1057 (8th Cir. 2011): This is an example of a court setting forth the circuit mantra that "sufficiency is a question of weight" --- but the mantra is unnecessary, dictum, because the expert clearly has a sufficient basis under Rule 104(a). The defendant was found with a bunch of bags each containing small amounts of powder. The expert tested each of the samples. At the end of the testing, the entirety was less than five grams, under the threshold for the charged crime. So the expert testified to how much weight is typically used in a sample. That total brought the figure possessed to above five grams. The defendant argued that the opinion was unsupported by a sufficient factual basis, but the court --- after saying that sufficiency is always a question for the jury --- disagreed:

Cowan initially testified that, in the course of her career, she had tested thousands of samples of substances, including several hundred samples of crack cocaine. * * * Cowan then testified that the contents of each of the 105 bags weighed between 0.04 grams and 0.11 grams. Based on her experience in weighing these small quantities of powdery substances and extracting portions of them for testing, Cowan explained that it was

common to consume one quarter of “a small sample like the 0.04 [sample].” Because one quarter of 0.04 grams—the smallest sample—is 0.01 grams, Cowan could estimate that, at a bare minimum, she had consumed 1.05 grams of crack cocaine during testing (0.01 grams multiplied by 105 bags), well in excess of the 0.76–gram “threshold.” We conclude that Cowan's expert testimony was not “fundamentally unsupported” and that its admission did not constitute an abuse of discretion.

Comment: The expert clearly had a sufficient basis for her conclusion under Rule 104(a). She did the testing, and her extensive experience sufficiently showed the range of amounts that are used in testing. Even at the low end of the spectrum of usage, there was more than enough tested to reach the five gram threshold. So the court’s broad statement that sufficiency is a question of weight is unfortunate, but not causative of an incorrect result.

City of Pomona v. SQM N.Am. Corp., 750 F.3d 1036, 1047 (9th Cir. 2014): Perchlorate was found in the city’s water supply and the city sued a company that imported sodium nitrate. The city proffered an expert who used the methodology of “stable isotope analysis” to conclude that the perchlorate came from the sodium nitrate. There are protocols for conducting such testing and the expert deviated from the protocols. The district court found this failure of application to be fatal and excluded the expert, but the court of appeals reversed. The court found that “expert evidence is inadmissible where the analysis is the result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community to pass muster under *Daubert*.” For this proposition the court relied on pre-2000 9th Circuit case law. The court elaborated as follows:

SQMNA's argument relates to adherence to protocol, which typically is an issue for the jury. SQMNA urges the Court to take a guarded approach to the issue of an expert's adherence to protocol. *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir.1994) (holding that “any step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.”). In the Ninth Circuit, however, expert evidence is inadmissible where the analysis is the result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community to pass muster under *Daubert*.” * * * A more measured approach to an expert's adherence to methodological protocol is consistent with the spirit of *Daubert* and the Federal Rules of Evidence: there is a strong emphasis on the role of the fact finder in assessing and weighing the evidence. *Daubert*.

Comment: The court clearly appears to embrace the Rule 104(b) standard for applying methodology. It rejects the ruling in *Paoli*, even though *Paoli* is quoted in the 2000 Committee

Note as the *basis* for adding the admissibility requirement that the methodology be accurately applied. The 9th Circuit's rejection of *Paoli* is especially confounding because the court, at the beginning of its opinion, cites Rule 702 and states that one of its requirements is that "the expert has reliably applied the relevant principles and methods to the facts of the case."

Perhaps the court is thinking that the application of the methodology in this case was generally sound --- more likely than not reliable --- and the deviations from protocol were so minor that they presented questions of weight under Rule 104(a). But that is not the way the opinion sounds, and it would be hard to assess from reading the opinion whether a court could find reliable application by a preponderance.

A possible consolation prize is that the ruling on application of methodology could be considered dictum even if the court was doing what it appears to be doing, applying Rule 104(b) to application. That is because the plaintiff's expert testified that he *did* follow protocol in all respects --- meaning that the question of *whether* he did so is a swearing contest, i.e., one of credibility for the jury.

In the end, the language used by the court is definitely at odds with Rule 702(d). The question is whether rulings like this justify an amendment, given that questions of weight arise no matter what standard of proof is used, and courts do not explicitly say whether they are using Rule 104(a) or 104(b) when actual rulings are made.

In re Urethane Antitrust Litig., 768 F.3d 1245 (10th Cir. 2014): The case involved the admissibility of the opinion of an expert who conducted a multiple regression analysis and concluded that price fluctuation could be attributed to a lack of competition. The defendants argued that the expert had not sufficiently ruled out other causes, and had cherry-picked the relevant time period. The validity of a regression analysis depends on selection of the appropriate independent variables. Consequently, the exclusion of major variables or the inclusion of improper variables would diminish the reliability of a regression model. But as this court holds, what is required is that the expert "includes the variables accounting for the *major* factors." (emphasis added). This is because the Rule 702 application requirement must be established by a preponderance of the evidence, not beyond a reasonable doubt.

The defendant challenged the expert's exclusion of domestic demand variables from his consideration. But the court concluded that "Dr. McClave had no need to consider every measurable factor—just the 'major' ones." It stated that "[t]he district court reasonably found that Dr. McClave had accounted for the major factors affecting demand, and Dow's arguments bore on the weight of Dr. McClave's opinions, not their admissibility." Is this statement in violation of Rule 702/104(a)? It appears not. As stated above, it is subtle, but at some point arguments about an expert's opinion go to weight and not admissibility even under Rule 104(a). It is reasonable to find that accounting for major factors will show sufficient basis and reliable application by a preponderance, and failing to account for minor factors would therefore go to weight and not admissibility under Rule 104(a).

Another question of application of methodology was the defendant's argument that the expert "mistakenly selected variables based on the data instead of picking variables that made economic sense." The defendant relied for this argument on an article on multiple regression, which states that the analyst "specifies the major variables that are believed to influence the dependent variable," then tests the accuracy of the chosen variables. According to Dow, the expert did the opposite, picking variables based on his own data rather than picking variables based on what he would have expected. But the court found that the district court "could reasonably infer" that the expert actually followed the protocol urged by the defendant. The expert stated under oath that he tested variables that best explained the changes in price, then tested how well these variables served to predict price changes. Thus the trial court found, apparently by a preponderance, that the expert reliably applied the methodology. The court concluded that "Dr. McClave's treatment of domestic demand is open to debate. But the district court had the discretion to accept Dr. McClave's explanation for omitting variables addressing domestic demand. Thus, the district court did not abuse its discretion in concluding that Dow's complaints bore on the weight of Dr. McClave's testimony rather than its admissibility." (This again can be justified as a Rule 104(a) ruling, because the trial court appeared to find it more likely than not that the expert properly applied the methodology.)

The defendant also argued that the expert engaged in "benchmark shopping," moving 2004 from the conspiracy period to the competitive/benchmark period in order to manufacture supra-competitive prices during the conspiracy period. On this point, the court declared that

reliability is primarily a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusions produced. Accordingly, a district court must admit expert testimony as long as it is based on a reliable methodology. It is then for the jury to evaluate the reliability of the underlying data, assumptions, and conclusions.

This is an incorrect statement under Rule 702(b) and (d). But drilling down, it appears that the *trial court* actually was using Rule 104(a). The defendant asserted to the district court that the expert had moved 2004 to the "benchmark" period in order to maximize damages. But the expert explained why he did what he did: he stated that he had included 2004 as part of the benchmark period based on test results reflecting that 2004 prices "were more consistent with competition than collusion." The court of appeals concluded that this was a "swearing match" --- thus for the jury --- and the district court did not err in resolving it in favor of the plaintiffs.

Comment: The bottom line is that a good case can be made that the district court properly hewed to Rule 104(a) and that while the appellate court used problematic language, there was no violation of Rule 702(b) or (d). The questions of weight seemed to be those that should be left to the jury after the court finds proper application by a preponderance of the evidence. (See the discussion of the district court's opinion, below).

Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1343 (11th Cir. 2003): The case involved whether a device used to muffle the noise of an airplane was properly designed and implemented. When the device was installed the plane lost performance and the dispute was over the cause of that loss. The plaintiff's expert employed a methodology called CFD --- a scientific discipline that uses computer models to measure fluid dynamics, e.g., the flow of air around and through a jet engine. The defendant did not seriously contest the reliability of CFD as a methodology. Rather it contended that the expert misapplied the generally valid principles underlying CFD. The court described the objection as follows:

[The defendant] says that [the expert] "put the wrong information into the [Fluent] software." In other words, "garbage in, garbage out." Quiet makes several specific arguments in this regard. First, it avers that the reliability of Frank's CFD analysis of the [airplane] was undermined by his failure to use the proper equation in calculating intake pressures for his uniform profile cases. In particular, Quiet contests the correctness of Frank's calculation of fan pressure ratio. This is important, appellant argues, because the pressure and other aerodynamic forces that act on the ejector determine the amount of drag created by any given component, including the reverser linkages. Accordingly, if the data used is incorrect, the drag determination necessarily will be flawed as well.

As to all of these serious challenges to the application of the method, the court found that the trial court did not abuse discretion in rejecting them. The court of appeals broadly stated that matters of application are questions of weight. Here is the court's analysis:

Quiet does not argue that it is improper to conduct a CFD study using the sorts of aerodynamic data that Frank employed, but rather that the specific numbers that Frank used were wrong. Thus, the alleged flaws in Frank's analysis are of a character that impugn the accuracy of his results, not the general scientific validity of his methods.

The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination. *See generally Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); * * * *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 920 (8th Cir.1986) ("Virtually all the inadequacies in the expert's testimony urged here by [the defendant] were brought out forcefully at trial.... [T]hese matters go to the weight of the expert's testimony rather than to its admissibility.").

* * *

Because Frank's methods and results were discernible and rooted in real science— i.e., were "intellectual[ly] rigor[ous]," *Kumho Tire*, 526 U.S. at 152—they were empirically testable. As such, they were subject to effective cross examination and, indeed, were questioned vigorously by Quiet. Accordingly, this is not a case where the jury was likely to be swayed by facially authoritative but substantively unsound, unassailable expert evidence.

Comment: While the court cited the entirety of Rule 702, it basically ignores Rule 702(d). Its citation to *Daubert* is unavailing because the famous paean to cross-examination refers to testimony that is “shaky but *admissible*.” And that is the very question that the court of appeals did not decide correctly --- because the defendant pointed to a number of important defects in the expert’s application, and those defects may well have rendered the testimony inadmissible under Rule 702(d).

The citation to *Kumho* is unavailing as well, because the Court in *Kumho* focused on methodology, not application. Moreover, the statement that the expert’s methods and *results* were rooted in real science is not supported by the court’s own analysis. The court held that the methods were reliable but left the results completely to the jury.

Beyond the fact that the court did not accurately apply Rule 702(d), the case raises the policy question about whether these kinds of questions of application really *should* be for the jury --- put another way, is it wrong to make the question of application a question of admissibility rather than weight? It can be argued that the facts of this case show the importance of requiring gatekeeping for questions of application. The defendant can argue all day about these technical questions of application, but it seems unlikely that the jury could make heads or tails of that attack. That is why the court’s citation to the *Wilmington* case is so uncomfortable. It is no answer under Rule 702 to say that the opponent was allowed to argue all the expert’s inadequacies at trial. The reason that Rule 702 *exists* is its assumption that the jury will not be able to fully comprehend these attacks, and will end up giving too much deference to the expert. Put another way, the court should be taking no comfort in the fact that the opponent cross-examined and argued to the jury, because the point of the gatekeeper function is that these methods are insufficiently effective unless the court has found by a preponderance that the expert’s testimony is reliable.

The case might be explained as one in which the trial court is just getting a pass because of the abuse of discretion standard of review. But that just changes the focus to the trial court. The misapplication of the methodology seems substantial enough to conclude that the trial court, in finding the challenges to be questions of weight, improperly applied the Rule 104(b) standard.

B. District Courts

Porte v. Illinois Central RR Co., 2018 WL 4404063 (E.D. La.): In a toxic tort case, the plaintiff’s expert as to general causation regarding a solvent ignored a number of studies that cut against his opinion, and could not articulate a biologically plausible mechanism for the solvent to cause renal cell carcinoma. The court, relying on *Daubert* as being a liberal opinion, held that these defects “all go to the weight of the expert’s opinion, and not the question of admissibility.” This appears to be a Rule 104(b) ruling as the defects in the expert’s opinion seem to be substantial.

Bouchard v. Am. Home Prods. Corp., 2002 WL 32597992, at *7 (N.D. Ohio): The plaintiff alleged that after taking a diet drug (Redux) she suffered pulmonary and brain damage. This case is unlike most of the others because it involved a damaged plaintiff moving to exclude the defense expert. The defendant's vocational expert concluded that the plaintiff could still do sedentary work. The portion of the analysis that deals with admissibility/weight is as follows:

Bouchard * * * argues that [the expert's] conclusions are faulty because he did not evaluate all available information before making his diagnosis. * * * Wyeth points out that Dr. Manges' opinion was based on information up to May 2001, and that "weaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility." See *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir.2000) (citation omitted). Furthermore, Bouchard has not shown why an expert in Dr. Manges' field may not rely on the plaintiff's own statements when making an evaluation.

The Court is not convinced that Dr. Manges' methodology is faulty. If Bouchard believes that he did not examine sufficient evidence to support his opinion, or believes that he ignored evidence that would have required him to substantially change his opinion, that is a fit subject for cross-examination, not a grounds for wholesale rejection of the expert opinion.

Comment: The court's broad statements would indicate that it was engaged in an improper Rule 104(b) analysis, because the expert was relying on only a portion of the information about the plaintiff's condition. The Sixth Circuit (as seen in the case cited by the court) routinely sets out the mantra that deficiencies in basis raise questions of weight and not admissibility. And yet, a good argument can be made that the court actually found a sufficient basis by a preponderance of the evidence. The injuries occurred in 1997, and the opinion is written in 2002. So, roughly, the expert was considering four out of five years of the plaintiff's condition. Rule 702 does not require a perfect foundation, just a sufficient one, more likely than not.

Further evidence that the court may have been treating Rule 702(b) seriously is another ruling in the opinion that *excluded* an expert for having an insufficient basis. The defendants proffered an economist to testify to the plaintiff's earning capacity, and the court rejected the testimony in the following analysis:

Berger assumes that even without any impairments that are allegedly related to her use of Redux, Bouchard would be severely disabled. Put another way, Berger assumes that Bouchard would have been just as disabled without using Redux as she claims to be after having used the drug. Then, using data provided by the U.S. Census Bureau, Berger assumes that Bouchard, like an average severely disabled woman of her age and educational level, would have had only a five percent chance of working full-time each year. Accordingly, Berger then credits Bouchard with only one-twentieth of what her expected income for any given year would otherwise have been.

* * *

Even more important than Berger's ability to decide that Bouchard would be disabled without the use of Redux is his almost complete disregard for the specific facts of this case. As pointed out by Bouchard, testimony on loss of earnings "must be accompanied by a sufficient factual foundation before it can be submitted to the jury." *Elcock v. Kmart Corp.*, 233 F.3d 734, 754 (3d Cir.2000). * * * This case is about Bouchard. It is not about an average disabled woman of her age and education. There is no indication in the record that the conditions that Berger assumes would give Bouchard a one-in-twenty chance to work full-time each year prevented her from holding a full-time job in all years prior to the onset of her allegedly Redux-related disability. Berger's anticipated testimony distorts the underlying facts of the case and would be unhelpful to the jury. Bouchard's motion to exclude his testimony will be granted.

So the expert was excluded because, among other reasons he had an insufficient factual basis. It could be argued that this also is a Rule 104(b) ruling --- that the basis was so lacking that no reasonable person could have found it to be sufficient. But it is equally plausible to conclude that the court was reviewing the basis of both experts under Rule 104(a). The problem, in all these cases, is that the court does not say whether it is applying Rule 104(a) or 104(b) --- which makes it difficult to know whether an amendment to Rule 702 to specifically invoke the Rule 104(a) standard would have a practical effect in many cases.

Another strange part of the case --- illustrative of the confusion in this area --- is that for one expert the court cites the Sixth Circuit mantra that deficiencies in basis are a question of weight, but when evaluating the other expert the court cites Third Circuit law indicating that sufficient basis is a question of admissibility. For the latter point, an out-of-circuit citation was required, because the Sixth and Eighth Circuits are the major offenders in misstating the standard applicable to questions of sufficiency of basis and reliability of application.

Oshana v. Coca-Cola Co., 2005 WL 1661999, at *4 (N.D.Ill.): The plaintiff sued Coca-Cola, contending that it deceived consumers about whether fountain diet coke contained saccharin. The plaintiff's marketing expert drew conclusions based on standard survey methodology. The entirety of the court's analysis is as follows:

The use of a survey methodology is not at issue. Rather, Coca-Cola challenges the validity of Dr. Star's conclusions based on his assumptions and calculations. Challenges addressing flaws in an expert's application of reliable methodology may be raised on cross-examination. *Daubert*, 509 U.S. at 596 ("vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of challenging shaky but admissible evidence").

Comment: While the court’s broad statement is incorrect under Rule 702(d), there is not enough discussion or analysis to determine whether the court was actually applying a Rule 104(a) or 104(b) standard. There is no explanation of the seriousness of the alleged errors in assumptions and calculations.

United States v. Adam Bros. Farming, 2005 WL 5957827, at *5 (C.D.Cal.): This was an enforcement action brought under the Clean Water Act. An expert testified regarding delineation of the site. His conclusions were based on standard methodology. The court stated that the defendant’s objections “are to the accuracy of his application of the methodology, not the methodology itself, and as such are properly reserved for cross-examination.”

Comment: While the court’s broad statement is incorrect under Rule 702(d), there is not enough discussion or analysis to determine whether the court was actually applying a Rule 104(a) or 104(b) standard. There is no explanation of the seriousness of the alleged errors in applying the methodology.

In re Roundup Product Liability Litig., 2018 WL 3368534 (N.D. Cal.): The parties disputed whether glyphosate, a commonly used herbicide, can cause Non-Hodgkin’s Lymphoma (“NHL”) at exposure levels people realistically may have experienced. The court first noted the dispute in the courts over the degree of rigor that district courts are to use in reviewing expert opinions:

The Ninth Circuit has placed great emphasis on *Daubert’s* admonition that a district court should conduct this analysis “with a ‘liberal thrust’ favoring admission.” *Messick*, 747 F.3d at 1196 (quoting *Daubert I*, 509 U.S. at 588). Accordingly, the Ninth Circuit has emphasized that the gatekeeping function is meant to “screen the jury from unreliable nonsense opinions, but not to exclude opinions merely because they are impeachable.” *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013). That is because “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert I*, 509 U.S. at 596; see, e.g., *Murray v. Southern Route Maritime SA*, 870 F.3d 915, 925 (9th Cir. 2017); *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237 (9th Cir. 2017). **This emphasis has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits.** Compare *Wendell*, 858 F.3d at 1233-38, and *City of Pomona*, 750 F.3d at 1043-49, with *In re Zoloft (Sertraline Hydrochloride) Products Liability Litigation*, 858 F.3d 787, 800 (3d Cir. 2017), and *McClain v. Metabolife International, Inc.*, 401 F.3d 1233, 1244-45 (11th Cir. 2005). **This is a difference that could matter in close cases.**

The court analyzed, in extensive detail, the opinions, methodology, application and basis of the plaintiff's causation experts. Here are some quotes from the court:

- With respect to dose response, it's true that some of the data from the case-control studies support Dr. Portier's conclusion, but other data do not, as he acknowledged. * * * Although the better conclusion might be that these data are inconclusive, Dr. Portier's assessment that the biological gradient criterion is moderately supportive of a causal association does not constitute an unsupported scientific leap. *See Joiner*, 522 U.S. at 146.

- More broadly, Dr. Portier's epidemiology-related conclusions, even tempered as they are by the recognition that the epidemiology evidence alone does not show causation, are far from unassailable. There is one large cohort study (the AHS), with results recently published in a well-regarded scientific journal, suggesting no association between glyphosate use and NHL. There is a series of case-control studies arguably suggesting an association, but a fairly weak one. There are limited data indicating that the association strengthens with greater exposure to glyphosate, but also data to the contrary. And there are legitimate concerns about the reliability of the data from all the studies. Under these circumstances, all one might expect an expert to conclude is that glyphosate exposure is cause for concern, but not that glyphosate is likely causing NHL at realistic human exposure levels. But, as noted at the beginning of this ruling, the *Daubert* inquiry does not require (or even allow) a district court to exclude an expert's opinion merely because the court is not persuaded that the expert's read of the evidence is the best one. * * * Monsanto can cross-examine Dr. Portier on the apparent weaknesses in his analysis, and there is little reason to think that a jury will not understand those weaknesses.

- In short, Monsanto's attacks on Dr. Portier's analysis of the mechanistic data probe his application of the scientific method, but do not demonstrate that the principles and methodology he applied in analyzing these data were not grounded in science.

- Turning from methods to conclusions, perhaps Dr. Portier has read too much into the evidence in certain areas—particularly in the important area of epidemiology. This could cause a jury to reject his conclusions, but it does not warrant keeping his opinion from a jury altogether. Thus, although it's a close question, Dr. Portier's opinion does not involve any logical leaps so great and so lacking in support as to render them inadmissible.

- Failing to take account of likely confounders by presenting and relying upon only unadjusted (or minimally adjusted) estimates is a serious methodological concern. * * * Accordingly, the misleading "Forest plot" from Dr. Ritz's report—which highlighted numbers unadjusted for other pesticides and, moreover, reported the number of cases in the individual studies without taking into account how many of these individuals were exposed to glyphosate—may not be presented to a jury. And frankly, this portion of her presentation calls her objectivity and credibility into question. However, although Dr. Ritz did not focus heavily on the adjusted numbers in her reports, she did consider them. * * * Further, during the hearings, Dr. Ritz professed that, even if she were limited to considering only the

numbers adjusted for other pesticides, her conclusion would not change. * * * Although it is again a close question, Dr. Ritz’s conclusions regarding the epidemiology evidence are admissible. While her analysis is subject to challenge—something Monsanto’s cross-examination during the Daubert hearing made plain—her opinion does not rise to the level of an “unreliable nonsense opinion.” *City of Pomona*, 750 F.3d at 1044.

- Each problem with Dr. Neugut’s testimony is not sufficient, on its own, to justify exclusion. Reliable experts sometimes make mistakes. They sometimes need to refer to the written materials during their testimony, to refresh their recollection about an issue or perhaps to consider a point raised by counsel for the first time on cross-examination. Even a few instances of misstating the details or failing to recall some aspect of a particular study would not be enough to exclude a witness. But in combination, the problems with Dr. Neugut’s testimony lead the Court to conclude that his opinion is not sufficiently reliable to be admissible.

- The plaintiffs also mount a broader attack on Dr. Goodman’s methodology as results-oriented. Dr. Goodman’s methodology emphasized studies conducted on mammals or mammalian cells and those that use the four basic tests used by international agencies for registration or approval of chemicals. He dismisses several of the studies as unable to rule out cytotoxicity as the cause of the results observed. Although he reaches different conclusions about what the weight of the mechanistic evidence shows, his analysis is not so flawed or one-sided that his opinions need be excluded.

- It’s a close question whether to admit the expert opinions of Dr. Portier, Dr. Ritz, and Dr. Weisenburger that glyphosate can cause NHL at human-relevant doses. Therefore, it’s a close question whether to grant or deny Monsanto’s motion for summary judgment. But the Court concludes that the opinions of these experts, while shaky, are admissible. They have surveyed the significant body of epidemiological literature relevant to this question; identified at least a few statistically significant elevated odds ratios from case-control studies and meta-analyses; identified what they deem to be a pattern of odds ratios above 1.0 from the case-control studies, even if not all are statistically significant; emphasized that studies of glyphosate have focused on many different types of cancer but found a link only between glyphosate and NHL; given legitimate reasons to question the results of the primary study on which Monsanto relies; and concluded, in light of all the available evidence, that a causal interpretation is appropriate. * * *

Reporter’s comment: The “close” questions that the court refers to throughout are the kind the outcome of which are often determined by which standard of proof is applied. It’s hard here, though, to conclude that the court was employing a Rule 104(b) standard on the issues of sufficiency of basis and application. The court did a thorough analysis and excluded some parts of the expert opinions. It applied the same degree of rigor to both sides’ experts. To say that it took its mission seriously would be an understatement. It is unclear whether an amendment to Rule 702, adding Rule 104(a) to the rule, would have affected the court’s determination in this case.

United States v. McCluskey, 954 F.Supp.2d 1227, 1247-48 (D.N.M. 2013): The case involved the use of PCR DNA identification, conducted by a state expert. The defendant argued that the application of the PCR process was unreliable in this case, due to the use of kits and software that reached an inaccurate result. The Government distinguished between review of the methodology itself (i.e., the PCR/STR method of DNA testing), and review of the application of that methodology (e.g., the kits, software, hardware, and statistics). The Government's position was that once the PCR/STR methodology is held admissible under *Daubert* and Rule 702 --- which the court and other courts had already done --- challenges to the particular procedures and instrumentalities used in applying that method go to the weight of the DNA evidence and not to admissibility. The defendant argued that no distinction should be made between methodology and application, and that exactly the same analysis under *Daubert* applies to the PCR/STR methodology and to each part of the procedure. In other words, the defendant argued that, before DNA evidence can be admitted, the Government must prove that each step in the procedure and each item used in the procedure met the *Daubert* test for scientific reliability.

The court engaged in an extensive analysis, reviewing case law throughout the country, and concluded that the most that is required for reliability of application is that the judge assure that the application was not so faulty as to skew the methodology itself --- which is a rough approximation of the Rule 104(b) standard. The court stated that in the 10th circuit there is authority for an even more permissive view --- that questions of application are *always* jury questions no matter how serious the flaw. The court concluded as follows:

Based on review of the arguments, the caselaw, and Rule 702's policies, the Court rejects Defendant's argument that each part of the procedure and each item used in the procedure are subject to the same *Daubert* analysis for admissibility as the PCR/STR methodology. The Court concludes that well-reasoned caselaw supports a distinction between methodology and application of that methodology. If the Court were to scrutinize each procedure and each item used with the same intensity, and under the same standards, as the court reviews the methodology itself, the court would run afoul of the philosophy and principles of *Daubert*—to respect the “liberal thrust” of the Federal Rules by “relaxing the traditional barriers to ‘opinion’ testimony.” *Daubert*, 509 U.S. at 588, 113 S.Ct. 2786. Under *Daubert*, the barriers to admission of expert testimony are to be lowered; under *Daubert* the jury is to take a greater role in making reliability determinations and assessing expert evidence.

* * * Defendant's challenges do not rise to the level of flaws that would undermine or skew the PCR/STR methodology itself.

Comment: The court engaged in extensive and detailed case-crunching, but the one thing it did not do was analyze and apply Rule 702(d). It also definitely overstated the liberality of *Daubert*, which imposes a gatekeeper function under Rule 104(a). On balance *Daubert* has resulted in more, not less, regulation of expert testimony.

But nonetheless, the court's review of the case law, and its comprehensive discussion of the gatekeeping function as related to application of a methodology, raises questions about the effectiveness of an amendment that would add the preponderance standard to the text of Rule 702. Will such an amendment cause this court, and others, to change their entire outlook in evaluating questions of application?

In re Urethane Antitrust Litig., 2012 WL 6681783, at *3 (D.Kan.): This was a price-fixing case. The defendant challenged an opinion from an economist as to liability. The expert undertook a "structure-conduct-performance" analysis of the alleged conspiracy. The defendant conceded that such a method of analysis is well accepted in this field, but it took issue with particular aspects of each part of Dr. Solow's analysis. The part that is relevant to the admissibility/weight issue is the following passage:

Dow next seeks to exclude Dr. Solow's opinion that certain conduct by the alleged conspirators is consistent with the existence of an agreement to fix prices. Dow first argues that Dr. Solow only considered evidence "cherry-picked" by counsel without considering contrary evidence in forming that opinion. Dow complains that Dr. Solow effectively weighed the evidence, thereby invading the jury's province.

The Court concludes that there is no basis to exclude Dr. Solow's testimony on this issue at this time. Dr. Solow stated that he did consider the defendants' witnesses denials. Moreover, Dr. Solow's opinion is essentially that particular events, assuming they occurred, are consistent with a conspiracy. Certainly, he may not give any opinion concerning the credibility of witnesses or whether a particular event actually occurred, and Dow will be free to object to any such testimony at trial. Nor may Dr. Solow opine on the ultimate issue of whether a conspiracy existed here, as plaintiffs acknowledge. *The extent to which Dr. Solow considered the entirety of the evidence in the case is a matter for cross-examination. The Court cannot say that Dr. Solow's failure to examine the entire record renders fatally unreliable his opinion that certain events are consistent with collusion, and Dow has not provided authority that would require exclusion here.* (emphasis added).

Comment: Admittedly, one way to look at this analysis is that the court is deciding that a jury could find that the expert had considered enough information, and so the rest is up to the jury. That analysis would be in violation of Rule 702(b)/104(a). But it seems equally plausible to interpret this passage as the court having concluded, more likely than not, that the expert has considered enough information, that what he hasn't considered is not very important, and that the deficit becomes a question for the jury. This latter interpretation seems sensible in light of the limited opinion that is being offered. The expert is not saying that there was an agreement to fix prices, or that all the conduct in the case definitely supports a finding of a conspiracy. He is saying that some of the conduct is consistent with an agreement to fix prices. What's more, there seems to be simply a dispute between the parties on whether the expert actually considered contrary information. Swearing contests go to the jury under Rule 104(a). And finally, the expert's

conclusion is conditioned on an assumption --- that the conduct actually occurred. And that would have to be proved by independent evidence at trial. So given these limits and assumptions, it would appear that the court could easily find that the expert had more likely than not relied on sufficient information.

Proctor & Gamble Co. v. Haugen, 2007 WL 709298 (D.Utah): The case involved a rumor regarding Amway and the rumor's effect on Amway sales. The challenge was to survey evidence. The court found that the expert was using standard survey methodology. The defendants argued that the expert used the methodology improperly, by interviewing insufficient numbers of consumers, by targeting consumers from cities that were not representative, and by inaccurately evaluating the interviews. The court held that all of these challenges to application went to weight and not admissibility. "As such, they can be raised on cross examination, the traditional method of challenging expert evidence that the Court finds admissible but that the party asserts is 'shaky.'"

Comment: One way to read the quoted passage is that the court is saying "I have found it admissible (under 104(a)) and any remaining questions of application might make the opinion 'shaky' but are for the jury." But the flaws in application appear to be substantial. So it may be that the court is saying, in a 104(b)-type analysis, that "the use of standard survey methodology is all that I need to find and the rest is for the jury."

And that is the problem with evaluating cases on the weight/admissibility distinction --- the court doesn't specifically say which standard it is using, leaving the reader to guess at how serious the defects are.

It should be noted that there are some opinions regarding survey experts in which the court specifically applies a Rule 104(a) standard and excludes experts who misapply survey methodology. See, e.g., *Louis Vuitton v. Dooney & Bourke*, 525 F.Supp.2d 558 (S.D.N.Y. 2007) (finding survey evidence regarding consumer confusion inadmissible when targeted consumers would not have had the finances to buy the product, and where comparisons presented were misleading --- the court found that a reliable methodology was unreliably applied).

In re Chantix Prods. Liab. Litig., 889 F.Supp.2d 1272 (N.D. Ala. 2012): Chantix is a drug used by people who want to stop smoking. Plaintiffs sued alleging that Chantix causes depression and suicide. In an extremely detailed opinion, the court held that the plaintiffs' experts would be allowed to testify to general causation, and to the fact that the defendant had improperly designed studies and therefore did not determine the risk that Chantix posed. As to the admissibility/weight issue, the court quotes the *Daubert* paean to cross-examination a dozen times. At one point it states that the mere fact that some of the studies relied upon by an expert has flaws is a question of weight and not admissibility. In the end it is difficult to assess whether the court found sufficient facts or data and reliable application by a preponderance of the evidence. It seems that most of the disputes are differences over judgment rather than differences over basis and application. The bottom line

is that this is not a case in which the court obviously ignores the admissibility requirements imposed by Rule 702(b) and (d).

C. Conclusion on Case Law

There is no doubt that in some circuits the courts routinely state the misguided notion that arguments about sufficiency of basis and reliability of application almost always go to weight and not admissibility.⁵ But in many of these cases, the expert arguably satisfied the Rule 104(a) standard anyway, so the court's cavalier treatment of Rule 702(b) and (d) appears to make no difference to the result. In other cases, it cannot be determined whether the court used the 104(a) or the 104(b) standard in assessing sufficiency of basis and application. Evaluation of the cases is muddled by two complications: 1) courts rarely specifically articulate the standard of proof that they are employing; and, more importantly, 2) there will be a line to draw for admissibility and weight no matter what standard of proof is employed. So it will be wrong for a court to say that questions of sufficiency always (or almost always) go to weight. But it will not necessarily be wrong – indeed it will often be right --- for a court to say that an argument about a certain flaw goes to weight and not admissibility.

The challenge is to get courts to evaluate the weight/admissibility line by using the lens of Rule 104(a) rather than 104(b). The Subcommittee and the Committee need to determine whether any amendment to Rule 702 will be useful in getting courts to focus on Rule 104(a). That is a hard question to answer, given the subtleties of different standards of proof, and the fact that the same admissibility/weight nomenclature applies to both Rule 104(a) and 104(b) questions.

⁵ “Almost” always because if the expert has *no* basis or applied the methodology in a completely bizarre way, the expert should be excluded even under the minimal Rule 104(b) standard.

III. Draft Text and Committee Note

Let's assume that amending the Rule to specify in text that a preponderance standard applies to the Rule 702 admissibility requirements will have a salutary effect. How best to implement the change?

It would seem that the most effective way to highlight the standard of proof is to put it at the beginning or the end of the rule, so that it clearly applies to *all* the Rule's admissibility requirements. Surely it would be wrong to add the preponderance standard only to subdivisions (b) and (d), as this would create the negative inference that the standard does not apply to the other requirements, such as qualifications and reliable methodology.

As to the beginning or the end, it would seem that the beginning would be a better location. It provides a stronger highlight, and moreover placing the standard at the end would mean that it would probably have to be in its own hanging paragraph. And restylists hate a hanging paragraph.

Placing the preponderance standard at the beginning would look like this:

Rule 702. Testimony by Expert Witnesses.

For a witness to testify as an expert in the form or an opinion or otherwise, the court must find the following requirements to be established by a preponderance of the evidence: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form or an opinion or otherwise, if:

(a) the ~~expert's~~ witness's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; ~~and~~

(d) the ~~expert-~~ witness has reliably applied the principles and methods to the facts of the case; ~~and~~

(e) the witness is qualified as an expert by knowledge, skill, experience, training, or education.

Comments:

1. The change has the collateral benefit of clarifying that qualification is an admissibility requirement governed by Rule 104(a). The current rule buries the qualification requirement in the introductory sentence to the rule.

2. As an admissibility requirement, I placed qualifications at the end. Logically, perhaps, it should go in the front. That's what the restylist suggested. But to do so would disrupt electronic searches on a rule that has been cited hundreds of times. Specifically, since 2000: more than 800 citations to 702(a); more than 600 citations to Rule 702(b); more than 400 citations to 702(c); and more than 150 citations to Rule 702(d).

Draft Committee Note

Rule 702 has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established by a preponderance of the evidence. *See* Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States*, 483 U.S. 171 (1987). But unfortunately many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment. There is no intent to raise any negative inference as to the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying that Rule.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

TAB 4

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Memorandum To: Advisory Committee on Evidence Rules

From: Daniel J. Capra, Reporter

Re: Proposed Amendment to Rule 106

Date: October 1, 2018

At its last meeting, the Committee continued review of a request from Judge Paul Grimm to consider possible amendments to Rule 106.¹ Rule 106, known as the rule of completeness, currently provides as follows:

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

The problems raised by Judge Grimm arise mostly in criminal cases, but as seen in this memo there are a number of Rule 106 rulings in civil cases as well. And this should not be surprising, because Rule 106 issues arise when an advocate makes a selective, unfair presentation of a document or statement. The possible benefit in such a presentation is not limited to criminal cases.

Judge Grimm in *Bailey* sets forth the following hypothetical to illustrate the need for a rule of completeness. The hypo is that there is an armed robbery and a gun is found. The defendant is being interrogated by a police officer and says, “yes I bought that gun about a year ago, but I sold it a few months later at a swap meet.” The government in its case-in-chief, through the testimony of the police officer, seeks to admit only the part about the defendant buying the gun. This part is admissible as a statement of a party-opponent under Rule 801(d)(2). The defendant contends that admitting only the first part of the statement makes for an unfair, misleading presentation --- because without the completing part, the jury will draw the inference that he *still had* the gun he bought at the time of the robbery. The defendant further argues that the remainder must be admitted

¹ Judge Grimm’s opinion on the subject, *United States v. Bailey*, is once again reproduced in the agenda book for the convenience of the Committee.

together with the first part of the statement, because if it is delayed until the defendant's case, the damage will be done and will be hard to rectify.

Rule 106 is designed to require contemporaneous completion in order to protect an opponent from a selective, unfair presentation. The rule recognizes that if there is an unfair presentation, there is an "inadequacy of repair work" when completion is delayed to a point later in the trial.² The question is whether the defendant can require the admission of the remainder.

Many courts require completion in the gun hypo, and that result is certainly supported by the policy underlying Rule 106. But a number of courts would not apply the rule of completeness, because they construe the rule to have two important limitations:

1. Some courts have held that Rule 106 cannot operate to admit hearsay; and the defendant's statement about selling the gun is hearsay.³ These courts hold that Rule 106 is only about the order of proof and is not a rule that trumps other rules of inadmissibility.

2. Some courts have held that Rule 106 does not apply to oral statements; and while some of the courts so holding have found a rule of completeness for oral statements in Rule 611(a), others have not.

A further complication is whether the common-law rule of completeness (which applied to oral statements and allowed admission of fairly completing statements even if they were hearsay) remains applicable, given the Supreme Court's recognition that Rule 106 is only a "partial codification" of the common-law rule. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988).

At the last two meetings, the Committee reviewed and discussed Judge Grimm's proposals, which are: 1) to amend Rule 106 to allow a party to admit the party's statements over a hearsay objection, when they are necessary to complete an unfair, partial presentation of the party's statements; and 2) to extend Rule 106 to cover oral unrecorded statements.

The Minutes of the Spring 2018 Meeting summarize where the Committee is so far on a proposed amendment to Rule 106:

The Chair asked the Committee whether it was interested in considering an amendment requiring the proponent to do its own completion, with a "misleading" limitation added to the rule text. The Committee voted to consider such a proposal for the next meeting with a Committee note explaining that there "can be no hearsay objection because the proponent is required to introduce the completing portion."

The Committee voted to continue consideration of an amendment to Rule 106 that would add oral statements to the rule at its next meeting. The Reporter agreed to write up

² Rule 106 Advisory Committee Note.

³ *See, e.g., United States v. Sanjar*, 853 F.3d 190, 204 (5th Cir. 2017): "When offered by the government, a defendant's out-of-court statements are those of a party-opponent and thus not hearsay. Rule 801(d)(2)(A). When offered by the defense, however, such statements are hearsay."

amendment alternatives for the fall meeting including a hearsay exception proposal, a requirement that the proponent complete to avoid the hearsay issue, the addition of the limiting term “misleading,” and the addition of oral statements to Rule 106.

This memo is in five parts. Part One discusses how and when Rule 106 applies. Part Two deals with the two major questions on which the courts are divided: whether the rule operates as a hearsay exception, and whether it covers oral statements or, if not, whether oral statements are covered under a completeness principle found in Rule 611(a). Part Three discusses another issue that extra research indicates might be usefully treated in an amendment to Rule 106 --- the question of timing, i.e., when must completing evidence be admitted? Part Four discusses the arguments in favor of and against an amendment to Rule 106, and various amendment alternatives. Part Five provides drafting alternatives.

I. How and When the Rule Applies.

A. Rule 106 Applies in Narrow Circumstances

Because Committee members at the last two meetings expressed concern about whether an amendment will allow rampant completion and constant disruption of the order of proof, it might be useful to provide more perspective on the scope of the rule. The rule contains an important threshold requirement that provides a substantial limitation on the consequences of the amendments being considered. It is not in any sense an automatic rule that a defendant is allowed to admit all exculpatory parts of a statement whenever the government admits an inculpatory part. Rather, the court must find two things before the rule of completion is triggered:

1. The portion offered by the proponent has been selected in such a way as to create an inference that is inaccurate; and
2. The completing portion that the adversary seeks to introduce is necessary to eliminate the unfair inference and to make the statement accurate as a whole.

The Grimm example of the gun possession is one in which both requirements are met. The portion chosen by the government creates an inaccurate inference. “I bought the gun” creates an inference that you still have it. The completing information – “I sold it” --- is necessary to eliminate that inaccurate inference.

By way of contrast, another hypo will show where the rule does not apply. Assume that the defendant is charged with possession of a firearm. He states to a police officer, “I had the gun on me, but I never used it.” The government will be allowed to admit the first part of that statement, without having to complete with the second. That is because “I had the gun” creates no unfair inference in a prosecution for possessing the gun. On the other hand, if the defendant is charged with *using* the firearm, completion should be required, because the first portion of the statement,

“I had the gun” creates an unfair inference that he used the gun, and the second portion is necessary to eliminate that inference.

Because the triggering requirements for Rule 106 are so narrow, it seems very unlikely that amending it to trump the hearsay rule and to cover oral statements is likely to create a flood of meritorious completion requests. The D.C. Circuit Court of Appeals held that Rule 106 allows the use of hearsay evidence to complete a partial, misleading presentation, and in response to a “floodgates” argument the court stated that “[i]n almost all cases we think Rule 106 will be invoked rarely and for a limited purpose.” *United States v. Sutton*, 801 F.2d 1346, 1369 (D.C.Cir. 1986). There is nothing in the reported cases in the D.C. Circuit, nor in other circuits following the same rule, to indicate that the floodgates have been opened on completeness arguments.

What follows are some examples of application of the fairness requirement of Rule 106, to illustrate the narrow circumstances in which it has been employed.

Here are some examples of completion required:

- *United States v. Castro-Cabrera*, 534 F.Supp.2d 1156 (C.D.Cal. 2008). The defendant was charged with reentering the United States after being deported. During a previous deportation hearing, the defendant was asked twice in a row to which country he claimed citizenship; the first time, he answered, “Hopefully United States through my mother,” while the second time, he answered, “I guess Mexico until my mother files a petition.” After the government offered only the second answer into evidence, the court found that the first answer was admissible as a completing statement, because it gave a fairer understanding of the defendant's answer. Without the remainder, the portion was a clear admission of Mexican citizenship, whereas both answers together suggested that the defendant was unsure, or thought he had dual citizenship.
- *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1983): In a felon-gun possession case, the defendant admitted to the police that he was aware of drugs found under a bed, but knew nothing about the gun that was found near it. The government redacted the statement to the admission that the defendant was aware of drugs. The relevance of that portion was that if the defendant had drugs, he was likely to have a gun. But that was an unfair inference because the defendant explicitly denied having a gun. The Seventh Circuit held that once the prosecution elicited testimony that the defendant admitted knowing about the drugs, the defendant should have been allowed to elicit the part about not knowing the gun was there. Otherwise the jury would use the statement as if the defendant implicitly admitted to having a gun, when that was not the case.

- *United States v. Sweiss*, 800 F.2d 684 (7th Cir. 1986): The government admitted a recording of a conversation between the defendant and an informant, which indicated that the defendant knew in advance of the conversation about a plot to obstruct justice. The government argued that this showed the defendant knew independently about, and so was connected to, the plot. But a prior recording of a conversation between the defendant and the informant indicated that the defendant had been told about the plot *by the informant*. The court held that the defendant had the right to introduce the prior recording under the rule of completeness, to dispel the inference from the second recording that he had independent knowledge.

Here are some examples of completion not required:

- *United States v. Doxy*, 225 Fed. Appx. 400 (7th Cir. 2007): In a drug prosecution, the defendant admitted to smoking marijuana but claimed not to know about crack cocaine hidden in the car. The court found no error in excluding the exculpatory evidence. The fact that the defendant smoked marijuana raised no inference about knowledge of hidden cocaine. The court distinguished *Haddad* as a case in which the very point of admitting the redacted portion was to raise an inference that was denied by the completing portion.
- *United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985): The government admitted a portion of the defendant’s confession, leaving out the defendant’s statements of his political and religious motives for committing the charged act. The court ruled that Rule 106 was inapplicable because the defendant’s motivations for his actions “did not change the meaning of the portions of his confession submitted to the jury. The redaction did not alter the fact that he admitted committing the acts with which he was charged. Further, because the defense of necessity was unavailable, Dorrell’s motivation did not excuse the crimes he committed.”
- *United States v. Shuck*, 1987 U.S. App. Lexis 1519471, at *6 (4th Cir.): The defendant’s previous statements about committing the crime were admitted, and he argued that his additional statements about how he had never been convicted of a crime should have been admitted to complete. The court found that completion was not necessary: “General rehabilitation, such as being free of a state or federal conviction * * * is not directly relevant to Shuck’s admissions. Not do such materials explain the passages introduced by the government. Nor were the additional portions necessary to avoid misleading the trier of fact.”
- *United States v. Lewis*, 641 F.3d 773 (7th Cir. 2011): Billingsley, charged with firearm possession and conspiracy to possess cocaine, confessed in an interview. He sought

to complete by eliciting testimony from the agent who interviewed him about how he had never mentioned any of his co-defendant's criminal associates by name. The court found that although this remainder could rebut the government's theory about the level of the defendant's involvement in the conspiracy, and could help to explain the defendant's theory of the case in general, it did not affect the meaning of any of the defendant's statements to which the agent had already testified. Accordingly, no remainders were necessary. Thus, a remainder under the fairness test has to be explanatory of the portion that it completes, not just part of the defendant's theory of the case. *See also United States v. Li*, 55 F.3d 325, 330 (7th Cir. 1995) (noting that “the trial judge need not admit every portion of a statement but only those needed to explain portions previously received,” and reasoning that “[t]o determine whether a disputed portion is necessary, the district court considers whether (1) it explains the admitted evidence, (2) places the admitted evidence in context, (3) avoids misleading the jury, and (4) insures fair and impartial understanding of the evidence”).

- *United States v. Dotson*, 715 F.3d 576, 581 (6th Cir. 2013): In a trial on charges of child pornography and exploitation of a minor, the trial judge admitted portions of a written statement given by the defendant to authorities following his arrest in which he stated that he made videos and photos of the victim; but the court rejected the defendant's request to admit the entire statement. The court held that the portions admitted were not misleading and the portions omitted were not necessary to place the admitted statements in proper context. The omitted portions showed that Dotson had a rough upbringing and had been sexually abused as a child, and that he was concerned that the victim knew he was exploiting her. These portions “did not in any way inform his admission that he photographed the victim, made videos of her, and downloaded sexually explicit images of other children from the internet.”

- *United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996): After the disaster at the Waco compound, Castillo was charged with using or carrying a firearm during a crime of violence. He confessed to donning battle dress and picking up guns when he saw ATF agents approaching. He also stated that he never fired a gun during the raid. The court found that the exculpatory statement was not necessary for completion --- the “cold fact” that Castillo had retrieved several guns during the day was neither qualified nor explained by the fact that he never fired them. Castillo was charged with using *or carrying* a gun during a crime of violence, and this charge did not require a finding that he shot a gun. The court concluded: “We do not doubt the exculpatory nature of the excluded statement, but that does not require its admission under Rule 106.” The court concluded as follows:

We acknowledge the danger inherent in the selective admission of post-arrest statements. Neither the Constitution nor Rule 106, however, requires the admission of the entire statement once any portion is admitted in a criminal prosecution. We do no violence to criminal defendants' constitutional rights by applying Rule 106

as written and requiring that a defendant demonstrate with particularity the unfairness in the selective admission of his post-arrest statement.

- *United States v. Marin*, 669 F.3d 73 (2d. Cir 1982): The defendant made statements to police about who he was with on the night that drugs were found in the car, but objected to redaction that it was Marin who put the drugs in the car. That redaction was done to comply with *Bruton*, because Marin was a codefendant. The court held that Rule 106 did not require completion (meaning in this context that a severance was not required) because the statement, as redacted, “concerned only the circumstances surrounding the meeting of Romero, Marin, and Farradaz in the Bronx, and their trip to Queens. The placement of the bag in the trunk of Romero’s car was an entirely different matter and thus was neither relevant to the rest of the statement nor necessary to explain or place in context the admitted portion.”
- *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986): The court found that Rule 106 does not require the introduction of an entirely separate conversation, on a different subject matter, simply because it was relevant to the defendant’s defense. Relevance is not a sufficient ground to allow completion under Rule 106.
- *United States v. Brown*, 720 F.2d 1059 (9th Cir. 1983): This was a completing attempt by the *government* that was unsuccessful. The government called witnesses who got plea deals and introduced the deal terms on direct. The defendant argued on cross that there were promises made by the government that were not in the agreement. The government countered, for completeness purposes, with polygraph clauses in the agreements. But the court found the polygraph clauses to be not necessary for completion, because the defendant’s attack was about what was *not* in the plea agreements.
- *United States v. Lesniewski*, 2013 WL 3776235 (S.D.N.Y.): The court held that mere proximity of the omitted portion to the statements introduced does not justify completion. It found that the omitted statements were not necessary for completion because they were just “self-serving attempts to shoehorn after-the-fact justifications for his actions into description of his actions.”

Of all the reported Rule 106 cases in federal district courts, the ratio of “completion required” to “completion not required” is about 1/15. The case law shows that Rule 106 is a narrow rule. It does not send the trial court on a quest through mounds of evidence to try to find something that exculpates a defendant.

B. Rule 106 Can Protect the Government

The rule of completeness is not a one-way street. The government has an interest in being allowed to complete misleading presentations of statements proffered by the defendant, and Rule 106 has been applied to protect the government in such circumstances. Thus, in *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988), it was the prosecutor who offered prior statements of a witness on redirect examination in order to complete what had been selectively adduced on cross-examination; the court found no error in the trial court’s allowing completion. And in *United States v. Maccini*, 721 F.2d 840 (1st Cir. 1983), the court held it proper to permit a prosecutor to have additional portions of a witness’s grand jury testimony read, after defense counsel introduced a misleading portion of that testimony. Similarly, in *United States v. Mosquera*, 866 F.3d 1032, 1049 (11th Cir. 2018), the court held that Rule 106 applied when the defendant selectively admitted portions of an interview that a witness had with a government agent. The court noted that additional portions of the interview were properly admitted “to avoid misrepresentation.”

See also United States v. Rubin, 609 F.2d 51 (2nd Cir. 1979): The defense counsel selectively quoted interview notes in cross-examining an officer. The court found that the remainder was admissible in the government’s behalf under Rule 106: “The notes had been used extensively and quoted from copiously by Rubin’s counsel * * * possibly leaving a confusing or misleading impression that the portions quoted out of context were typical of the balance. We have repeatedly recognized that where substantial parts of a prior statement are used in cross-examination of a witness, fairness dictates that the balance be received so that the jury will not be misled.” *Accord United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988) (government allowed to complete with portions of the grand jury testimony of a witness, even though the statements were hearsay).

C. Rule 106 Can Apply in Civil Cases

As stated above, the possibility of a selective and unfair presentation is not limited to criminal cases. One example of completion required in a civil case is *Zahorik v. Smith Barney, Harris Upham & Co.*, 1987 U.S. Dist. Lexis 14078, at *6 (N.D. Ill.), which involved the introduction of charts that were misleading in the absence of the context in which they were prepared. The court found that it was “necessary to admit Huddleston’s entire affidavit in order to

explain the context in which the charts were prepared.” It specifically noted that contemporaneous presentation of the affidavit was “preferable to Zahorek’s suggestion that Smith Barney could correct any misinterpretations through the use of live testimony or deposition testimony.” That was because, as the Advisory Committee Note to Rule 106 makes clear, repair work after the fact is often not sufficient to correct the original misimpression.

See also Phoenix Assocs. III v. Stone, 60 F.3d 95, 101 (2nd Cir. 1995) (when financial statements were introduced, the trial court did not err in holding that the accountant’s workpapers were necessary to complete, because the financial statements on their own created an unfair inference); *Brewer v. Jeep Corp.*, 724 F.2d 653, 656 (8th Cir. 1983): In a product liability action, “the appellant was free to introduce the film containing the jeep rollovers but only upon the condition that the written study explaining these graphic scenes also be offered. The trial court’s order required only that the complete report be admitted, the mundane as well as the sensational. In this the trial court was fair and its exercise of discretion was not an abuse.”

II. The Two Major Questions on Which Courts are Divided

A. Can Hearsay Be Admitted When Necessary to Complete Under Rule 106?

The most important problem --- and dispute among the courts --- raised by Judge Grimm is whether Rule 106 requires the court to admit a completing statement over the government’s hearsay objection. It must be remembered that there is a substantial condition that must be met before you even get to the hearsay question: the portion offered by the proponent must raise unfair inferences and the hearsay portion must rectify the unfairness. As discussed above, Judge Grimm’s example of the gun that was purchased but then sold before the crime is one in which the narrow conditions of Rule 106 completion are surely met. If the government seeks to make its partial presentation, the question is then whether the government can turn around and object on hearsay grounds to the defendant’s statement that he sold the gun.

As Judge Grimm notes, many courts have held that even in this narrow situation, a defendant cannot invoke Rule 106 to correct the government’s misleading presentation of the evidence. The rationale given is that Rule 106 cannot operate as a hearsay exception because, for one thing, it is not in Article VIII. But as Judge Grimm notes, a number of courts have reasoned that in order to do its job of correcting unfairness, Rule 106 *has to* operate as a rule that will admit completing evidence over a hearsay objection.

Here is the conflicting case law on the hearsay question:

Cases holding or stating that Rule 106, when properly triggered, applies to overcome a hearsay objection to the remainder:

- *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986): The court notes that Rule 106 cannot do what it is intended to do unless it can be used as a vehicle to admit completing hearsay. The court also makes three important arguments for finding that Rule 106 operates as a hearsay exception:

1. “[E]very major rule of exclusion in the Federal Rules of Evidence contains the proviso, ‘except as otherwise provided by these rules.’ * * * There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed.”
2. The DOJ petitioned Congress to add specific language stating that completing evidence had to be independently admissible. But Congress refused to add such language.
3. Rule 106 was patterned after the California rule, and that rule was (and is) known to allow for admissibility of hearsay.

- *United States v. Bucci*, 525 F.2d 116 (1st Cir. 2008) (“Case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.”).

- *United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007) (under Rule 106, “even though a statement may be hearsay, an omitted portion of the statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion”).

- *United States v. Green*, 694 F. Supp. 107, 110 (E.D. Pa. 1988), aff’d, 875 F.2d 312 (3d Cir. 1989) (dictum; the court finds that Rule 106 allows the admission of hearsay, but finds the offered portion in this case to be not necessary for completion).

- *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988): The *government* sought to complete with portions of the grand jury testimony of a witness. The defendant argued that the portions were hearsay. The court responded:

The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. Fed.R.Evid. 106 allows an adverse party to introduce any other part of a writing or recorded statement which ought in fairness to be considered contemporaneously. The rule simply speaks the obvious notion that parties should not be able to lift selected portions out of context. *United States v. Sutton*, 801 F.2d 1346, 1366–69 (D.C.Cir.1986).

- *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1983): “Ordinarily a defendant's self-serving, exculpatory, out of court statements would not be admissible. But here the exculpatory remarks were part and parcel of the very statement a portion of which the Government was properly bringing before the jury, i.e. the defendant's admission about the marijuana. * * * The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence.”

- *United States v. Lopez-Medina*, 596 F.3d 716 (10th Cir. 2010) (completing hearsay was found admissible, the court reasoning that a party who introduces a misleading portion opens the door to a fair completion).

Cases Holding or Stating that Rule 106 Cannot be Used to Admit Evidence That is not Otherwise Admissible

- *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) (“Rule 106 does not render admissible evidence that is otherwise inadmissible.”); *Accord, United States v. Coplan*, 703 F.3d 46 (2nd Cir. 2012); *United States v. Nixon*, 779 F.2d 126 (2nd Cir. 1985); *United States Football League v. National Football League*, 842 F.2d 1335 (2nd Cir. 1988)(“The doctrine of completeness, Rule 106, does not compel admission of otherwise inadmissible hearsay evidence.”).

- *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014) (defendant’s web postings were not admissible under Rule 106 because they were hearsay); *United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008) (“Rule 106 does not render admissible the evidence which is otherwise inadmissible under the hearsay rules.”).

- *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982) (“The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded.”); *United States v. Adams*, 722 F.3d 788 (6th Cir. 2013) (discussed *infra*, noting that Rule 106 does not operate to admit hearsay even if admission is necessary to prevent an unfair result; the court recognizes that the government offered a misleading portion but held that the defendant had no relief under Rule 106).

- *United States v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012) (“a party cannot use the doctrine of completeness to circumvent Rule 803’ s [sic] exclusion of hearsay testimony.”).

- *United States v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987): “Neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the ‘ascertainment of the truth’ empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception.”

- *United States v. Hayat*, 710 F.3d 875, 896 (9th Cir. 2013) (“Rule 106 does not compel admission of otherwise inadmissible hearsay evidence.”).

In sum there is a clear conflict in the courts about whether Rule 106 can operate as an independent rule of admissibility.

B. Does the Rule of Completeness Apply to Oral, Unrecorded Statements?

Rule 106 does not, by its terms, apply to oral statements that have not been recorded. The Advisory Committee Note cryptically states that the limitation to written and recorded statements was implemented for “practical reasons.” Judge Grimm plausibly concludes that the “practical” reason that persuaded the Advisory Committee to narrow the traditional, common law rule of completeness was a concern over disputes about what was said in an oral statement.⁴ But as Judge Grimm notes, the problems involved in proving what was said probably do not justify a blanket rule that leaves these statements out of any completeness principle.

The exclusion of unrecorded oral statements from Rule 106 has led some courts to find an alternative way to admit unrecorded oral statements necessary for completion. As Judge Grimm recounts, the Supreme Court has intimated that the common-law rule of completeness---which does cover oral statements --- retains vitality. *See United States v. Sanjar*, 853 F.3d 190, 204 (5th Cir. 2017) (common law rule of completeness “is just a corollary of the principle that relevant evidence is generally admissible”). Like Rule 106, the common law rule comes into play only when necessary to correct a misleading impression created by the portion of the oral statement

⁴ The Florida Advisory Committee, commenting on the Florida counterpart to Federal Rule 106, explains the exclusion of oral statements this way:

This section does not apply to conversations but is limited to writings and recorded statements because of the practical problem involved in determining the contents of a conversation and whether the remainder of it is on the same subject matter. These questions are often not readily answered without undue consumption of time. Therefore, remaining portions of conversations are best left to be developed on cross-examination or as a part of a party's own case.

already admitted. The common law rule of completeness is described as follows by the court in *United States v. Littwin*, 338 F.2d 141 (6th Cir. 1964):

The general rule is that if one party to litigation puts in evidence part of a document, or a correspondence *or a conversation*, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary.⁵

And as recognized by Judge Grimm, the common-law rule of completeness as to oral statements has been implemented by a number of courts through an invocation of Rule 611(a), which grants courts the authority to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth.”

The leading case on oral statements and completeness is *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987), where the court noted that independently of Rule 106, “courts historically have required a party offering testimony as to an utterance to present fairly the substance or effect and context of the statement.” Accordingly, Rule 611(a), “compared to Rule 106, provides equivalent control over testimonial proof.” The court concluded that “whether we operate under Rule 106’s embodiment of the rule of completeness, or under the more general provision of Rule 611(a), we remain guided by the overarching principle that it is the trial court’s responsibility to exercise common sense and a sense of fairness to protect the rights of the parties.”

The end result is that in many courts oral statements are subject to the rule of completeness in the same measure as written statements, but usually under a different rule.

Other than the Second Circuit, supra, the following circuits have explicitly recognized a rule of completeness applicable to oral statements:

- *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (oral statements of a government witness properly admitted to complete).
- *United States v. Maccini*, 721 F.2d 840 (1st Cir. 1983) (relying on Rule 106 --- which is not applicable --- to uphold admission of oral statements offered by the government for completion).
- *United States v. Holden*, 557 F.3d 698, 704 (6th Cir. 2009): “The common law version of the rule was codified for written statements in Fed.R.Evid. 106, and has since been extended to oral statements through interpretation of Fed.R.Evid. 611(a). Courts treat the two as equivalent. *United States v. Shaver*, 89 Fed.Appx. 529, 532 (6th Cir.2004).”

⁵ Note that the common law rule, as described in *Littwin*, also operates to admit completing evidence over a hearsay objection, as Judge Grimm noted in *Bailey*.

- *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1993) (exculpatory portion of an oral confession should have been admitted to complete; declaring that Rule 611(a) gives the judge the same authority regarding oral statements as Rule 106 grants regarding written and recorded statements).
- *United States v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987) (stating that Rule 611(a) supports a rule of completeness for oral statements that is the same as that applied to written and recorded statements under Rule 106; but holding that neither rule allows the admission of otherwise inadmissible hearsay).
- *United States v. Green*, 694 F. Supp. 107, 110 (E.D. Pa. 1988), aff'd, 875 F.2d 312 (3d Cir. 1989) (dictum; the court finds that the rule of completeness applies to oral statements, adopting Second Circuit authority, but finds the offered portion in this case to be not necessary for completion).

While it is, to say the least, disorganized to have two separate rules covering the same problem, that might not be cause for amending Rule 106 to cover oral statements. But there are at least two reasons to consider amending Rule 106 to cover oral statements:

1. Many of the courts holding that Rule 106 does not allow admission of hearsay as to written and recorded statements have extended that limitation to unrecorded oral statements under Rule 611(a). That is the case, for example, in the Second Circuit, and also in the Eighth Circuit, as seen in *Woolbright*, above. So the major problem is the one discussed above --- whether a party is to be allowed to correct a misleading portion through hearsay statements. And it would seem that if written and recorded hearsay is admissible to complete, an amendment will need to treat the question of admissibility of oral hearsay. It can't leave that matter unaddressed; if the Committee is going to amend Rule 106 to allow for hearsay, it can't simply ignore oral statements.

2. More importantly, a deeper investigation of the case law uncovers a number of decisions in which a court, confronting a completeness argument as to oral unrecorded statements, simply says that Rule 106 does not apply, and so that is that --- *they do not evaluate the statement under Rule 611(a) or the common-law rule of completeness*. That is to say, they explicitly or implicitly reject, or just ignore, the Second Circuit's view on the rule of completeness applying to oral statements.

For example, in *United States v. Gibson*, 875 F.3d 179 (5th Cir. 2017), the defendant complained that the trial court erred in preventing defense counsel from cross-examining a former employee about a statement that the defendant made to him. The trial judge prevented the question on the ground that the defendant's statement was hearsay. The defendant contended that the government had on direct inquired into other statements that the defendant had made to the employee, and that the defendant had a right under Rule 106 to introduce a statement that completed the misleading portion. The court disagreed, stating that "Rule 106 applies only to written and recorded statements."

It may be that counsel in *Gibson* never raised the common-law rule of completeness, or Rule 611(a). But that in itself might indicate a reason to treat both oral and written statements under a single rule --- in order to avoid a trap for the unwary. In fairness to the unlearned, Rule 611(a) does not refer to completion at all; and resorting to common law rules is not exactly the first thing that a lawyer would think of when he can't find a Federal Rule of Evidence exactly on point. The Supreme Court in *Abel v. United States*, 469 U.S. 45 (1984), quoted with approval Professor Cleary's statement that in principle "under the Federal Rules no common law of evidence remains." While there are exceptions to that principle (as recognized in *Abel*) it seems obviously less than ideal to have three separate rules covering completeness: one explicitly in the Rules, one inexplicitly in the rules, and one in the common law.

The Fifth Circuit in *Gibson* is not the only court that appears to have rejected *any* application of the rule of completeness to oral statements. ***The following courts also appear to reject the rule of completeness as to oral statements:***

- *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (finding no relief as to oral unrecorded statements because Rule 106 does not apply).
- *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007) (refusing to consider completion with oral unrecorded statements because Rule 106 does not apply); *United States v. Hayat*, 710 F.3d 875, 895 (9th Cir. 2013) ("our cases have applied the rule of completeness only to written and recorded statements").
- *United States v. Ramirez-Perez*, 166 F.3d 1106 (11th Cir. 1999): The court held that the rule of completeness did not apply to the defendant's confession *even though it was written and signed*. That is because the officer who took the confession was asked at trial only about what the defendant said, not what the defendant wrote down. The court concluded that "[b]ecause the prosecutor questioned the agent only about what Maclavio said rather than about what was written in the document, Rule 106 did not apply."⁶
- *United States v. Cooya*, 2012 WL 1414855 (M.D. Pa.) ("Rule 106 applies only to written and recorded statements"; no attempt made to analyze completeness under Rule 611 or the common law rule of completeness).

The upshot of the above case law is that if a party has a statement that rectifies a misleading portion, admissibility is completely dependent on whether the statement was oral or recorded. Such

⁶ The result in *Ramirez-Perez* has to be wrong even under the existing law. The proponent should not be able to avoid the rule of completeness by asking the witness what he heard, when what he heard was placed in a writing. The case provides a pretty good example of the need to treat written and oral statements the same under the rule of completeness.

an absolute rule makes no sense. In sum, there is a good case for amending Rule 106 to cover oral statements – or at least to say something about oral statements if an amendment is being proposed on other grounds.

III. Timing: When Can Completion Occur?

A comment by Judge Campbell at the Spring, 2018 meeting led the Reporter to do some research on another question about Rule 106, to determine whether an amendment might be needed to provide some clarification. The question posed by Judge Campbell is whether a party who had the *right* to complete could do so at a later point in the trial. This section discusses the law on the question of timing.

The Committee Note to Rule 106 states that “[t]he rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.” But all that means is that the party is not *required* to invoke the rule of completeness. It can just wait and offer the evidence it could otherwise have demanded to be introduced at the time the initial portion was admitted. The more complicated question arises if you assume (or amend a rule to explicitly provide) that the rule of completeness *also* operates to admit otherwise inadmissible evidence. The specific question then is, does the completing party have to offer the hearsay at the time the initial portion is admitted, or does the party have the option to wait and have it introduced at a later time? In other words, the Advisory Committee Note says that a completing party can wait, but if they do so, do they retain the benefit of admissibility over a hearsay objection?

On the question of timing, there seems to be a conflict in the courts. Some courts have required the completing evidence to be admitted at exactly the time that the initial portion is admitted. For example, in *United States v. Larranaga*, 787 F.2d 489 (10th Cir. 1986), the government introduced part of a defendant’s statement during defendant’s cross-examination. The defendant then sought to complete on redirect. The court held that Rule 106 was no help because the defendant “did not follow the procedure outlined in Rule 106 ‘at that time’ when the questions and answers are introduced.” The “at that time” quote is from the rule itself --- “the adverse party may require the introduction, at that time, of any other part.” Thus the defendant in *Larranaga* lost his one opportunity to introduce completing hearsay because he waited until redirect to demand completion.⁷

⁷ A weird case on timing is *United States v. Maccini*, 721 F.2d 840, 844 (1st Cir. 1983), where the defendant admitted part of a statement and the government sought to complete at a later point in the trial. The defendant argued that completion could only be done when the defendant introduced the partial statement. The court rejected this argument, stating that Rule 106 provides “on its face” that completion can be done “*at any time*.” But that is just a flat misreading of the rule. Rule 106 does not have the word “any” in it. It says completion must occur “at that time.”

The ruling as to timeliness in *Larranaga* seems supported by the language of the rule itself, which says that completing party may require introduction at the time that the initial portion is introduced; and the rule contemplates that the two portions will be considered “at the same time.”

But other courts have found that trial courts have discretion to allow completion at a later time --- meaning that in a court holding that Rule 106 can overcome a hearsay objection, the proponent of the remainder can wait until a later point (perhaps even its case-in-chief) to take advantage of the rule, and admit completing hearsay. For example, in *United States v. Holden*, 557 F.3d 698, 704 (6th Cir. 2009), the defendant sought to admit redacted portions of his confession. The court held that “the rule does not restrict admission of completeness evidence to the time the misleading evidence is introduced”; the court stated that the judge has “discretion to determine whether and when the curative evidence should be admitted.”

See also 21A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 5076 (stating that “the better-reasoned cases hold that the opponent need not invoke Rule 106 at the time the truncated evidence is introduced”); *United States v. Webber*, 255 F.3d 523 (8th Cir. 2001) (trial court has substantial discretion as to the timing of completion, especially because there were hours of tape recordings presented); *Hearings on the Proposed Rules of Evidence, Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. Ser. 2, 55-56 (1973) (indicating legislative intent to leave the question of timing to the discretion of the trial court).

The court in *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) recognized that the text of the rule seems to require contemporaneous completion, but nonetheless held that the trial court had discretion to allow completion at a later point:

Stone argues that Rule 106 does not apply because appellants never attempted to move the work paper into evidence at the time the financial statements were admitted, but waited until their direct examination of Ambrosini to do so. While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly. *See, e.g., Rubin*, 609 F.2d at 63 (upholding admission of notes under Rule 106 even though government waited until its redirect examination of witness to introduce them). Thus, the timing of appellants' proffer fell within the requirements of Rule 106.

In sum there are questions about the timing of completion that might be worth clearing up if the Committee decides to propose an amendment to Rule 106. Those questions are raised because the text of the rule says that completion must be at the time that the initial portion is introduced, but at least some courts recognize that trial courts (and the injured party) should have discretion as to timing. Thus, there is a conflict, and it is caused in part by the language of the rule, which appears to allow no discretion as to timing, when it probably should state that the court

has discretion. At the least it would be useful to discuss the matter in a Committee Note to any amendment.

IV. The Possibilities for Amending Rule 106 --- Arguments for and Against the Alternatives

There are a number of possible amendments that might be proposed to address the conflicts in the courts regarding Rule 106, and also to improve the rule.

The first is to provide that a statement that completes in accordance with the fairness standards of Rule 106 is admissible over a hearsay objection.

A second possibility --- discussed at the last meeting --- is to *require* the proponent of the initial portion to also offer the completing portion. That proposal arguably addresses the hearsay problem because the proponent is offering the statement rather than the party-opponent.

A third possibility is to take a more limited approach, and provide that the completing statement is admissible for the non-hearsay purpose of providing context for the misleading portion.

A fourth possibility --- which can be combined with any of the above options, is to expand the coverage of Rule 106 to include unrecorded oral statements.⁸

A fifth possibility is to provide that the timing of completion is within the discretion of the court. (This might be combined with some of the other possibilities).

A sixth possibility is to limit the rule to completion only by the statements of the same declarant who made the initial portion --- an issue raised by Judge Schroeder and discussed at the last meeting. (This might be combined with some of the others as well).

A seventh possibility, suggested by DOJ, is to provide that a portion must be “misleading” before completion is allowed.

So, it’s complicated. ☺

These possibilities will be discussed in turn.

⁸ Some of the states allow completion evidence for “acts” as well as statements. Because the rule is about contemporaneous completion, it can be argued that allowing contemporaneous completion for acts should be approached with caution. For example, if the government provides an eyewitness to state that he saw the defendant entering the bank that was robbed, does the defendant, at that point, get to introduce evidence that he saw the defendant leave the bank without any money? A completeness rule as to acts could threaten to upset the order of proof in many cases. This memo proceeds under the assumption that including “acts” in Rule 106 would be problematic.

A. Providing that a Statement That Is Necessary to Complete Is Admissible Over a Hearsay Objection

As Judge Grimm recounts, many courts have found that even if a statement qualifies under the Rule 106 fairness standard --- that is, even if it ought in fairness to be admitted contemporaneously with the portion admitted by the adversary --- it is nonetheless subject to exclusion as hearsay. These courts view Rule 106 to be merely a timing rule for evidence that is otherwise admissible. Judge Grimm describes in detail the contrary view of a number of courts, best set forth in *United States v. Sutton*, 801 F.2d 1346 (D.C.Cir. 1986), that Rule 106 is by its terms not limited by other rules of admissibility, and that “Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously.”

This is a conflict in the courts about an important and oft-recurring matter, and Judge Grimm makes a strong case that it needs to be resolved. There is further a strong case that it should be resolved by an amendment to the Rule, because this conflict is one of long-standing. One of the strongest reasons for amending an Evidence Rule has traditionally been that to do so will resolve a longstanding conflict --- resolving such a conflict is at the heart of codification of a uniform set of Federal Rules of Evidence.

It seems pretty unlikely that the Supreme Court will resolve the conflict. The conflict has existed for about 40 years. The Supreme Court has only reviewed Rule 106 once – in *Beech Aircraft* --- and in that case the Court could have resolved the conflict in the rule, but pointedly refused to do so: it stated that “[w]hile much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106.” 488 U.S. at 175.

If the conflict on Rule 106 is to be resolved, it would seem apparent that it must be resolved in favor of admissibility of the completing evidence – again assuming that the strict requirements for completion under Rule 106 are established. Judge Grimm makes the case as well as it can be made. It seems simply wrong to hold that the adverse party can introduce a misleading portion of a statement, and then turn around and object to evidence that would fairly be offered to rectify the deception. Professor Wright and Graham opine that construing Rule 106 to allow such injustice would violate the basic principles of Rule 102:

No one has ever explained how these standards would be met by a construction that would allow a party to present evidence out of context so as to mislead the jury, [and] then assert an exclusionary rule to keep the other side from exposing his deception.

21A Wright et al., *Federal Practice and Procedure*, §5078.1.

1. Argument Against Amendment: The Testifying Alternative

Some courts have argued that a court's refusal to allow completion with hearsay statements is not unfair, because the defendant can simply rectify the situation by taking the stand and testifying to the completing statement. So for example, the argument is that the defendant in the Grimm hypothetical could simply take the stand and say, "when I told the officer I bought the gun, I also told him that I sold it before the crime."⁹

But there are a number of reasons why the defendant's testimony option is not a great solution to the unfairness problem. First, the defendant, by testifying, might be subject to impeachment under the liberal tests employed by the courts under Rule 609 (a ship that has sailed for now); impeachment with a prior conviction is a pretty heavy cost to pay for restoring fairness after the government has engineered a misleading impression. Second, the testimony remedy ignores the advantage that Rule 106 presents as to the timing of completion --- that rule recognizes that contemporaneous completion is provided by the rule due to "the inadequacy of repair work when delayed to a later point in the trial." (Rule 106 Advisory Committee Note). Third, while it probably can't be said that the need to complete *compels* the defendant to testify, there is certainly a tension between the defendant's right not to testify and creating a situation in which the defendant would need to testify to correct a misleading statement offered by the prosecution. The Seventh Circuit recognized the unfairness of the testimony alternative in *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981):

In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no "repair work" which could remedy the unfairness of a selective presentation later in the trial of such a case. While certainly not as egregious, the situation at hand does bear similarity to "[f]orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of [a] confession [which] is a denial of his right against self-incrimination." [quoting Weinstein's Evidence].¹⁰

⁹ See *United States v. Holifield*, 2010 U.S. Dist. LEXIS 147815 (C.D.Cal.) ("The court orders that Defendant Jordan may not introduce any exculpatory statements, not previously introduced by the government, that constitute inadmissible hearsay" and that if the defendant wants to admit such statements "he must do so by taking the stand and testifying himself" because "Federal Rule of Evidence 106 does not influence the admissibility of such hearsay statements.").

¹⁰ See also *United States v. Marin*, 669 F.2d 73, 85 n.6 (2d Cir. 1982) ("when the government offers in evidence a defendant's confession and in confessing the defendant has also made exculpatory statements that the government seeks to omit, the defendant's Fifth Amendment rights may be implicated").

Fifth, in some cases the defendant is not seeking to complete his own statements, but rather offering the remainder of a statement by a third party, after the government selectively introduced a portion of the statement. In those cases, it is hard to see how the defendant can testify his way out of a statement of a third party that is redacted to be misleading.

Sixth, and probably most importantly, even if the defendant testifies, he will most likely *not* be able to testify to his prior statement. Thus, the Grimm defendant would not be able to testify that “I told the officer that I sold the gun.” That is because that testimony would constitute a prior consistent statement, which would only be admissible if the defendant’s credibility is attacked and the statement is relevant to rehabilitation. See Rule 801(d)(1)(B). In this case, the statement would not be probative to rehabilitate the defendant’s credibility --- the attack would be that the defendant has a motive to falsify, but the statement (pursuant to an arrest) was not made before the motive to falsify arose. See *United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1986) (“the plain language of Rule 801(d)(1)(B) does not suggest that where a party inquires into part of a conversation, the opposing party may introduce the whole conversation as substantive evidence under the Rule”). So the best that defendant could do is to testify that “I sold the gun” --- which, in light of the litigation, is not at all the same as “I told the officer that I sold the gun.”

In sum, the testimony alternative does not appear to be a good answer to the argument that it is unfair for the government to admit a misleading portion of a statement and then lodge a hearsay objection to the necessary remainder. Moreover, the testimony alternative is not a solution when it is the *government* that wants to complete. The government may not be able to find or call the witness whose statement it wishes to complete.

2. Argument Against an Amendment: Parties Wouldn’t Risk Being Rebutted by Completing Evidence

At one of the Committee meetings, the thought was raised that the problem of admitting misleading portions of a statement would be self-regulating --- meaning it wouldn’t happen --- because the party would be worried that the remainder would be admitted somewhere down the line. Let’s call that the “deterrence” argument --- you don’t need an amendment because the party will be deterred from introducing a misleading portion.

There are two reasons to think that the deterrent effect of later rectification will not be sufficient to protect against the use of misleading portions. The first reason is recognized in the Advisory Committee Note and was previously discussed. A major reason for the rule is to permit contemporaneous completion because of “the inadequacy of repair work when delayed to a point later in the trial.” Thus, the *very premise* of the rule is that the risk of correction “somewhere down the line” is not a sufficient deterrent.

Second and more importantly, if the “repair” would come from a hearsay statement, then *there will be no rectification down the line* in the courts that hold that Rule 106 does not allow admission of hearsay. That is the point of those cases --- the misleading statement is admitted, without ever being rebutted.

Is it really possible that a court would allow a party to admit a misleading portion of the statement, but then prevent a completion even though fairness would require it? The answer is yes. There are, in fact, decided cases in which the court recognizes that the initial portion is misleading, yet admissible --- and un rebuttable because the completing party seeks to complete with hearsay. The leading example of this troubling result is *United States v. Adams*, 722 F.3d 788, 827 (6th Cir. 2013). Defendant Maricle, a state court judge, was accused of conspiring to buy votes and to help appoint corrupt members of the Clay County Board of Elections. The government was allowed to present portions of a phone recording in which a cooperating witness (White) told Maricle about questions she had been asked during her grand jury testimony. White told Maricle that she had been asked at the grand jury whether Maricle had appointed her as an election officer. Maricle responded, “Did I appoint you? (Laugh),” and White said “Yeah.” Maricle then said, “But I don't really have any authority to appoint anybody.” That last statement was redacted from the government’s presentation. That meant that the portion indicated that Maricle had essentially adopted the accusation that he had appointed White. When Maricle sought to complete with his statement that he didn’t even have authority to make the appointment, the court excluded it as hearsay.

Remarkably, the Sixth Circuit found that the government had unfairly presented the evidence, but that nothing could be done about it:

Defendants claim that “by severely cropping the transcripts, the government significantly altered the meaning of what [defendants] actually said.” Maricle Br. at 35. *Although we agree that these examples highlight the government's unfair presentation of the evidence, this court's bar against admitting hearsay under Rule 106 leaves defendants without redress.* (emphasis added).

In a footnote in *Adams*, the court stated that “should this court sitting en banc address whether Rule 106 requires that the other evidence be otherwise admissible, it might consider” all the authorities that have criticized the rule that allows the government to admit a misleading portion and then object on hearsay grounds to a necessary completion.¹¹

¹¹ The authorities cited by the *Adams* court are:

Stephen A. Saltzburg et al., 1–106 Federal Rules of Evidence Manual § 106.02 (“We believe that these rulings are misguided and contrary to the completeness principle embodied in Rule 106. A party should not be able to admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify the unfairness.”); Charles Alan Wright et al., 21A Federal Practice and Procedure § 5078.1 (2d ed.2012) (“Even were Rule 106 ambiguous on this point, Rule 102 requires that it ‘be construed to secure fairness in administration ... to the end that the truth be ascertained and proceedings justly determined.’ No one has ever explained how these standards would be met by a construction that would allow a party to present evidence out of context so as to mislead the jury, then assert an exclusionary rule to keep the other side from exposing his deception.”); Dale A. Nance, A Theory of Verbal Completeness, 80 Iowa L.Rev. 825 (1995); *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) (“The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof.... Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.”).

It should be noted that *Adams* was written five years ago; the Sixth Circuit has not sat en banc on the Rule 106 question.

It bears repeating that it is not only criminal defendants who are hamstrung by a ruling that Rule 106 cannot overcome hearsay. Consider *United States v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987), a case in which the *government* wants to complete and is not permitted to do so with otherwise inadmissible hearsay. Randle and Woolbright were found in a room with drugs after another person overdosed. All the drugs were found in a travel bag. Randle, who was not a defendant in the case, and who invoked her 5th amendment right, told the police that the bag was hers. The defendant offered this statement, and the court found it admissible under Rule 804(b)(3), a declaration against penal interest, to prove Randle's possession. But in another part of the statement, Randle said that she and Woolbright were on a honeymoon --- thus leading to an inference that Woolbright constructively possessed the drugs in the bag. The trial judge admitted the remainder under Rule 106, because Randle's statement that the drugs were hers led to a misleading inference that they were hers *alone*. But the court held that "neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the 'ascertainment of the truth' empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception." Thus the misleading impression created by the defendant should have gone unrectified in the absence of a hearsay exception, according to the court.¹²

3. Legislative History and Textual Arguments

Providing language in Rule 106 that would overcome a hearsay objection appears to be consistent with legislative intent. This argument is based on two separate points about the drafting of the rule:

1. The rule was patterned after (though admittedly not the same as) the California rule, which has always been held to allow for completion with hearsay evidence.

2. When the rule was being considered in Congress, the DOJ sought to add language that completing evidence had to be independently admissible. During hearings on the Federal Rules of Evidence, Assistant Attorney General W. Vincent Rakestraw specifically requested that the Senate Judiciary Committee amend Rule 106 to permit the introduction

¹² The *Woolbright* court ultimately stretched pretty far to find no error, by stating that Randle's statement about the honeymoon was admissible under the residual exception.

of “any other part or any other writing or recorded statement *which is otherwise admissible.*” But Congress did not add that language.¹³

There is a contrary textual argument, however --- that Rule 106 cannot and should not operate as a hearsay exception because it is not placed with the other hearsay exceptions in Article 8. If the drafters had wanted a “rule of completeness hearsay exception” why wouldn’t they put it with the rest of the hearsay exceptions?

There are three pretty good responses to the location argument, however. First, Rule 802, which is the operative rule against hearsay¹⁴, provides that hearsay is inadmissible “unless any of the following provides otherwise: ● a federal statute; ● *these rules*; or ● other rules prescribed by the Supreme Court. The reference is to *these* rules, meaning *all* of the evidence rules. If the drafters had wanted to limit hearsay exceptions to those in Article 8, Rule 802 would have referred to “the rules in this article” rather than “these rules.”

Second, courts have actually found other rules to be grounds for admitting hearsay. For example, Civil Rule 32(a)(4)(B) allows admission of hearsay from a deposition even though the declarant is not unavailable under the terms of the Evidence Rules. In effect the Civil Rule creates an independent hearsay exception. And courts have upheld that exception, referring to Rule 802’s list of sources for an exception outside of Article 8. See, e.g., *Fletcher v. Tomlinson*, 895 f.3d 1010 (8th Cir. 2018) (Rule 32 authorizes admissibility of deposition hearsay even though it is not admissible under the Article 8 exceptions, relying on Rule 802). If a hearsay exception can be found completely outside the Evidence Rules, there is no reason why an exception cannot be found within those rules.

The third responsive argument regarding placement of Rule 106 is set forth by the D.C. Circuit in *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986). The court found the placement of Rule 106 to be a point *in favor* of finding a hearsay exception:

The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof. Rule 106 is found not in Rule 611, which governs the “Mode and Order of Interrogation and Presentation,” but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules. See C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (1977 & 1986 Supp.).

Moreover, every major rule of exclusion in the Federal Rules of Evidence contains the proviso, “except as otherwise provided by these rules,” which indicates that the draftsmen knew of the need to provide for relationships between rules and were familiar

¹³ Letter from Rakestraw to Senate Jud. Comm., 93rd Congress, 121-23.

¹⁴ Rule 801 provides the definition of hearsay; Rule 802 is the source of exclusion of hearsay.

with a technique for doing this. There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed.

In sum, while there are arguments on both sides, it would appear that legislative history and the placement and language of Rule 106 support the conclusion that Rule 106 should operate as a hearsay exception for completing evidence.

4. Justifying a Rule 106 Hearsay Exception as a Matter of Waiver or “Opening the Door”

When a party makes a misleading presentation, it has been held in many circumstances that the party waives the right to complain about the consequences. This is one aspect of “opening the door” --- a well-established doctrine in evidence. It has been held, for example, that a defendant who selectively reveals only the helpful parts of a testimonial statement waives the right to complain that the remainder is testimonial hearsay that violates the right to confrontation. The New York Court of Appeals, in *People v. Reid*, 19 N.Y.3d 382, 948 N.Y.S.2d 223, 227 (2012), put it this way:

If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant’s actions at trial, then a defendant could attempt to delude a jury by selectively treating only those details of a testimonial statement that are potentially helpful to the defense * * *. A defendant could do so with the secure knowledge that the concealed parts would not be admissible under the Confrontation Clause. To avoid such unfairness and to secure the truth-seeking goals of our courts, we hold that the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission.

If the open door principle is enough to answer a constitutional objection, it certainly should be enough to answer a hearsay objection.

It is notable that Evidence Rule 502(a), governing subject matter waiver of privilege, lifted the language of Rule 106 as the standard for determining subject matter waiver. See Advisory Committee Note to Rule 502(a) (noting that the animating principle of Rule 106 and 502(a) are the same). Under Rule 502(a), a party that makes a “selective, misleading presentation [of privileged communications] that is unfair to the adversary opens itself to a more complete and accurate presentation” through undisclosed privileged communications on the same subject matter. *Id.* If a selective, misleading presentation results in a *subject matter waiver of privilege*, it is hard to see how it cannot result in a waiver of a hearsay objection under Rule 106.

Indeed, in the circuits that exclude completing evidence on hearsay grounds, there is an objectionable inconsistency between Rules 106 and 502(a), contrary to the legislative intent behind Rule 502(a) --- *which was directly enacted by Congress*. Congress concluded that the two rules

addressed the same type of problem and should be applied in the same way.¹⁵ So it would appear that an amendment that corrects the courts that ignore the relationship between Rule 106 and 502(a) would be consistent with congressional intent and the fabric of the rules.

B. The Alternative of Requiring the Proponent of the Initial Portion to Introduce the Remainder

At the last meeting, the Committee discussed the fact that the original Rule 106, as approved by Congress, contained language that appeared to solve the problem of completing statements being inadmissible hearsay because they were offered by the defendant. The original rule states that the party who offered the misleading portion *would itself be required* to offer the completing portion. Specifically, the original Rule 106 provided as follows:

When a writing or recorded statement or part thereof is introduced by a party, *an adverse party may require him at that time to introduce* any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. (Emphasis added).

So in a case in which the government is misleadingly presenting the defendant's statements, the original rule provides that the defendant may require the *government* to introduce the defendant's statements that are necessary to correct the misimpression. If that is so, then the government's hearsay objection --- to evidence the government itself is proffering --- should be overruled. The completing statement should be admissible as a statement by the government's party-opponent. Rule 801(d)(2)(A) exempts from the hearsay rule a statement that is "offered against an opposing party" and "was made by the party." While Rule 801(d)(2)(A) does not allow a party to offer their *own* statements, it definitely allows the adversary to introduce the statements of an opposing party. So there is a good argument that the original rule 106, by requiring the proponent of the initial part to admit the remainder, was written to foreclose a hearsay objection for a defendant's completing statements.

What happened to the original rule? It was gender-neutralized in 1987. While no substantive changes were intended (and the Committee Note says so), the change made to Rule 106 to take the "his" out of it arguably did make a substantive change. The gender-neutralized rule is as follows:

"[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of ~~require him at that time to introduce~~ any

¹⁵ Other rules with similar results are Rule 410(b)(1) (allowing admission of protected plea statements in which a selective and misleading impression can be corrected by those statements --- again using the "ought in fairness" standard); and Rule 804(b)(6)(hearsay objection forfeited for wrongdoing that did and was intended to keep the declarant from testifying). It makes no sense that a waiver of evidentiary protections is found in these rules but not in Rule 106.

other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

It no longer says that the party who introduced the misleading portion is required to offer the evidence. But because the gender-neutralizing amendments are not supposed to be substantive, one can argue that it is appropriate to return to the meaning of the original rule, thus requiring the government to offer the completing evidence.

There is some indication that the courts focused on the party being *required* to admit the remainder under the pre-gender-neutralized rule. See *United States v. Walker*, 652 F.2d 708 (7th Cir. 1981), in which the court found a violation of Rule 106 where the government admitted a selective, misrepresentative portion of the defendant’s prior testimony. The court states that “the Government would not have been confronted with a situation of operosity *had it been compelled* to read the balance of the transcript.” (emphasis added). See also *United States v. Soures*, 736 F.2d 87, 90 (3rd Cir. 1984), where the defendant objected to admitting only portions of his grand jury testimony. The court described Rule 106 as allowing the opponent to “require the other party to introduce” the completing part.

But this focus on a requirement did not, in these cases, help the court answer the *hearsay* question. No pre-1986 court that I have found relied on the requirement language to hold that the remainder was admissible hearsay.

The Committee explicitly requested at the last meeting to consider an amendment to Rule 106 that would restore the requirement language (while of course maintaining gender neutrality). The idea behind such an amendment is that it would be more limited and less aggressive than a full-on hearsay exception; and it could be pitched as simply a return to the meaning of the original rule.

An amendment restoring the requirement language is surely better than the existing state of affairs. It will probably encourage some courts to reject the case law that finds Rule 106 to be simply a rule on timing.

But there are several reasons why this limited amendment may not be sufficient to treat the problem of unfairness that arises when a party introduces a misleading portion and then objects on hearsay ground to the completing portion. **There are six potential concerns:**

1. *It’s too subtle.* It takes several steps to see how requiring the initial party to admit the remainder satisfies the hearsay problem. A reader looking just at the text of a rule requiring the party to admit the remainder would not necessarily realize that the amendment was even addressing a hearsay problem. The reader would probably have to look at the Note, and not everyone looks at the Note.

2. *Rule 801d2a applicability is subject to argument.* In the classic case where the government is admitting a misleading portion and the defendant wants to complete with some of

his redacted statements, requiring the government to admit the completing statements seems to answer the limitation on admissibility of such statements in the case law --- that a party cannot admit its own statements under Rule 801(d)(2)(A), but can admit the statements of the opponent. If the government is required to admit the statements, the defendant is not trying to admit his own statements. But there is at least an argument that Rule 801(d)(2)(A) is *still inapplicable*. That is because that Rule allows admissibility of statement “offered *against* an opposing party.” Where the government is forced to admit the defendant’s exculpatory completing statements, is the government really offering the statements *against* the defendant? The answer is arguably yes, because they are part of the larger inculpatory whole, and moreover the presumption surely is and should be that if one party is offering evidence, the offer is against the adversary. But nonetheless, the applicability of Rule 801(d)(2)(A) to completing evidence that the government is required to offer, favorable to the defendant, is at least arguable --- meaning that the “requirement” solution becomes even more subtle and complicated.

3. Courts may not be persuaded if their pre-1986 interpretation on Rule 106 barred hearsay. Most of the circuits currently holding that Rule 106 does not allow completion with hearsay have case law extending back before 1986, when the requirement language was still in the rule. *See, e.g., United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982) (“The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded.”); *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) (“Rule 106 does not render admissible evidence that is otherwise inadmissible.”); *United States v. Burreson*, 643 F.2d 1344, 1349 (9th Cir.1981) (court did not abuse its discretion in excluding evidence under Rule 106 because it was inadmissible hearsay). So if a requirement amendment is seen as just restoring the original rule, it may not lead to a change in these courts, because they construed the original rule to bar hearsay. As stated above, I did not find a pre-1986 case in which the court specifically held that the hearsay problem was solved *because* the government was required to admit the defendant’s statements.

4. It’s odd to apply if completion is delayed: As discussed above, at least some courts allow completion to be made some time *after* the initial portion is introduced. The requirement solution does not seem to work very well where completion is delayed. It would be odd, for example, where completion is allowed in the opponent’s case in chief --- would the initial proponent then offer the completing portion in the opponent’s case in chief? This is not a deal breaker, but it is clear that the requirement alternative becomes even more complicated if completion is delayed.

5. It doesn’t apply to statements of nonparties. The Rule 801(d)(2)(A) requirement scenario may work in the classic situation of the Judge Grimm hypothetical --- where the government offers a misleading portion of the defendant’s statements and the defendant wants to complete with some of his other statements. But in many cases, the completion demand is not about the defendant’s statements. It might be about statements that a witness made to police or the grand jury. It might be about statements made by an accomplice --- as in *Woolbright, supra*, where

the defendant's accomplice made one statement that was clarified by another statement made later by the accomplice. In civil cases, the completion issue might be about charts that are clarified by the underlying notes of the party that prepared them. In all of these cases, Rule 801(d)(2)(A) is inapplicable, because the statements offered are not those of the party-opponent. So the hearsay problem does not appear to be solved by an amendment requiring the proponent to admit the completing part.

One could argue that the hearsay problem *is* solved by resort to the time-honored premise that a party cannot complain about evidence that the party itself offers. *See Ohler v. United States*, 529 U.S. 753, 758 (2000) ("Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." McCormick on Evidence § 55 ("If a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact, he has waived his objection"). Rule 801(d)(2)(A) does not come into the picture under this argument --- rather the argument would lead to a general loss of any ability to object to hearsay, on the ground that the proponent was the one who admitted the completing portion and so cannot object.

The response to that argument is that the time-honored premise --- that you can't complain about what you offer --- does not really apply in this completion situation because the party is being *forced* to offer the completing material. The counter to *that* argument is that the party is not being forced to admit the completing evidence. Rather it is being presented with a choice -- offer the completing evidence along with the initial portion, or offer nothing at all. Admission is conditional. But however that argument gets resolved, at a minimum the applicability of a "requirement amendment" to statements of third parties is muddled --- lending more subtlety to an already subtle attempt at a solution.

In the end the basis for an admission of hearsay under the requirement rationale is probably best expressed as a waiver --- that the proponent has opened the door and therefore has no right to complain about hearsay. But that is the same rationale, discussed above, that justifies simply saying in the rule that the statement is admissible even if it is hearsay. Why not state explicitly in the rule what the rule is intended to do?

6. It is problematic when completion is sought by the government. Even if a requirement amendment would apply to allow third-party statements to be admissible over a hearsay objection, it runs into a further problem when it is the government that is seeking completion. An example is *Woolbright*, where the government wants to introduce the defendant's girlfriend's statement that she and the defendant were on a honeymoon, to raise the inference that Woolbright constructively possessed the drugs in her purse. That was to complete a statement that the defendant offered in his case-in-chief. A "requirement" amendment would mean that the defendant would have to admit the completing portion.

Implementing a solution that the defendant is *required* to admit inculpatory evidence should give one pause. This is not so say that the requirement would be unconstitutional. Again it could be argued that the defendant is not being required to do anything; rather he is given a choice

to admit both statements or none at all. But the solution does seem a little off-putting, a little radical --- it is likely to raise some hackles on the criminal defense side of the public comment.

For all these reasons, it would seem that the Committee should be wary of an amendment that would try to solve the hearsay problem by requiring the proponent to admit the completing statements with the initial portion.

C. The Context Alternative

One argument against adding a hearsay exception to Rule 106 is that it is not needed to remedy the unfairness, because the statement, if necessary to complete, is admissible as non-hearsay. That would mean that the courts that do exclude completing evidence on hearsay grounds are simply wrong about the hearsay question itself. As Judge Grimm observes, when the proponent offers evidence out of its necessary context, any out-of-court statement that is clearly necessary to place the evidence in proper context is not hearsay at all; rather it is admissible for the not-for-truth purpose of providing context.¹⁶

But if a large number of courts are getting the hearsay question wrong, and have been doing so for years, a possible response short of a hearsay “exception” is to amend the rule to state that if the narrow conditions for completion are met, the completing statement may be admitted for the non-hearsay purpose of context. The amendment would be justified as sending a needed signal to many courts that they should be doing what they haven’t been doing. There are precedents for such an amendment --- i.e., telling the courts that they have been misapplying the rule and to stop it --- including: 1) the 2003 amendment to Rule 608(b), which corrected the courts that had been holding, incorrectly, that the Rule’s bar on extrinsic evidence was applicable to all forms of impeachment, not just impeachment for untruthful character; and 2) The 2006 amendment to Rule 404(a), which corrected courts that had been holding, incorrectly, that character evidence could be offered to prove conduct in some civil cases. Consequently, if the Committee determines that the completeness-hearsay problem is correctly resolved by admitting the completing portion for context, a rule amendment should probably be proposed to that effect.¹⁷

¹⁶ See Michael Hardin, *This Space Intentionally Left Blank: What to do When Hearsay and Rule 106 Completeness Collide*, 82 Ford. L. Rev. 1283 (2013) (Remainder that is otherwise hearsay should be admitted whenever its probative value in providing necessary context is not substantially outweighed by its prejudicial effect).

¹⁷ A context solution is one of the drafting alternatives in the final section of this memo.

There are some pretty serious problems with a “context” solution, however:

1. The completing statement could be used only for context and not as proof of a fact, and this results in an evidentiary imbalance --- the party who created the whole problem by offering a misleading portion is entitled to have that portion considered as proof of a fact, while the party simply seeking fairness is not allowed to argue that the completing portion can be used as proof of a fact. So the “wrongdoer” ends up with a comparative advantage.

2. A second problem between differentiating a substantive initial portion and a “not-for-truth” remainder is that it results in a most complicated situation for the jury to figure out. Take the Grimm hypo, for example, where the defendant says “I bought the gun, but I sold it before the crime.” The government can argue that the defendant’s possession of the gun before the crime has been proved by the defendant’s own statement “I bought the gun”--- and of course the jury will be allowed to draw the inference that because he bought the gun, he still had it at the time of the crime. The defendant, for his part, can’t argue that the evidence indicates that he no longer had the gun. He is limited to the argument that the completing statement may be considered only for “context.” If the jury follows that instruction --- a big if --- it would probably mean that the inferences that the jury would otherwise draw from the misleading portion should not be drawn because of the context of the statement. Apparently, that would mean that they should assume there is no evidence one way or the other about the defendant’s possession of the gun at the time of the crime – when in fact it should mean that there is affirmative evidence that the defendant did *not* have the gun at the time of the crime. That all seems a very complicated resolution. And there is good reason to think that the jury will not be able to follow a context instruction in this instance. That is because the evidence of the gun purchase was offered precisely for the inference that the defendant continued to have the gun at the time of the crime.

3. The “context” solution can be thought confusing --- and artificial --- because in order to provide context, the statement will often have to be true. Again consider Judge Grimm’s example of “I owned the murder weapon, but I sold it before the murder.” When “I sold it before the murder” is admitted for “context,” how is it actually relevant to context unless it is true? If it is false, it doesn’t correct any misimpression at all. It doesn’t change the meaning regardless of the content. The only way it changes the meaning is if it is true. And if that is the case --- as it seems to be in many of the cases --- then it makes little sense to take the difficult, instruction-laden context route.¹⁸ It is much more direct to just say that the statement is admitted for its truth.

4. Another concern about the “context” solution is that it will change the law not only in the circuits that bar hearsay to complete, but also in most of the circuits that *allow* hearsay to complete. Currently there are two predominant views on hearsay statements offered for

¹⁸ *Haddad, supra*, appears to be another case in which the completing evidence must be true to be useful for context. There the defendant says that the drugs were his, but he knew nothing about the gun. He is charged with felon-firearm possession. The government offers the admission about drug activity, to create an inference that if he was involved in drugs, he probably had a gun, and this is misleading because he denied gun possession. But the only way the statement about possession is relevant to “context” is if it is true. If Haddad did know about the gun, then it doesn’t correct a misimpression --- the jury should be permitted to draw inferences from drug possession to gun ownership. Those inferences are undermined only if Haddad is truthfully relating a lack of knowledge.

completion: one is that they are admissible as proof of a fact, and the other is that they are not admissible at all. There are only a few decisions that allow completion on the non-hearsay basis of context.¹⁹ It would seem that the Committee would need to be very convinced that the “context” solution is the right result before it rectifies a conflict by changing the law in almost all federal courts.

In the end, there is something to be said for a solution that would allow the completing portion to be admissible *to prove a fact*. It puts the parties on an even playing field; it avoids a confusing limiting instruction; and it would appear to be the just result --- because the party who introduced the misleading portion should have lost any right to complain.

For all these reasons, the “hearsay exception” solution seems more justified and substantially less complicated than the “context” solution. But that is for the Committee to decide, and at least it can be said that while the context solution is problematic, it is better than doing nothing at all.

D. Unrecorded Oral Statements

As Judge Grimm compellingly argues, there is no good reason to exclude categorically all unrecorded oral statements from a rule of completeness. While there might be a dispute about the content or existence of some oral statements in some cases, surely the difficulty of proof is a matter that should be handled on a case-by-case basis under Rule 403. That is, the fairness rationale should apply equally to completing unrecorded oral statements, unless the court finds that the probative value of the completion is substantially outweighed by the difficulties and uncertainties of proving whether and what was said.

When it comes down to it, the problem raised by oral statements offered to complete --- were they ever made, or are they being misreported --- is the problem raised by *every single oral statement reported in a court*. So why should completing oral statements be treated differently from any other oral statement? The injustice of such a result is shown once again in the Grimm hypothetical, assuming it is an oral statement. The police officer takes the stand and testifies that the defendant told him he purchased the gun. The defendant wants completion with his oral statement that he sold the gun. Why is there any less uncertainty and difficulty in rendering the first statement, about the purchase? The officer is rightly allowed to testify to that first part even

¹⁹ See, e.g., *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010) (the fact that completing statement is hearsay “does not block its use when it is needed to provide context for a statement already admitted”); *United States v. Allums*, 2009 WL 1010854 (D.Utah) (“the court will require admission” of the defendant’s statement “because it provides context that the defendant is not admitting ownership of the coat.”).

if there is a dispute about what was said. So why should it be any different with the completing statement? That distinction does not make sense.

Moreover, the failure to cover an oral statement gives rise to the possibility of sharp practice and abuse. An example is *United States v. Ramirez-Perez*, 166 F.3d 1106 (11th Cir. 1999), discussed above. The defendant made a written confession, and the government offered a misleading portion. But the rule of completeness was held not to apply because the officer was only asked about what the defendant *said*, not about what he wrote down --- even though there was no showing that the two renditions were different. The prosecutor was careful to ask the witness “what did the defendant say?” Such a baldfaced attempt to avoid the Rule 106 fairness rule was made possible by the circuit case law providing that the rule of completeness does not apply to oral statements.

So it would seem that there is a compelling reason to amend Rule 106 to cover unrecorded oral statements, as a number of the states have done.²⁰ A complicating factor is that, as Judge Grimm describes, many courts have found a way to apply the rule of completeness to unrecorded oral statements by relying either on Rule 611(a) and the common-law rule of completeness. In these courts, adding oral statements to Rule 611(a) would not change any result.

Yet as discussed above, there are a fair number of opinions where courts simply hold that Rule 106 does not cover oral statements, and that is the end of the analysis --- those courts do not consider admissibility under Rule 611(a) or the common-law rule.

Thus, there is an argument that including oral statements in Rule 611(a) will serve two separate purposes:

1) In those circuits that cover oral statements under Rule 611(a) and the common law, everything will now be collected under one rule. One advantage of good codification is that an unseasoned litigator can just look at the written rule and figure out what to do. But that is not possible with unrecorded oral completing statements, because looking at the rule one would think that there would be no way to admit the completing statement. It is unlikely that Rule 611(a), or the common-law rule of completeness, would come readily to mind. So adding coverage of oral statements to Rule 106 would be part of the good housekeeping and user-friendliness that is an important part of rulemaking.

2) In those circuits that provide no protection at all for misleading portions of oral statements, a rule amendment would bring an important substantive change grounded in fairness; and it would prevent bad faith attempts to avoid the rule of completeness in cases where oral statements are subsequently rendered into writing.

²⁰ State versions of Rule 106 were discussed in a previous memo. The following states have provisions allowing oral statements to complete, when fairness requires: California, Connecticut, Georgia, Iowa, Montana, Nebraska, New Hampshire, Oregon, and Texas.

But even if the unrecorded oral statement question is not in itself a sufficient reason to amend Rule 106, the question becomes different if the decision is made to amend Rule 106 to provide that completing evidence is admissible over a hearsay objection or for context. Many rule-based problems have been found not serious enough to warrant an amendment on their own, but were usefully addressed as part of an amendment that was going to be proposed on other grounds.²¹ The Committee may well conclude that if an amendment to Rule 106 is to go forward on the hearsay question, the question of coverage of oral statements should also be addressed --- one way or another, because to just ignore the entire question of oral statements while still amending the rule seems not to be an option.

E. Timing Issues and Judicial Discretion

As discussed above, there are questions in the courts about *when* completion can or must occur. The rule on its face states that completion must occur at the time that the initial portion is introduced --- it uses the term “at that time”; and the rule is triggered when the completing portion “ought to be considered at the same time” as the initial portion. So there are cases holding that Rule 106 requires completion to be done at the time the initial portion is introduced. Of course Rule 106 does not prevent the opposing party from trying to rebut the negative inferences at a later point. As the Advisory Committee Note says, nothing in the rule circumscribes “the right of the adversary to develop the matter on cross-examination or as part of his own case.”

If the completing statement is not hearsay, the question of timing is not very important as a rulemaking matter. The adversary can choose the benefits of contemporaneous completion under 106, or simply wait to a later point, as the Advisory Committee Note recognizes. But if invoking Rule 106 is found to overcome a hearsay objection, the question of timing is quite important. If the benefit of Rule 106 in overcoming a hearsay exception is conditioned on the rule’s requirement of immediate completion, then the party essentially loses the option of waiting to a later point to introduce the completing hearsay.

It follows that if the Committee decides to proceed with an amendment that would allow for completing hearsay, it should probably also consider the question of timing. As discussed above, some courts have stated that a court should have discretion to allow completion at a later point. And this seems to be a salutary result. Judicial discretion is coin of the realm in the Evidence Rules. It seems eminently sensible to leave room for a situation in which completion might be allowed over time. Examples include a situation in which there are many conversations and many completions, and the court might find that timing should be flexible to assist in jury understanding. See, e.g., *United States v. Webber*, 255 F.3d 523 (8th Cir. 2001) (trial court has substantial

²¹ An example is the Rule 408 amendment in 2006. The major reason for the amendment was to resolve a conflict over whether a civil settlement was admissible in a subsequent criminal case. Another problem was whether a statement made in a settlement conference could be admitted to impeach a party at trial as an inconsistent statement. That problem was not considered serious enough to warrant an amendment on its own, but it was added to the amendment package once the Committee determined it was going forth with the rule on criminal cases.

discretion as to the timing of completion, especially because there were hours of tape recordings presented that were subject to completion). Or there may be witnesses to testify to completion who are available one day but not another, and so the trial judge might find it useful to allow completion at a point after the initial portion is introduced. Or the court may simply decide that the party who suffers a misleading portion should have the discretion to determine when it is best to complete.

While certainly there should be a preference for contemporaneous completion, there probably needs to be some play in the joints for courts to meet specific situations. The question then is whether the rule needs to be amended to specifically address timeliness. There is a good argument for a clarifying amendment. As stated above, the courts are divided on whether completion must be contemporaneous with admitting the initial portion --- and the text of the rule requires contemporaneous completion and admits of no discretion. See, e.g., *Zahorik v. Smith Barney, Harris Upham & Co.*, 1987 U.S. Dist. Lexis 14078. At *6 (N.D. Ill.) (Rule 106 “allow[s] admission of the qualifying or explanatory evidence at the time the opposing party offers the partial evidence rather than at a later stage of the trial.”). So some language like, “or at such later time as the court allows” might be a useful amendment. At a minimum the Committee might consider a reference to judicial discretion as to timing in the Note to any amendment that might be proposed.

F. Third Party Statements

Judge Schroeder, in a letter to the Chair and Reporter, raises a problem regarding the application of Rule 106 that was discussed by the Committee at the last meeting. He notes that the rule change being discussed is focused on a portion of the defendant’s statement that is completed by another portion of the defendant’s statement. But the rule provides that a completion can occur with *any other* statement. Judge Schroeder noted that the reference to “any other” “appears to permit hearsay by other speakers or possibly in unreliable formats, such as statements contained in newspapers.” He suggests a fix that will be set out in the next section of drafting alternatives. The point of the fix is to make sure that the initial portion and the completing statement are made *by the same person*.

My research of the case law has not found a case in which a court allowed a completion with a statement by a person different from the one who made the initial portion. There are cases in which the question has been raised. And in these cases the courts have held that completion is not permitted by the statement of another. For example, in *United States v. Allums*, 2009 WL 1010854 (D.Utah), the court refused to allow completion because it would require the admission of portions “wherein individuals other than the Defendant are recorded.” And in *Lambert v. Fulton County*, 253 F.3d 588, 596 (11th Cir. 2001), the defendant argued that his television interview was taken out of context and could be completed by introducing the interviews of other people. But the court found that completion was properly denied, stating that “the rule of completeness embodied in Fed.R.Evid. 106 does not extend to a different interview of a different witness.”

Allowing completion with third party statements does appear to be a bridge too far and could lead to disruptions at the trial. The Committee at the last meeting approved of a limitation

on third party statements for any amendment to Rule 106 that might be proposed. That limitation is set forth in the drafting alternatives in the next section.

G. Adding the Word “Misleading” to the Text

The DOJ suggests that if the Committee proceeds with an amendment, it should specify that completion is permitted only when the initial portion is “misleading.” As applied to the current rule, that change would look like this:

If a party introduces all or part of a writing or recorded statement and it is misleading, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

This change might be seen as salutary because it provides a clue in the text as to what the rule is really about --- correcting misleading statements. The rule as written is pretty opaque as to what it is trying to do. Also, adding the word “misleading” might provide a guard against possible overuse of the Rule. A party seeking completion would have to make a threshold argument that the initial portion is affirmatively misleading.

One possible concern is that the case law does not always use the word “misleading” as a trigger for the rule. Rather, many courts use a jumble of concepts. For example, the court in *Phoenix Associates III v. Stone*, 60 F.3d 95, 102 (2nd Cir.1995), says that completion occurs when “it is essential to explain an already admitted document, to place the admitted document in context, or to avoid misleading the trier of fact.” Since these concepts are set forth in the disjunctive, it might be thought that just mentioning one of them in the rule --- misleading --- would be underinclusive of existing case law. But that concern is probably more theoretical than real. The bottom line of completion is that the jury is going to draw the wrong inference from the initial portion --- it is going to be misled. When a person says, “that was taken out of context,” or “let me explain” he is saying that if you consider only what you heard, you will be misled.

The concern about underinclusiveness is not trivial, though. It wouldn’t be a surprise if some member of the public (or some member of the Rules Committee) will come up with a good example of a statement triggering Rule 106 coverage under current law that is not “misleading.” But perhaps any possible underinclusiveness can be tolerated by using a concrete word, “misleading,” that sharpens the concept in a way that the case law does not.

A more substantial concern is that adding “misleading” raises some question about how to interpret the rest of the rule, and may require a further amendment. Under the DOJ proposal, the rule would require two things: 1. The initial portion must be misleading; and 2. Completion ought in fairness be required. But those two concepts are tautological. If the initial portion is misleading, then shouldn’t it always be fair to complete? The problem is that the trigger requirement of misleading is *already* in the concept of fairness that is in the rule --- completion is only necessary,

in fairness, when the initial portion is misleading. By specifying that the initial portion must be misleading, the change might be read to render the fairness component a surplusage --- analogous to the “materiality” and “justice” requirements in Rule 807 that the Committee has recently deleted. That would be a confusing result.

One can argue that the fairness component retains utility because under currently law it actually requires *two* trigger events: 1) the statement must be misleading; and 2) the completing statement must actually complete (and not be, for example, irrelevant, or not explanatory). So adding “misleading” essentially only *reduces* the impact of the fairness language --- cuts it in half, so to speak --- and does not render it superfluous. That is probably so, but at a minimum would require some explanation in the Committee Note.

If “misleading” is added, thus rendering fairness applicable only to the completing part, one question is whether to take the next step and clarify when completion is actually allowed, as opposed to relying on the fuzzy standard of fairness. So for example, the language might be changed as follows:

If a party introduces all or part of a writing or recorded statement and it is misleading, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — ~~that in fairness ought to be considered at the same time~~ that corrects the misleading impression.

That change might be considered user-friendly, and perhaps even necessary if the term “misleading” is added to the front end of the rule. This proposal will be set forth in detail in the section on drafting alternatives, below.

V. Drafting Alternatives

Below are a number of drafts of a possible amendment to Rule 106, to cover the alternatives discussed in the previous section. 1. Hearsay exception; 2. Requiring the proponent of the initial portion to complete; 3. Context; 4. Covering oral statements; 5. Timing; 6. Same declarant statement; and 7. Adding the term “misleading.”

There are obviously a lot of moving parts and possible combinations. **To make things a little simpler, I added the “same declarant” requirement throughout.**

A. Draft One --- Admissibility of Completing Statement, Even if Hearsay, to Prove a Fact

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement by the same person — that in fairness ought to be considered at the same time, even if it would otherwise be inadmissible under the rule against hearsay.

Draft Committee Note

Rule 106 has been amended to provide that if evidence is found necessary to complete under the strict requirements of the rule, then that completing evidence is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates the misimpression can object to the completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The adverse party, who has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. The adverse party can fairly be said to have waived its right to object to hearsay that would be necessary to correct a misleading impression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person's statement is misleading it will rarely if ever be sufficiently clarified by statements or writings of other persons.

The amendment does not give a green light of admissibility to all excised portions of writings, recordings and statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party makes a partial, misleading presentation of a person's statements, and the adverse party proffers other statements of the same speaker that will in fact correct the misimpression.

Reporter's Comment: The Committee might think more broadly about allowing completion that is otherwise barred by *any* rule of admissibility, not just hearsay. Theoretically, it could be possible that completion might be necessary with evidence that is otherwise barred by, say, Rule 407 or the Best Evidence Rule. (Not likely by Rule 403, though, because that rule has an opening-the-door principle so that the probative value of completion of a misleading statement would probably never be substantially outweighed by the risk of prejudice).

The argument against going more broadly to other grounds of exclusion is that there appears to be no reported case in which completion otherwise required under Rule 106 was prevented on any grounds other than hearsay. Because hearsay is *the* problem, it would seem more focused and more instructive to address that problem --- and it is usually a good idea not to provide an amendment that is broader than it has to be.

But if the Committee thinks that the rule should be broader, it can be changed as follows:

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement by the same person — that in fairness ought to be considered at the same time, even if it would otherwise be inadmissible under the rule against hearsay.

There would also need to be changes to the Note to accommodate this broader language.

B. Draft Two: Requiring the Proponent of the Initial Portion to Introduce the Remainder

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, ~~an adverse party~~ the court may require ~~the introduction~~ the party to introduce, at that time, ~~of~~ any other part — or any other writing or recorded statement by the same person — that in fairness ought to be considered at the same time.

Draft Committee Note

Rule 106 has been amended to provide that if evidence is found necessary to complete under the strict terms of the rule, then the court may require the proponent to admit the completing evidence. The condition for admitting the proponent's evidence is that the proponent must introduce the completing evidence.

Courts have been in conflict over whether a proponent may object to evidence that is necessary for completion on grounds such as hearsay. Under the amendment, such an objection cannot be entertained because it is the proponent, and not the opponent, that is offering the completing evidence.

The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates the misimpression can object to the completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The adverse party, who has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain un rebutted. In such circumstances, it is reasonable for the court to condition admissibility of the misleading evidence on admitting the completing evidence as well. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person's statement is misleading it will rarely if ever be sufficiently clarified by statements or writings of other persons.

The amendment does not give a green light of admissibility to all excised portions of writings, recordings and statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party makes a partial, misleading presentation of a person's statements, and other statements of the same speaker will in fact correct the misimpression.

C. Draft Three: Admissibility for Context Only

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement by the same person — that in fairness ought to be considered at the same time-- in which event the completing evidence is admissible for the non-hearsay purpose of providing context.

Draft Committee Note

Rule 106 has been amended to clarify that if evidence is found necessary to complete under the strict requirements of the rule, then that completing evidence is admissible for the non-hearsay purpose of providing context for the evidence initially introduced. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that courts precluding the use of hearsay to complete a misleading presentation have failed to consider that the completing evidence is admissible for the non-hearsay purpose of placing the initially introduced evidence into context. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The remainder of the statement places the misleading portion in proper context. As such, a hearsay objection should be overruled because the completing portion is not offered for its truth.

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person's statement is misleading it will rarely if ever be placed in proper context by statements or writings of other persons.

The amendment does not give a green light of admissibility to all excised portions of writings, recordings and statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party makes a partial, misleading presentation of a person's statements, and the adverse party proffers other statements of the same speaker that will in fact place the initial presentation in proper context.

C. Draft Four: Coverage of Unrecorded Oral Statements

Reporter’s Note: The remaining drafts concern proposals that are not related to the hearsay rule. For ease of review, each is combined, here, with a proposal to overcome a hearsay objection (Alternative 1, above). If the Committee decides instead to proceed with Alternative 2 or 3, above, then the different combinations would be easy to put together.

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Oral or Written Statements

If a party introduces all or part of a an oral or written ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part — or any other oral or written ~~writing or recorded~~ statement by the same person — that in fairness ought to be considered at the same time, even if it would otherwise be inadmissible under the rule against hearsay.

Draft Committee Note

Rule 106 has been amended to provide that if evidence is found necessary to complete under the strict requirements of the rule, then that completing evidence is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates the misimpression can object to the completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The adverse party, who has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain un rebutted. The adverse party can fairly be said to have waived its right to object to hearsay that would be necessary to correct a misleading impression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The Rule has also been amended to cover oral statements that have not been recorded. The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about

disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. The trial judge, under Rule 403, can take into account the nature and difficulty of the dispute over the content or existence of the completing statement in deciding whether it should be admitted. In any case, many courts have found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. The amendment brings all rule of completeness questions under one rule.

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person's statement is misleading it will rarely if ever be sufficiently clarified by statements or writings of other persons.

The amendment does not give a green light of admissibility to all excised portions of writings, recordings and statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party makes a partial, misleading presentation of a person's statements, and the adverse party proffers other statements of the same speaker that will in fact correct the misimpression.

Reporter's comment: As this proposal covers all statements, it can be argued that "oral or written" is unnecessary, and that the simple term "statement" can be used throughout. If so, the rule would look like this:

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part — or any other ~~writing or recorded~~ statement by the same person — that in fairness ought to be considered at the same time, even if it would otherwise be inadmissible under the rule against hearsay.

This is a perfectly acceptable alternative, though there is an arguable advantage in including the term "oral or written" – it emphasizes, in the text, that the change has been made to cover oral statements. If "oral or written" is not included, courts and litigants might not easily pick up the change --- and leaving the import of the change to the Committee Note is probably not ideal. Given the difficulty (or reluctance) that courts have had in following amendments in some cases, it may be that including "oral or written" in the proposed amendment is a useful emphasis.

*D. Draft Five --- Allowing Discretion as to Timing.*²²

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Oral or Written Statements

If a party introduces all or part of a an oral or written ~~writing or recorded~~ statement, an adverse party may require the introduction, ~~at that time,~~ of any other part — or any other oral or written ~~writing or recorded~~ statement by the same person — that in fairness ought to be considered ~~at the same time,~~ even if it would otherwise be inadmissible under the rule against hearsay. Timing of the completion is within the court’s discretion.

Draft Committee Note

Rule 106 has been amended to provide that if evidence is found necessary to complete under the strict requirements of the rule, then that completing evidence is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates the misimpression can object to the completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The adverse party, who has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain un rebutted. The adverse party can fairly be said to have waived its right to object to hearsay that would be necessary to correct a misleading impression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The Rule has also been amended to cover oral statements that have not been recorded. The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. The trial judge, under Rule 403, can take into account the nature and difficulty of the dispute over the content or existence of the completing statement in deciding whether it should be admitted. In any case, many courts have found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. The amendment brings all rule of completeness questions under one rule.

²² Together with: 1) hearsay exception; 2) limiting to the speaker’s statements; and 3. covering oral statements.

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person's statement is misleading it will rarely if ever be sufficiently clarified by statements or writings of other persons.

The original rule provided for completion only at the time that the initial statement is introduced. But courts have understandably found that trial courts should have discretion to determine when the completion may occur. The amendment provides that the court has discretion to require contemporaneous completion or to allow a delay in the introduction of the completing evidence. It is contemplated that completion will be contemporaneous in most cases, because of the "inadequacy of repair work when delayed to a later point in the trial." Adv. Comm. Note to Rule 106.

The amendment does not give a green light of admissibility to all excised portions of writings, recordings and statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party makes a partial, misleading presentation of a person's statements, and the adverse party proffers other statements of the same speaker that will in fact correct the misimpression.

F. Draft Six: Adding the Term “Misleading”²³

Rule 106. ~~Remainder of or Related Writings or Recorded~~ Oral or Written Statements

If a party introduces all or part of a an oral or written ~~writing or recorded~~ statement that is misleading, an adverse party may require the introduction, ~~at that time~~, of any other part — or any other oral or written ~~writing or recorded~~ statement by the same person — ~~that in fairness ought to be considered at the same time~~, that corrects the misleading impression, even if it would otherwise be inadmissible under the rule against hearsay. Timing of the completion is within the court’s discretion.

Reporter’s comment:

As stated above in the memo, if “misleading” is added to the triggering mechanism of the rule, it makes sense to then clarify when completion is allowed --- as opposed to leaving it to the mushy “fairness” standard. Thus the proposal above describes the standard for admitting completing evidence when the initial portion is misleading. But the Committee could also decide to leave the fairness language.

Draft Committee Note

Rule 106 has been amended to provide that if evidence is found necessary to complete under the strict requirements of the rule, then that completing evidence is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates the misimpression can object to the completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The adverse party, who has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain un rebutted. The adverse party can fairly be said to have waived its right to object to hearsay that would be necessary to correct a misleading impression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

²³ Together with what has gone before: 1) hearsay exception; 2) limitation to the speaker’s own statements; 3) covering oral statements; and 4) providing discretion as to timing.

The Rule clarifies that it is triggered by a misleading presentation that will be corrected by the completing statement. The Committee determined that it would be useful to set forth more specific criteria than the “fairness” standard set forth in the original Rule.

The Rule has also been amended to cover oral statements that have not been recorded. The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. The trial judge, under Rule 403, can take into account the nature and difficulty of the dispute over the content or existence of the completing statement in deciding whether it should be admitted. In any case, many courts have found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. The amendment brings all rule of completeness questions under one rule.

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person’s statement is misleading it will rarely if ever be sufficiently clarified by statements or writings of other persons.

The original rule provided for completion at the time that the initial statement is introduced. But courts have understandably found that trial courts should have discretion to determine when the completion may occur. The amendment provides that the court has discretion to require contemporaneous completion or to allow a delay in the introduction of the completing evidence. It is contemplated that completion will be contemporaneous in most cases, because of the “inadequacy of repair work when delayed to a later point in the trial.” Adv. Comm. Note to Rule 106.

The amendment does not give a green light of admissibility to all excised portions of writings, recordings and statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party makes a partial, misleading presentation of a person’s statements, and the adverse party proffers other statements of the same speaker that will in fact correct the misimpression.

TAB 4B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**
Southern Division

UNITED STATES OF AMERICA,

v.

Criminal No.: PWG-16-0246

CALEB ANDREW BAILEY,

Defendant.

* * * * *

MEMORANDUM OPINION

Defendant Caleb Andrew Bailey was charged with multiple counts including illegal possession of machine guns, receipt and possession of unregistered short-barrel rifles, receipt and possession of unregistered destructive devices, production and attempted production of child pornography, possession of child pornography, and witness tampering. Revised Second Superseding Indictment, ECF No. 88-2. Prior to trial, the Government filed a motion *in limine*, in which it sought a pretrial ruling precluding Bailey from “eliciting on cross-examination of law enforcement agents certain potentially exculpatory statements Bailey made during his [recorded] interviews with law enforcement on May 5, 2016.” Gov. Mot. 1, ECF No. 62. In a nutshell, the Government argued that anything Bailey told the agents during his recorded interview¹ that it intended to introduce during its case in chief would be admissible non-hearsay (as an admission by a party opponent under Fed. R. Evid. 801(d)(2)(A)), but that anything exculpatory that Bailey

¹ I previously denied Bailey’s Motions to Suppress, ECF No. 52, the two Mirandized statements that he gave to Government agents on May 5, 2015, the day a search and seizure warrant was executed at his residence, which led to the discovery of the evidence that led to the charges pending against him. The guidance in this opinion assumes that the statements given by the Defendant are not inadmissible under the Fourth or Fifth Amendments. Put differently, the focus of this opinion is the law of evidence, and it takes as given that there are no Fourth or Fifth Amendment grounds for suppressing the defendant’s statement.

told them that he intended to elicit under cross examination or otherwise would be inadmissible hearsay, unless he was prepared to testify about it and be subject to cross examination. Gov. Mot. 2. Bailey filed an opposition. Def.'s Opp'n, ECF No. 91.

On May 12, 2017, I held a telephonic hearing with counsel during which I advised that without knowing the specific portions of Bailey's statements that the Government intended to introduce, I was not able to issue a definitive pretrial ruling on the record pursuant to Fed. R. Evid. 103(b), but I nonetheless gave them guidance regarding the approach I would take at trial. I also told them that I planned to issue a written opinion to memorialize my thinking because the issues raised by the Government are recurring in nature, and there is a scarcity of helpful decisional authority in this circuit to guide courts and counsel in resolving the sometimes complicated issues the Government's Motion raises. This Memorandum Opinion provides that guidance.

Whether the defendant in a criminal trial may compel the Government to introduce his exculpatory statements at the same time that it introduces his inculpatory ones implicates a number of evidentiary rules, including Rules 102 (which instructs judges to interpret the rules of evidence in order to insure fairness, ascertain the truth, and to secure a just determination), 106 (the so-called "rule of completeness"), 401 (relevance), 403 (probative value versus danger of unfair prejudice or confusion); 611(a) (court control over the examination of witnesses and presentation of evidence); and 802 (the rule against admissibility of hearsay, and its exceptions). But where the inculpatory statements given by the defendant to the government were not written or recorded, common-law principles of evidence also apply. As will be seen, although there is no shortage of case law and treatise analysis on this subject, the law is far from settled, and

courts and commentators have reached starkly different results by applying a variety of approaches, resulting in an evidentiary landscape that is unclear.

It is not my aim in this opinion to untangle the many nuances of the Gordian knot raised by the Government’s Motion, but rather to identify the key elements that a court should examine to make an appropriate ruling, consistent with the Rules of Evidence and the still-viable common law.² The starting place is the common law evidentiary principle known as the “doctrine of completeness” (which is partially codified as Fed. R. Evid. 106), and its impact on the adversary system.

I. Common-Law Origins of Rule 106

The relationship between Rule 106 and the common-law doctrine of completeness has been explained by one respected evidence treatise this way:

Rule 106 arises from the common law completeness doctrine. Both the common law and Rule 106 presume two tenets of the adversary system. First, under the principle of party presentation of evidence, parties—not the court—bear the responsibility to produce evidence of their respective factual claims. An important corollary of party presentation holds that neither party has any obligation to produce evidence that favors the adversary. Second, a principal of sequential procedure, sometimes called “stage preclusion”, provides that the trial of an issue of fact follows a sequence of proof and counterproof whereby at each stage the parties alternate roles in presenting and challenging evidence. . . . The two tenets that give rise to Rule 106 are also embodied in Rule 611.

21A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5072 (2d ed. 2005) (footnotes omitted).

² Following my telephone hearing with counsel but before the entry of this Memorandum Opinion providing the written rationale for my oral ruling, the Defendant entered a guilty plea to certain of the charges. For this reason, there will be no trial. Nonetheless, because I informed counsel that I would memorialize in writing the ruling that I previously made, and because the issues discussed have occurred in past cases where, without the full consideration of the issues that I have given in this case, I reached contrary results, I am filing this Memorandum Opinion. Had the case proceeded to trial, I would have adopted the analysis set out above. It is my hope that the discussion may be helpful to other judges of this court, and counsel, in future cases.

The back-and-forth presentation of evidence in a criminal case usually works fairly smoothly, but problems arise when one party's artful phrasing of a question calls for a response that is technically accurate, but incomplete, altering the meaning of the original statement. A classic example is when the prosecutor elicits from a law-enforcement witness that, when the defendant was interviewed in connection with a homicide investigation, he admitted that he owned the gun used to commit the murder but omits that the defendant also said that he sold the gun three months before the shooting. Quoting the defendant out of context presents a misleading picture for the jury. In such circumstances, if the defendant is required to wait until his case in chief, or even until cross examination, to put his statement to the government witness in its proper context, it might be too late to counteract the impression left with the jury that the defendant, having admitted to owning the murder weapon, was the one who shot the victim.

A. Common-Law Doctrine

“The common law responded to these abuses of the adversary system by a limited restriction on party control of the cases that . . . [is called] ‘the completeness doctrine.’ ” 21A Wright & Graham, *supra*, § 5072. Wigmore’s description of the rule of completeness was that “[i]n evidencing the tenor of an utterance material or relevant, made in words, whether written or oral in original or in copy, the whole of the utterance on a single topic or transaction must be taken together.” *Id.* (quoting John Henry Wigmore, *Code of Evidence* 371 (3d ed. 1941)). The influential Field Code codified the common law rule of completeness in this manner:

When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence.

Id. (quoting N.Y. Commissioners on Practice and Pleading, *Code of Civil Procedure* § 1687, at 704–05 (1850)).

A careful reader will notice straightaway that in its common-law and early-code-law expression, the doctrine of completeness encompassed conversations and other spoken utterances (as well as acts) that had not been memorialized in writing or recorded. Another important feature of the common-law doctrine of completeness was that it allowed the introduction of otherwise inadmissible evidence to give proper context to the incomplete and misleading evidence offered by the original proponent. *Id.* § 5072 (“Thus, the opponent can introduce what would otherwise be hearsay to complete a truncated statement offered by the proponent.” (citing *Crawford v. United States*, 212 U.S. 183, 201 (1909))). Less clear was whether the party seeking to complete the record regarding what was said in a writing or conversation could require the proponent to include the content necessary for completeness at the time the incomplete version was presented to the jury or had to wait until his case in chief or cross examination to do so. Most common-law courts would not allow this “acceleration of completeness,” but some courts, including the Supreme Court, did. *Id.* (citing *Crawford*, 212 U.S. at 201).

B. Rule 106

The common-law doctrine of completeness has been partially codified by Fed. R. Evid. 106. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (“The Federal Rules of Evidence have partially codified the doctrine of completeness in Rule 106.”); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (“The common-law doctrine of completeness has been partially codified in Rule 106 of the Federal Rules of Evidence.”). Rule 106 states:

If a party introduces all or part of a *writing* or *recorded statement*, an adverse party may require the introduction, *at that time*, of any other part—or any other writing or recorded statement—that *in fairness ought to be considered at the same time*.

Fed. R. Evid. 106 (emphasis added). The italicized words highlight several important features of Rule 106. First, it applies only to writings and recorded statements, not to conversations or other oral statements that have not been memorialized in some written or recorded form (hence, Rule 106 only *partially* incorporates the common law rule). Second, when the Rule applies, it permits the party against whom the incomplete information has been introduced to require the introduction of completing information at the same time (the so called “acceleration clause”). Third, the rule only requires the introduction of the completing information when fairness requires that it be considered at the same time as the incomplete information.

The Advisory Committee Note to Rule 106 states:

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

Fed. R. Evid. 106 advisory committee’s note to 1972 proposed rules (citation omitted). Conspicuously absent from the Rule or the Advisory Note is any indication of whether completing information can be admitted under Rule 106 even if otherwise inadmissible (for example, because it is hearsay).³ Nor does the Rule or Note give any guidance as to what must be shown to satisfy the “fairness” requirement in order to require the introduction of the

³ In 2002–03, the Advisory Committee considered whether to amend Rule 106 to extend its scope to oral statements and acts, and whether to amend the rule to state that evidence that met the fairness requirement of Rule 106 was admissible even if it would be inadmissible if offered on its own. It ultimately “voted unanimously not to amend Rule 106 on the ground that the costs exceeded the benefits because ‘any problems under the current rule were being well-handled by the courts.’ ” 21A Wright & Graham, *supra*, § 5071 (quoting Advisory Comm. on Evidence Rules, *Minutes of Meeting of April 25, 2003*, at 9).

completing information at the same time as the incomplete information. And, although the Advisory Note states that the rule only applies to writings and recorded statements (and not to conversations) for “practical reasons,” it does not explain what those practical reasons are, or how courts should deal with the problem created when one party introduces a misleadingly incomplete portion of an oral statement or conversation.

II. Application of Rule 106

A. Independent Admissibility

1. Split of Authority

In the absence of guidance from the Rule or the Committee, courts and commentators have been left to answer these questions on their own, with conflicting results. For example, some courts have held that evidence that would be inadmissible if offered independently cannot be used for completeness purposes under Rule 106. *See, e.g., United States v. Hassan*, 742 F.3d 104, 134–35 (4th Cir. 2014) (holding that district court did not abuse its discretion by excluding defendant’s exculpatory statements under Rule 106 because they were inadmissible hearsay); *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007) (“Rule 106 applies only to written and recorded statements, not unrecorded oral confessions, and Rule 106 does not render admissible otherwise inadmissible hearsay.”); *United States v. Guevara*, 277 F.3d 111, 127 (2d Cir. 2001) (“Rule 106 does not ‘render admissible evidence that is otherwise inadmissible.’ ” (quoting *United States v. Terry*, 702 F.2d 299, 315 (2d Cir. 1983))), *overruled on other grounds as recognized in United States v. Doe*, 297 F.3d 76, 90 n.16 (2d Cir. 2002); *United States v. Ortega*, 203 F.3d 675, 682–83 (9th Cir. 2000) (holding that Rule 106 would not allow defendant’s exculpatory statements because they were inadmissible hearsay); *United States Football League v. Nat’l Football League*, 842 F.2d 1335, 1375–76 (2d Cir. 1998) (“The

doctrine of completeness does not compel admission of otherwise inadmissible hearsay evidence.” (citation omitted)); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (holding that the government was entitled to introduce the defendant’s inculpatory statements as admissions under Rule 801(d)(2)(A), but that the defendant could not introduce exculpatory portions under Rule 106 because they would be inadmissible hearsay).

What is concerning about many of the cases that have restricted Rule 106 to evidence that is independently admissible is the ease with which they have done so without any real consideration of the common-law history of the doctrine of completeness (which did not limit completing evidence to that which was independently admissible), its purpose to guard against abuses of the adversary system, or the harm that can result from letting one party (for example, the government in a criminal case) have an unfair advantage over another by creating a misleading impression in the minds of the jury that is, as a practical matter, uncorrectable. This hardly lives up to the aspirations of Rule 102 that the rules of evidence should be construed to the “end of ascertaining the truth and securing a just determination.”

But not all courts have been so quick to restrict Rule 106 to independently admissible evidence, even at the expense of fairness. In *United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986), the court rejected the notion that only admissible evidence could be used to complete the record under Rule 106. Its analysis is worth quoting at length:

Rule 106 explicitly changes the normal order of proof in requiring that . . . evidence [within the scope of the Rule] must be “considered contemporaneously” with the evidence already admitted. Whether Rule 106 concerns the substance of evidence, however, is a more difficult matter. The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof. Rule 106 is found not in Rule 611, which governs the “Mode and Order of Interrogation and Presentation,” but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules. *See* C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (1977 & 1986 Supp.). Moreover, every major rule of exclusion in the Federal Rules of

Evidence contains the proviso, “except as otherwise provided by these rules,” which indicates “that the draftsmen knew of the need to provide for relationships between rules and were familiar with a techniques for doing this.” *Id.* There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed. *See id.*

Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.

The most sensible course is to allow the prosecution to introduce the inculpatory statements. The defense can then argue to the court that the statements are misleading because of a lack of context, after which the court can, in its discretion, permit such limited portions to be contemporaneously introduced as will remove the distortion that otherwise would accompany the prosecution’s evidence. Such a result is more efficient and comprehensible, and is consonant with the requirement that the “rules shall be constructed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. Federal Rule of Evidence 102.

Id. at 1368–69 (footnotes omitted); *see also United States v. Harvey*, 653 F.3d 388, 394–95 (6th Cir. 2011) (affirming decision of district court to admit under the rule of completeness recordings that the court previously had ruled inadmissible on their own); *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008) (“[O]ur case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.”); *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988) (“The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. Fed. R. Evid. 106 allows an adverse party to introduce any other part of a writing or recorded statement which ought in fairness be considered contemporaneously. The rule simply speaks the obvious notion that parties should not be able to lift selected portions out of context.”); *United States v. LeFevour*, 798 F.2d 977, 980–82 (7th Cir. 1986) (“If otherwise inadmissible evidence is necessary to correct a misleading impression, then

either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible . . . the misleading evidence must be excluded too.”); *United States v. Green*, 694 F. Supp. 107, 110 (E.D. Pa. 1988) (noting with approval the D.C. Circuit’s holding that Rule 106 permits introduction of evidence that is otherwise inadmissible), *aff’d*, 875 F.2d 312 (3d Cir. 1989).

2. *Concerns Animating Split of Authority Are Mitigated by Proper Application of Rule 106’s “Fairness” Clause*

Perhaps courts’ willingness to restrict the use of Rule 106 to admissible evidence reflects the same concern expressed by the Department of Justice when it objected to the revision of the rule in 2002 to permit the use of inadmissible evidence. DOJ “prosecutors argued that amending the Rule would allow defense counsel to make bogus claims that the evidence was taken out of context so that they could get inadmissible evidence before the jury.” 21A Wright & Graham, *supra*, § 5071. Fair enough. But it is just as much of an abuse of the adversary system for the prosecution to paint a misleading picture to the jury by introducing out-of-context inculpatory statements by the defendant as it is for a defense attorney to assert “bogus” claims that prosecution evidence was taken out of context as a pretext to “correct” the record by introducing otherwise inadmissible evidence. And it does not answer to prevent the later abuse but permit the former. Moreover, proper application of the “fairness” requirement of Rule 106 should prevent the abuses that the Department of Justice feared because judges should restrict application of Rule 106 to those situations where misleading information actually was introduced by the prosecution and allow only such correcting evidence as is necessary to counteract it. In this regard, courts and commentators have identified various factors that go a long way towards preventing any abuse of Rule 106 that might occur if inadmissible evidence is allowed to complete the record.

To begin with, Rule 106 should never come into play unless misleading evidence has been introduced that requires clarification or explanation—otherwise there is no unfairness that needs correction. *Wilkerson*, 84 F.3d at 696 (“Thus, the rule of completeness . . . would not appl[y] . . . where there was no partially introduced conversation that needed clarification or explanation.”). And, judges need not take at face value exaggerated claims that a partially introduced statement requires completion unless it can be shown with some precision just how the incomplete evidence is taken out of context. The Seventh Circuit has identified a four-part test to determine when this has happened:

Our case law interpreting Rule 106 requires that the evidence the proponent seeks to admit must be relevant to the issues in the case. Even then, a trial judge need admit only that evidence which qualifies or explains the evidence offered by the opponent. The test is conjunctive. Once relevance has been established, the trial court then must address the second half of the test, and should do so by asking (1) does it explain the admitted evidence, (2) does it place the admitted evidence in context, (3) will admitting it avoid misleading the trier of fact, and (4) will admitting it insure a fair and impartial understanding of all the evidence.

United States v. Velasco, 953 F.2d 1467, 1474–75 (7th Cir. 1992) (citations omitted).

A respected evidence treatise also has identified a series of factors that help courts identify when the fairness requirement of Rule 106 has been met. They include: (1) Is the proffered evidence taken out of context (does what is missing change the meaning of what was introduced)? (2) Does the lack of context make the evidence misleading (does the admitted evidence “invite” or “permit” a false premise)? (3) Can the misleading impression be dispelled by other means (for example, by instructing the jury not to draw the misleading inference, or by permitting introduction of completing evidence at a later time, such as during cross examination or the defense case, so as not to interrupt the presentation of the prosecution’s case)? (4) How much evidence is needed to dispel misleading effects (lawyers should be precise in identifying the information actually needed to correct the misleading impression created by the incomplete

evidence, and judges should be skeptical about allowing expansive introduction of lengthy excerpts from writings or recordings under the guise of “correcting” a misimpression)? (5) How strong is the evidence admitted and omitted (how does the strength of the admitted evidence compare to the strength of the omitted evidence—a minor discrepancy does not require “correction” with a massive introduction of information of little probative value)? (6) How long will repair be delayed if not accelerated (if the completing information is not introduced during the prosecution’s case, can the defendant effectively dispel any misleading impression during cross examination or during his case in chief, or will the damage, once done, be irremediable if not immediately addresses)? (7) What is the consequential fact to be proved (if the misimpression goes to an essential element of the prosecution’s case—such as the defendant’s motive or intent—then there is a more exigent need to insure immediate correction than exists if the incomplete information is primarily relevant to a less critical issue, such as an assessment of a witness’s credibility)? (8) How much will completion disrupt or prejudice the proponent (the more disruptive the immediate completion will be of the proponent’s case, the more cautious the court should be before allowing it at that time)? And (9) does truncation or completion implicate constitutional rights (if the prosecution introduces incomplete portions of a defendant’s confession that, if not completed by introducing other parts of the confession, would require the defendant to waive his Fifth Amendment right not to testify)? 21A Wright & Graham, *supra*, § 5077.2.

Consideration of these factors should be sufficient for any careful judge to determine whether (and if so, how much) completeness is required by Rule 106, and eliminate much of the concern expressed by those who resist the idea of permitting inadmissible evidence to complete the record when fairness legitimately requires it. Unfortunately, to date few cases (especially

those that hold that inadmissible information may not be used for completion purposes) have taken the opportunity to do so.

B. Oral Statements

A final vexing issue raised (but not answered) by Rule 106 and the enigmatic language of the Advisory Committee Note is what courts should do with regard to oral statements or conversations that have not been memorialized by a writing or recording—particularly when the unwritten or unrecorded statement is the defendant’s confession to a law-enforcement officer. On its face, Rule 106 is limited to “writings” and “recorded statements,” and the Advisory Committee Note states that for (unnamed) “practical reasons” the rule does not apply to conversations. Fed. R. Civ. P. 106 & advisory committee’s note to 1972 proposed rules. Many courts have taken this to mean that in a criminal case, the prosecution may elicit a law-enforcement officer’s testimony about inculpatory statements made by the defendant because they are admissible under Rule 801(d)(2)(A) as admissions. But they have also held that, during cross examination of the officer, the defendant may not elicit non-inculpatory statements the defendant made during the same interview because (a) Rule 106 does not apply to oral statements and (b) even if it did, the defendant’s exculpatory statements (even if necessary to dispel the misleading, out-of-context impression left by the officer’s direct examination) are inadmissible hearsay. *See, e.g., Ortega*, 203 F.3d at 682–83 (“Even if the rule of completeness did apply, exclusion of Ortega’s exculpatory statements was proper because these statements would still have constituted inadmissible hearsay.”); *Wilkerson*, 84 F.3d at 696 (holding that Rule 106 did not apply to unrecorded conversation between defendant and FBI agent, and defendant’s exculpatory statements to the agents were not admissible under the hearsay rules).

While the “practical reasons” why oral conversations are excluded from Rule 106 undoubtedly include the need to avoid “he said, she said” disputes about the content of an unrecorded or unwritten statement, those concerns do not justify creating an environment in which the prosecution may be able to introduce the defendant’s out-of-context inculpatory oral statements, but where the defendant is powerless to do anything at that time because Rule 106 does not reach oral statements. And if there is legitimate concern about the difficulty in establishing what was said in oral conversations, the factors described above provide a judge with the analytical tools to determine whether to allow the evidence during the proponent’s case or thereafter during cross examination or during the adversary’s case in chief on a case by case basis. A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized (for example, in a FBI agent’s form 302 summary of the defendant’s confession), or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.

1. *Residual Common-Law Completeness Doctrine*

But there is an even more fundamental reason why court decisions that hold that Rule 106 does not apply to oral statements or conversations should not prevent a party from completing the record (at the time the misleading evidence is introduced or thereafter during cross examination or the opposing party’s own case) to prevent abuse of the adversary system when a proponent introduces a misleadingly incomplete part of a conversation or oral confession. The reason is that, as the Supreme Court itself appears to have recognized, Rule 106 only *partially* codifies the common law doctrine of completeness, and for situations beyond the reach

of Rule 106, the common law still applies.⁴ *Beech Aircraft*, 488 U.S. at 170–72; 1 Kenneth S. Broun, *McCormick on Evidence* § 56, at 392 n.5 (7th ed. 2013) (“*In Beech Aircraft Corp. v. Rainey*, the Court indicated that Rule 106 ‘partially codified’ the completeness doctrine. The implication is that the uncodified aspect of the doctrine is still in effect in federal court.”); 21A Wright & Graham, *supra*, § 5072.1 (stating that *Beech Aircraft* “impliedly held that Rule 106 does not repeal the common law completeness doctrine”).

Further, to the extent that the common-law doctrine of completeness (which allowed even inadmissible evidence to be introduced to dispel misleading evidence of written, recorded and oral statements) applies to oral statements or conversations, commentators have recognized that, when necessary to avoid the prejudice created by introduction of misleading characterization of oral statements, inadmissible evidence should be permitted for completion purposes. One has observed:

With respect to other parts of writings and recorded statements or related writings and recorded statements, counsel may eschew Rule 106 and develop the matter on cross-examination or as part of his own case. Similarly, the remainder of oral statements and related oral statements may be introduced by an opposing party on his next examination of the same witness, whether cross or redirect. Of course, as with written or recorded statements, it is sometimes stated that the additional oral statements may be admitted only if otherwise admissible. Clearly, the principle of completeness does not give an adverse party an unqualified right to introduce an omitted part of a conversation or related conversation otherwise inadmissible merely on the ground that the opponent has “opened the door.” To the extent however that such evidence, otherwise inadmissible, tends to deny, explain, modify, qualify, counteract, repel, disprove or shed light on the evidence

⁴ The Court resorted to the common-law rule of completeness to reverse the trial court’s exclusion of evidence necessary to dispel a “distorted and prejudicial impression” of a witness’s letter brought about by a law-enforcement officer’s testimony. *Beech Aircraft*, 488 U.S. at 170. The Court noted that Rule 106 only “partially codified” the doctrine of completeness and brushed away arguments that completion was not required because Rule 106 did not apply: “While much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106.” *Id.* at 172.

offered by the opponent, the evidence may be admitted provided its explanatory value is not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, or waste of time, Rule 403.

2 Michael H. Graham, *Handbook of Federal Evidence* § 106:2 (7th ed. 2012) (footnotes omitted); *see also* Broun, *supra*, § 56 (“It is sometimes stated that the additional material may be introduced only if it is otherwise admissible. However, as a categorical rule, that statement is unsound. In particular, the statement is sometimes inaccurate as applied to hearsay law. At least when the other passage of the writing or *statement* is so closely connected to the part the proponent contemplates introducing that it furnishes essential context for that party, the passage becomes admissible on a nonhearsay theory.” (emphasis added) (footnotes omitted)); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 1:43 (4th ed. 2013) (“Rule 106 does not say whether additional statements (or parts) may be admitted when necessary to provide context if they would otherwise be excludable under other rules, such as the hearsay doctrine. . . . It seems that hearsay objections should not block use of a related statement . . . when it is needed to provide context for statements already admitted. Thus a statement should be admissible if it is needed to provide context under Rule 106 and to prevent misleading use of related statements even if the statement would otherwise be excludable hearsay”); 1 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* §106.02[3] (11th ed. 2015) (“[Rule 106] does not on its face state that hearsay is admissible. This has led some courts to hold that Rule 106 operates solely as a timing device, affecting the order of proof—it does not make admissible what would otherwise be excluded. We believe these rulings are misguided and contrary to the completeness principle embodied in Rule 106. A party should not be able to admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify the unfairness.”).

2. Rule 611's Connection to Rule 106

Courts, too, have found the means to rectify abuses of the adversary system caused by incomplete or misleading renditions of oral statements by resorting to Fed. R. Evid. 611(a), which provides, in relevant part:

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth.

In *United States v. Pacquette*, 557 F. App'x 933 (11th Cir. 2015), the court held “Rule 106 does not apply to oral statements. However, we have extended the fairness standard in Rule 106 to oral statements ‘in light of Rule 611(a)’s requirements that the district court exercise reasonable control over witness interrogation and the presentation of evidence to make them effective vehicles for the ascertainment of truth.’ ” *Id.* at 936 (internal quotation marks and citation omitted) (quoting *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005)); *see also United States v. Verdugo*, 617 F.3d 565, 579 (1st Cir. 2010) (noting that the district court “retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements”); *United States v. Collicott*, 92 F.3d 973, 983 n.12 (9th Cir. 1996) (noting, without disagreement, that other circuits have held that Rule 611(a) gives district courts the same authority regarding oral statements that Rule 106 gives regarding to recorded statements); *United States v. Branch*, 91 F.3d 699, 727–28 (5th Cir. 1996) (noting, without disagreement, that “[o]ther circuits have held that Rule 611(a) imposes an obligation for conversations similar to what rule 106 does for writings”); *United States v. Li*, 55 F.3d 325, 329 (7th Cir. 1995) (holding that Rule 106 does not apply to oral statements, but observing “we . . . have held that Fed. R. Evid. 611(a) grants district courts the same authority regarding oral statements which Fed. R. Evid. 106 grants regarding written and recorded statements”); *United States v. Haddad*, 10 F.3d

1252, 1258 (7th Cir. 1993) (“[Rule 106] refers to written or recorded statements. However, Rule 611(a) gives the district courts the same authority with respect to oral statements and testimonial proof.”); *Alvarado*, 882 F.2d at 650 n.5 (holding that Rule 106 applies to writings, but Rule 611(a) “renders it substantially applicable to oral testimony as well”).

The evidence commentators agree. 1 Broun, *supra*, § 56, at 394 n.7 (observing that while Rule 106 only applies to writings and recordings, “[n]evertheless, the trial judge appears to have the same power to require the introduction of [the] remainder of oral conversations under Federal and Revised Uniform Rule of Evidence (1974) 611(a)”; 2 Graham, *supra*, § 106:2 (“Under unusual circumstances, the court may require the proponent to introduce contemporaneously other parts of oral conversation pursuant to the general authority of the court to control the mode and order of interrogating witnesses and presentation of evidence [Rule 611(a)].”); 1 Mueller & Kirkpatrick, *supra*, § 1:43 (“It seems that basic notions of relevancy embodied in Rule 401, coupled with the principle in Rule 403 that evidence can be excluded if it is misleading or overly prejudicial, both complemented by the power of trial judges acknowledged in Rule 611 to exercise reasonable control’ of the presentation of evidence in order to aid in ‘determining the truth,’ provide ample basis to apply the completeness principle more broadly. Hence courts can indeed apply essentially the same principle to proof of oral statements, even if they were not recorded or written down, and in cases where they are recorded or written down but the proponent has chosen to prove them by other means, such as testimonial accounts.”); Saltzburg et al., *supra*, § 106.02[2] (“While Rule 106 by its terms applies only to writings and recordings, the principle of completeness embodied in the rule has been applied to testimony about oral statements as well (such as a police officer’s selective rendition of a defendant’s oral statement). Whether this is mandated by Rule 106 or by Rule 611 is unimportant. The important point is

that where a party introduces a portion of an oral statement, the adversary is entitled to have omitted portions introduced at the same time, insofar as that is necessary to correct any misimpression that the initially preferred portion would create.” (footnote omitted)); 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 106.02[3] (Joseph M. McLaughlin, ed., 2d ed. 2015) (“[T]he trial court does have an essentially equivalent control [as in Rule 106] over testimonial proof, as part of a judge’s general power to control the mode and order of interrogating witnesses and presenting evidence [referencing Rule 611(a)].”); 21A Wright & Graham, *supra*, § 5072.2 (“Rule 611 is another rule that must be considered along with Rule 106. Indeed, it is frequently said that Rule 106 is a ‘specialized application’ of Rule 611. . . . Perhaps the most expansive use of Rule 611 to supplement Rule 106 is the courts who used Rule 611 to justify continuation of the common law completeness doctrine.” (footnotes omitted)).

3. Rule 403

Finally, Fed. R. Evid. 403 should not be overlooked when considering the implications of the rule of completeness as it relates to writings, recordings, and oral statements. Rule 403 states:

The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusion the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Even in circuits (such as the Fourth Circuit) that seem to limit Rule 106 to written or recorded statements and that do not appear to allow the introduction of evidence under the rule of completeness to rectify the unfairness caused by the introduction of a misleadingly incomplete description of the content of a writing, recording, or oral statement unless it is independently admissible, *Hassan*, 742 F.3d at 134–35; *Wilkerson*, 84 F.3d at 696, a trial court is not powerless

to address an abuse of the adversary system. If allowing a government witness to testify only to a defendant's inculpatory statements, without being subject to cross examination about the exculpatory portions of the same statement (because they are not independently admissible) would leave the jury with a misleading understanding of the defendant's statement to the extent that it would cause unfair prejudice, the court may give the government a choice: either allow cross examination to provide a complete picture of what the defendant said; or exclude the testimony of the incomplete portion of the statement.

Rule 403 should not be used in this manner, however, unless the testimony regarding the defendant's statement is unfairly incomplete, when measured by the factors discussed above. And, if a defendant seeks to introduce excluded portions of his statement (either during cross examination or in his own case) in order to complete the record, the same factors should be used by the court to ensure that only what is actually necessary to dispel the misleading impression is permitted.

Conclusion

So, what lessons may be drawn from this discussion? First, the rule of completeness, like its common-law predecessor, is more than just an obscure procedural rule governing the timing of the introduction of writings and recordings. It is tied to the very purpose of the adversary system, which allows the parties to strike blows that are hard but not unfair. The adversary system finds its most important application in the trial of a criminal case. The government has nearly unlimited resources to investigate and bring charges. With that power comes the obligation to prove the charges beyond a reasonable doubt. We take pains to instruct criminal juries that the government bears the entire burden of proof. The defendant is presumed to be innocent, and is not required to prove anything, or even testify. We admonish juries to draw no

adverse inference when a defendant elects not to testify in his case. We also esteem the defendant's right not to be compelled to incriminate himself and take precautions to avoid the chilling effect that comes with any comment in front of the jury that suggests that they should take note of the fact that he chose not to testify.

If a prosecutor introduces an incomplete version of the defendant's written or oral statement to the investigating officers by eliciting only the inculpatory portions, while leaving out exculpatory ones that, in fairness, would paint a more complete picture and dispel a misleading impression that the jury may have reached having heard only the incomplete portions, then the defendant is at a serious disadvantage. If he is unable to introduce the parts of his statement that the government omitted at the same time that the incomplete version is presented to the jury (or instead very shortly thereafter on cross examination, or even later during his own case) because the court rules that the omitted parts are inadmissible hearsay or (if the statement was an oral one) that Rule 106 is inapplicable to oral statements, then he has only two remaining options: (1) allow the misleading version to stand unchallenged; or (2) waive his rights against self-incrimination and testify—but only after the government has completed its case. This is a high price to pay to correct misleading information. If one accepts, as the language of the Rule requires, that Rule 106 may only be invoked in the first place to correct an unfair presentation of incomplete information, then construing Rule 106 the way that many courts have done countenances an abuse of the adversary system that the common-law rule of completeness was designed to prevent. That is why the better-reasoned cases have held that, where necessary to redress an unfairly incomplete rendition of a written, recorded or oral statement, evidence that would otherwise be inadmissible may be introduced.

Second, the goal of Rule 106 and the common-law rule of completeness is to level the playing field, not tilt it in favor of the defendant. For that reason, it should only come into play when it is clear that the incomplete version of a written, recorded or oral statement is unfairly misleading. And only information that is essential to dispel the misleading impression should be admitted. This is especially true if, as the better-reasoned cases have concluded, inadmissible evidence may be used for this purpose. For this reason, judges have an obligation to carefully examine both the assertedly misleading information and the proffered completing information to insure that the evidence that was introduced requires clarification or explanation, and the proffered evidence is essential to clarify or explain. Careful consideration of the factors that courts and commentators have developed will allow a judge to strike the right balance, and offset any concern about the use of inadmissible evidence where necessary to correct unfairly incomplete evidence. *See supra*, § II.A.2.

Third, there is little persuasive justification for not applying the same principles to oral statements that Rule 106 applies to written or recorded ones. A misleading oral statement is no less unfair than a written one. And the cases that have allowed the use of Rule 611(a) to achieve this result seem better reasoned than the ones that have not. *See supra*, § II.B.2. Similarly, it seems ill-advised to conclude, as some courts have done, that only admissible evidence may be used under Rule 106 or the common law rule of completeness without first considering the underlying purpose of the rule, which is to prevent an abuse of the adversary system. *See supra*, § II.A.1. One can hardly claim the moral high ground through a willingness to accept an unfair result in the name of evidentiary purity. As the D.C. Circuit noted in *Sutton*, “Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the offered evidence should be considered

contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.” 801 F.2d at 1368–69.

Finally, if a trial court is compelled by reason of the governing circuit authority to restrict Rule 106 to writings and recorded statements (and precluded from using Rule 611(a) to adopt the protections of Rule 106 for oral statements), or is prevented from admitting inadmissible evidence when necessary to dispel an unfairly misleading version of a written or oral statement introduced by the prosecutor, the court should carefully consider Rule 403. *See supra*, § II.B.3. If the incomplete version offered by the government would cause unfair prejudice to the defendant, or tend to mislead the jury, then the court—unable because of restrictions imposed by circuit authority to redress the prejudice—should prevent the government from introducing the unfairly misleading evidence to the jury.

The ultimate conclusions that I reach in light of the foregoing discussion are:

- (1) Rule 106 only covers writings or recordings, but its codification does not preempt the application of the common-law rule of completeness for oral statements and conversations. If the common-law rule is applied to oral statements and conversations, the court should consider the factors discussed at § II.A.2 to determine whether the completing information is required at the same time that the incomplete information is introduced or whether it should be admitted at cross examination or later.
- (2) As an alternative means of dealing with oral statements or conversations, Rule 611(a) allows the trial judge to apply the same underlying logic of Rule 106.
- (3) Neither Rule 106 nor the common-law rule of completeness is triggered unless some clearly identifiable unfairness would exist without allowing the party that would be prejudiced the opportunity to offer information that would clarify or explain. The trial

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Memorandum To: Advisory Committee on Evidence Rules

From: Daniel J. Capra, Reporter

Re: Possible Amendments to Rule 615

Date: October 1, 2018

Judge John Woodcock, a former member of the Committee, has asked the Committee to consider possible amendments to Rule 615, the rule governing sequestration of witnesses. Rule 615 currently provides as follows:

Rule 615. Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) a person authorized by statute to be present

Judge Woodcock's concerns about Rule 615 arose from a case in which the plaintiff moved to sequester witnesses, including expert witnesses, after some of the plaintiff's witnesses had already testified. He recounts the issues that were raised in an email sent to the Committee Chair and Reporter:

At a recent trial, after the plaintiff's lawyer called two witnesses and after they completed their testimony, he moved to sequester all remaining witnesses, including experts. I was dubious. Acting instinctively, I thought his timing was fishy because he had already presented two witnesses and it seemed unfair to allow the plaintiff to call a select number of unsequestered witnesses and exclude the rest. Also, my gut reaction was that the sequestration rule did not apply to experts. Anyway, unlike many cases, this particular case did not hinge on witness credibility and I thought I had the discretion to deny the motion.

I discovered to my chagrin that I was wrong on almost all counts. As both of you know, Rule 615 makes the exclusion of witnesses mandatory: "At a party's request, the court must order witnesses excluded." * * * So much for my instinctive view that I had the discretion to say no. Next, although the Rule does not mention timing, the same advisory committee note states: "No time is specified for making the request." Strike two.

I was not out, because I was correct about the exclusion of experts. But the language of the rule that addresses this issue is exceedingly obscure:

"But this rule does not authorize excluding: (c) a person whose presence a party shows to be essential to presenting the party's claim or defense."

Mulling over this language and wondering why it did not apply to virtually every important witness, I searched in vain for help from the advisory committee notes. The notes contain the following reference to experts, but it is under a discussion of exclusion of party representatives: "(3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of litigation." This comment seemed to be directed to an expert advisor, not an expert witness.

Fortunately, with the assistance of my law clerk, we were quickly able to come up with case law that confirmed my impression that the sequestration rule does not typically apply to an expert who is not a fact witness. From a practical perspective, the exclusion of experts makes little sense because their testimony often depends on the trial testimony and their presence avoids the need to lay out lengthy hypotheticals.

Here is Judge Woodcock's request:

My suggestion is that the Committee take another hard look at Rule 615. I wonder about why the rule is mandatory and why unlike so many other evidentiary rulings, Rule 615 does not call for a balancing or trial judge discretion. Next, I am concerned about the timing issue. In my case, I suspect the plaintiff's lawyer forgot to move for sequestration at the outset of trial and was not gaming the rule. But the rule could easily be gamed by plaintiffs by presenting all their witnesses, resting, and moving to sequester all the defense witnesses. Even if the sequestration of the defense's witnesses had no practical effect, it

would seem unfair. Finally, I suggest that the advisory committee review the language of subpart (c), which seems decidedly obscure.

This memo is in five parts. Part One discusses the mandatory vs. discretionary nature of Rule 615. Part Two discusses the question of timing of a sequestration motion and whether an amendment might be useful. Part Three discusses whether an amendment directed toward experts might be useful. Part Four discusses an issue not raised by Judge Woodcock but which has been raised by others: should the rule specifically extend to preclude conversations with excluded witnesses *outside* court? Part Five sets forth an example of what an amendment to Rule 615 might look like.

It should be noted that no action will be taken on a possible amendment to Rule 615 at the Fall 2018 meeting. This is a preliminary memo designed to determine whether the Committee is interested in further investigating a possible amendment or amendments to Rule 615. The research supporting this memorandum is preliminary as well. If the Committee is interested in considering any of the suggested amendments to Rule 615 raised in this memo, a full report will be prepared for the Spring meeting.

I. Mandatory Sequestration Upon the Motion of Any Party

Rule 615 is one of the very few Evidence Rules that admits of no discretion.¹ Should that be changed? Judge Woodcock suggests that in cases that don't involve witness credibility, the Rule of automatic exclusion is overbroad. And there might be other cases in which a court might find exclusion to be unnecessary, or might find that one witness but not another might be prone to tailor their testimony if they are present at trial, and so exclusion should be partial.

The policy basis for Rule 615 might shed some light on whether sequestration should be mandatory or discretionary. Sequestration of witnesses developed on the theory that falsehood could be detected by exposing inconsistencies in testimony. 6 Wigmore, Evidence s 1837 at 455 (Chadbourn rev. ed. 1976).² It prevents “the possibility of one witness shaping his testimony to match that given by other witnesses at the trial.” *United States v. Leggett*, 326 F.2d 613 (4th Cir. 1964). Rule 615 “change[d] the prior practice under which the trial court had discretion to determine whether a witness should be excluded.” *Government of the Virgin Islands v. Edinborough*, 625 F.2d 472, 474 (3rd Cir. 1980).

¹ Rule 609(a)(2) is another, requiring the court to admit falsity-based evidence to impeach a witness. Rule 105 requires the court to give an instruction on limited admissibility upon request, but the court has discretion as to how to instruct.

² The practice has existed since Biblical times. In *The History of Susanna* in the Apocrypha, Susanna was being tried before the assembly for adultery. She was accused by two Elders, whom she had rebuffed when they made sexual advances. Daniel separated the Elders and questioned them. Elder One said Susanna did the act under a fig tree, and Elder Two said that she did the act under a date tree. If Elder Two had been in the courtroom when Elder One said “fig tree” then it is pretty likely that Elder Two would have tailored his testimony around the fig tree.

The Committee Note to Rule 615 does not explain why the Rule makes exclusion mandatory. It simply notes that there was a choice between discretionary and mandatory, and it chose mandatory. It would appear that the Advisory Committee was persuaded by Wigmore's view that parties should have the right to have witnesses sequestered. The Wigmore treatise is cited after the statement in the Note about the Committee's choice of a mandatory rule.

Dean Wigmore was an avid proponent of mandatory sequestration. In his treatise, he emphasized the importance of sequestration in exposing perjury and in enabling effective cross-examination of witnesses.³ In addition, he explained the difficulty inherent in determining whether sequestration of the witnesses in a given case is necessary:

[I]t cannot be left with the judge to say whether the resort to this expedient is needed; not even the claimant himself can know that it will do him service; he can merely hope for its success. He must be allowed to have the benefit of the chance, if *he* thinks that there is such a chance. To require him to show some probable need to the judge, and to leave to the latter the estimation of the need, is to misunderstand the whole virtue of the expedient, and to deny it in perhaps that very situation of forlorn hope and desperate extreme when it is most valuable and most demandable.⁴

The mandatory view of sequestration in Rule 615 was retained throughout the drafting process; no changes were made and no debate about the mandatory view appears in the drafting history.⁵

The contrary view is that there is no reason to treat a sequestration ruling differently than any other ruling on evidence. We give discretion to trial courts because they can be expected to consider all the pertinent circumstances, and those circumstances change from case to case. For example, there may be cases, like Judge Woodcock's, that don't depend on witness credibility. The argument is that a mandatory rule is insufficiently attuned to the specific circumstances of a case, and therefore may be overinclusive.

It is notable that nineteen states make sequestration discretionary with the court --- usually because the case law in those states had held that sequestration was discretionary. Those states are

³ Wigmore on Evidence (Chadbourn Ed.), § 1839 (1976).

⁴ Wigmore, *supra*. The Uniform Rules of Evidence also have a mandatory requirement of sequestration upon motion of a party. URE 615.

See also, *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986):

We understand the mandatory, unambiguous language of the rule to reflect the drafters' recognition that any defendant in Farnham's position would find it almost impossible to sustain the burden of proving the negative inference that the second agent's testimony would have been different had he been sequestered.

⁵ See Fed. Prac. & Proc. § 6241 (Thomson Reuters 2016) ("Notwithstanding this departure [from the common law discretionary standard], the provision when proposed generated no controversy. The drafters made no changes to either the rule or the Advisory Committee's Note during the rulemaking process.").

Alabama, Alaska, California, Delaware,⁶ Idaho, Iowa; Louisiana;⁷ Maine;⁸ Massachusetts; Michigan; Minnesota; New Jersey; New York; ⁹ North Carolina;¹⁰ Oregon; Pennsylvania; Rhode Island; South Carolina; and Washington. The change made by and large in these states is simply to substitute “may” for “must”:

At a party’s request, the court ~~must~~ may order witnesses excluded so that they can hear other witnesses’ testimony.

So it might be argued that there is a question of policy here, on whether the rule of mandatory sequestration is a proper rule that is necessary to protect against tailoring of testimony and perjury --- or whether instead it is an unjustified outlier from the basic principle of guided discretion.

In the end, though, one should not get the impression that there is a giant divide between a discretionary and a mandatory system. This is so for two reasons:

1) The discretionary model, as applied in the states listed above, is pretty close to a mandatory system because there remains a heavy presumption that sequestration will be ordered. The Committee Notes to the states that have discretionary systems virtually all state that sequestration is the basic rule, and discretion to deny sequestration is limited to exceptional situations. And any amendment to the Federal Rule should make it clear in text or Committee Note that a move to a discretionary system is unlikely to change very many cases.

2) Even under the mandatory rule, the court has a substantial amount of discretion when it comes to applying the exception to exclusion found in Rule 615(c), for a person

⁶ The Delaware comment to Rule 615 states:

This rule tracks F.R.E. 615 except that “may” was substituted for “must” in the first line. It was believed that the court should be given latitude as to whether witnesses should be sequestered. It was recognized that in most cases a request for sequestration will be granted but that it is sometimes desirable not to sequester a particular witness, especially an expert witness.

⁷ Louisiana 615 provides that a court must order exclusion upon request, but also states that the court may, in “the interests of justice” exempt any witness from its order of exclusion. So in the end the court has discretion to deny a sequestration request.

⁸ The Maine Commentary states: “This rule makes exclusion of witnesses from the courtroom while other witnesses are testifying wholly discretionary, reversible only for abuse. *State v. Miller*, 253 A.2d 58 (Me. 1969). In practice the court routinely grants a request for exclusion. The Federal Rule makes exclusion mandatory on request.”

⁹ New York does not, by and large, have codified evidence rules, but the case law establishes that sequestration is a matter of judicial discretion. See Martin and Capra, *New York Evidence Handbook* at 637 (citing cases).

¹⁰ The North Carolina Commentary states:

The use of “*may* order witnesses excluded” rather than “shall,” as in the federal rule, is intended to preserve discretion in the trial judge, allowing him to take into account such things as the physical setting of the trial. However, the practice should be to sequester witnesses on request of either party unless some reason exists not to.

whose presence is essential to presenting the party's claim or defense. As the court in *Edinburgh* put it:

Subsection (3) of the Rule permits an exception for "a person whose presence is shown by a party to be essential to the presentation of his cause." This indicates that Rule 615 *has not entirely eliminated all judicial discretion, but rather has changed the burden of proof*, 3 Weinstein & Berger, Evidence P 615(01) at 615-8. While the party desiring sequestration previously had to convince the court to grant it, under Rule 615 sequestration must be given unless the party opposing the exclusion has convinced the court to exercise its discretion to except a particular witness from the sequestration order on the basis of his or her necessity to the presentation of a party's cause.¹¹ (emphasis added).

Given that the difference between a discretionary and a mandatory rule is not all that great, the Committee might determine that an amendment is not warranted as it would have such a limited effect. On the other hand, even if the discretionary/mandatory issue is found to be an insufficient ground for an amendment, it might be an issue to consider if the rule is to be amended on other grounds. Those other possible grounds are discussed below.

II. Timing of a Sequestration Motion

Rule 615 says nothing about when a motion to sequester must be made. The Committee Note states that "No time is specified for making the request." That choice of language is problematic on a number of counts. First, it is not a request, it is a demand; it's a request if the judge has the discretion to deny it. Second, as to timing, the statement is opaque. It could be looked at as simply a description of what is not in the rule, and an indication that courts should come up with rules on timing. Or it could be a statement of intent that there shouldn't *be* any timing limitation on a sequestration motion.¹²

In response to this confusing landscape, the case law is murky, and divided. Some courts declare that there is no limitation on the timing of a Rule 615 motion. See, e.g., *Wood v. Sw. Bell*

¹¹ In *Edinburgh*, the court found that the trial court could have exercised discretion, in a child sexual assault case, to allow the victim's mother to stay in the courtroom during the testimony of the victim --- even though the mother was scheduled to testify. The court stated that "children, particularly those who must testify about sexual molestation, will find the judicial experience even more frightening if they are required to testify in the unfamiliar surroundings of a sterile courtroom without the sight of a familiar and protective individual."

¹² Wigmore subscribed to the view that the timing of a sequestration request should not affect its availability: "It need not be demanded at the very opening of the testimony; at any later time, when the supposed exigency arises, the order may be requested." Wigmore on Evidence (Chadbourn Revision), § 1840. This may be some indication that the Advisory Committee did not want any regulation as to timing, as it relied on Wigmore to conclude that sequestration should be mandatory. But the passage about timeliness in Wigmore is *not* cited in the Rule 615 Committee Note. So, whatever.

Tel. Co., 637 F.2d 1188, 1194 (8th Cir. 1981) (“Rule 615 does not specifically require that the exclusionary request be made at any particular stage of the trial.”). One reported decision specifically finds that a motion can be made after some witnesses testify. See *William L. Comer Family Equity Pure Trust v. Cmm’r. of Internal Revenue*, 958 F.2d 136, 141 (6th Cir. 1992)(trial court lacked discretion to deny defense request for sequestration made after defense witnesses had testified; relying on the fact that “[n]othing in the rule specifies a time for making the request.”).¹³

Other courts have implied or declared that a party must bring the motion before any witness testifies; but there is not really a bright line rule.¹⁴ The case most often cited on timeliness is *Blackmon v. Johnson*, 145 F.3d 205, 211 (5th Cir. 1998). Blackmon invoked the sequestration rule during the second day of testimony, after witnesses entered the courtroom. The district court did not order the witnesses sequestered because the rule had not been invoked at the beginning of the proceedings and a witness for Blackmon had been present in the courtroom during the preceding day's testimony. Thus the district court employed a timeliness requirement. But the appellate court's response was muted. It stated that “[e]ven if we were to agree that the trial court erred in not sequestering the witnesses, Blackmon is unable to demonstrate sufficient prejudice from the testimony of Goodwin and Ross.” So the appellate court does not actually hold that there is any timing requirement, much less one that requires a motion before any witness testifies.

Here are some other cases about timeliness of a Rule 615 motion:

- *United States v. Brown*, 547 F.2d 36, 37–38 (3d Cir. 1976): The defendant sought exclusion of witnesses prior to the prosecutor's opening argument. The court granted the motion but then let the witnesses back after the argument. The appellate court found no error. The court stated that the district court “was under no obligation to interpret this motion as a request for the sequestration of witnesses both before and after the opening statements of counsel” because, as to trial testimony, the motion was “premature.” So if the defendant wanted sequestration for the witness testimony, “he should have renewed the motion at the time the witnesses were to testify.”

Comment: This could be read as imposing a requirement of moving before any witness testifies. But it really doesn't cover a situation like Judge Woodcock's --- which might be called the “midstream motion” --- because Brown never made such a motion. He moved only once --- before opening arguments.

- *United States v. West*, 607 F.2d 300, 306 (9th Cir. 1979): The defendant moved for sequestration before opening statements and it was denied. The court recognized that an opening statement may improperly suggest testimony to a witness but held that Rule 615 does not deal with

¹³ See also *Sequester Witnesses — Motion*, Federal Trial Objections § S10 (6th ed.) (“Ideally, the sequestration motion should be made in limine or at the start of trial, but no rule precludes a party from making such motion at any other time.”).

¹⁴ Only one of the state versions of Rule 615 has any reference to timing. Maryland Rule 615 states that “The court may order the exclusion of a witness on its own initiative or upon the request of a party at any time.”

this danger. Therefore the defendant could not complain about witnesses being present during opening statements.

Comment: The case deals with timing in a roundabout way --- the motion was made at the wrong time. But it is more about what the rule covers than it is about timing. And it doesn't have anything to say about the timing of a motion to exclude witnesses after testimony has begun.

● *Strasburg-Jarvis, Inc. v. Radiant Sys., Inc.*, 2008 WL 11383461, at *1 (D. Kan. Oct. 20, 2008): The court held that a pretrial motion to exclude was too early in time. It stated that sequestration “is a matter which should be addressed at the time of trial.”

● *Leidel v. Ameripride Servs., Inc.*, 291 F. Supp. 2d 1241, 1247 (D. Kan. 2003): The court entered a sequestration order after a motion made by a party on the first day of trial. Witnesses were not called until the next day but the court stated that there was no need to renew the motion. This case obviously does not deal with midstream motions, and really doesn't provide a ruling on timeliness.

The bottom line is that there is not much authority on timing requirements for Rule 615 motions; probably the weight of this slim authority is that the motion can be made at any time.

If the Committee finds the issue of timing worth pursuing, the question would be, what is the right answer? One would think there should be some rule to regulate gaming the system, as may have occurred in Judge Woodcock's case. On the other hand, it would probably be a bad idea to have a timing requirement so rigid and specific that it becomes a trap--- e.g., “the motion must be made after opening statements but before any witness is called.” And it would probably make sense to have a good cause safety valve for a motion out of time, akin to the good cause protections in the pretrial notice requirements of the Evidence Rules.

Putting all those concepts together, and assuming *arguendo* that timing language is to be added, it might look something like this:

The party's request must be made before any witnesses are called to testify, unless the court, for good cause, allows the request to be made at a later time.

In the end the question of timeliness doesn't appear to arise enough (at least under the case law) to warrant an amendment on its own. But perhaps it could justifiably tag along with other amendments to the Rule. If the Committee is interested in further consideration the matter will be developed for the next meeting.

III. An Exception for Experts

Under current law, the question of whether an expert will be immune from exclusion is determined by Rule 615(c): is the expert “a person whose presence a party shows to be essential to presenting the party’s claim or defense.” The party has the burden of showing essentiality and as stated above determination is within the court’s sound discretion.

Judge Woodcock suggests that the language of Rule 615(c) is opaque, and the rule would be improved if it were amended to treat experts specifically. This suggestion actually raises two separate questions: 1) should there be a separate subdivision on experts?; and 2) what should that provision be?

It seems pretty clear that the only reason to have a separate provision on experts would be to change the substantive standards from the current subdivision requiring a showing that presence at trial is “essential to presenting the party’s claim or defense.” Under the current rule, there is no really no mystery about where to go to determine whether an expert can be excepted from exclusion; there is only one provision that could apply: Rule 615(c). Subdivision (a) is for parties, (b) is for entity representatives, and (d) is for statutory protections. So while subdivision (c) might sound like it is not talking about experts, in fact it is the only possible listed exception for experts. Unless you are going to alter the substantive standard of “essentiality” there appears to be no cause for amending Rule 615 to specifically mention experts.

So assuming some alteration in the standard for exception from exclusion is to be made with regard to experts, there would appear to be two possible approaches: 1) an expert-centric standard, stating exactly when experts are protected from exclusion (as opposed to a generic “essentiality” standard); or 2) a protection that extends to all experts. These options will be discussed in turn.

1. Specific criteria for experts.

As to an expert-centric standard, the courts have essentially found two reasons that experts need to be at a trial and so are protected from exclusion under Rule 615(c): 1. The expert may be basing an opinion on evidence presented at trial;¹⁵ or 2. The expert is needed to assist the party in developing the testimony of other witnesses.¹⁶ **Accordingly, an expert-centric provision might look like this:**

* * * But this rule does not authorize excluding:

¹⁵ See, e.g., *United States v. Lussier*, 929 F.2d 25 (1st Cir. 1991) (no error to refuse to exclude expert where his testimony was based on the evidence presented at trial); *Mayo v. Tri-Bell Indus.*, 787 F.2d 1007 (5th Cir. 1986) (expert properly exempted where he based his opinion in part on information provided by other witnesses).

¹⁶ See, e.g., *Malek v. Federal Ins. Co.*, 994 F.2d 49 (2nd Cir. 1993) (error to exclude an expert witness where the expert could have assisted the party in cross-examining the adverse party’s expert).

* * * (d) an expert witness whose testimony will be based on evidence presented at trial, or whose presence will assist the party in developing the testimony of other witnesses;
* * *

This break-out of experts might be considered user-friendly. The statement of specific criteria seems more helpful to litigants and courts than the general standard of “essentiality” in Rule 615(c).¹⁷ But the benefits of the change seem marginal --- meaning that any such change probably constitutes an add-on to an amendment, and not a reason to amend the rule itself. The courts have consistently employed Rule 615(c) to experts, and have usually found that experts should be protected from exclusion when they are relying on evidence presented or when they are needed to develop the testimony of other witnesses.¹⁸

It should also be considered that the benefit of clearer criteria runs the risk of being underinclusive. Perhaps there will come a case where an expert is necessary but not on the specific grounds set forth in the new provision. Arguably that would not be the end of the world, because Rule 615(c) would still be intact, and the party could argue that the presence of the expert is essential on other grounds. But that is a messy result if you are going to go to all the trouble of having a new subdivision covering experts.

2. An exception for all experts

What about a rule that *all* experts are exempt from exclusion? At first glance, there are advantages in a bright line rule --- especially given the holding in most courts that experts are usually exempt from exclusion under the current Rule 615(c).¹⁹ A bright line rule provides the advantage of ease of application. Of course it would, by definition, be overbroad, resulting in

¹⁷ Maryland Rule 5-615 has a separate subdivision protecting from exclusion “an expert who is to render an opinion based on testimony given at the trial.”

¹⁸ The Federal Rules of Evidence Manual, at 615-19 --- 615-21 annotate 14 circuit court cases applying one or the other of the stated criteria, and in all the cases an expert is protected from exclusion if she is relying on evidence presented in court or is necessary to challenge other witnesses.

¹⁹ See, e.g., *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 629–30 (6th Cir. 1978) (“where a fair showing has been made that the expert witness is in fact required for the management of the case, and this is made clear to the trial court, we believe that the trial court is bound to accept any reasonable, substantiated representation to this effect by counsel”); *Opus 3 Ltd. v. Heritage Park, Inc.*, (“Because Rule 615 is designed to preclude fact witnesses from shaping their testimony based on other witnesses’ testimony, it does not mandate the sequestration of expert witnesses who are to give *only* expert opinions at trial.”); *United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002) (expert is presumptively exempt from exclusion under Rule 615(3)); *In re Omeprazole Patent Litig.*, 190 F. Supp. 2d 582, 584 (S.D.N.Y. 2002) (“Usually an expert is either responding to the theories of an adversary’s expert or is basing his opinion entirely on facts adduced by fact witnesses at trial. Such experts are infrequently sequestered.”); *Indem. Ins. Co. of N. Am. v. Electrolux Home Prod., Inc.*, 520 F. App’x 107, 112 (3d Cir. 2013) (“The ‘essential’ exception applies most often in cases involving expert witnesses. There is little, if any, reason for sequestering a witness who is to testify as an expert and not to the facts of the case.”).

exempting certain experts from exclusion when it is not actually essential for them to be present. But it could be argued that the benefits of bright line application would outweigh the cost of having non-essential experts in the courtroom before they testify.

Which brings up the question --- that exactly *is* the cost of having a non-essential expert present in the courtroom before they testify? It could be that the cost is trivial. There are a few cases in which experts have been found non-essential, and the reason has been that the expert is not basing an opinion on any evidence presented in court. For example, an expert who is testifying to general principles of, say, thermodynamics, is not relying on facts or data presented in a particular litigation --- he could testify exactly the same in any case in which thermodynamics is relevant.²⁰ But while such an expert does not *need* to be present, she also does not really *need to be excluded*. There is no risk that such an expert will tailor her testimony to the evidence presented at trial because she is going to be testifying to something that is not fact-dependent.²¹ And if the trial judge, under existing law, errs in allowing her to be present in the courtroom, you can bet that the error will be found harmless on appeal.²²

Consequently, there is something to be said for a separate exception from exclusion for all experts, on the ground that, in virtually all cases, their presence will either be necessary or not relevant to any risk that Rule 615 protects against. I say “virtually all” because of course it would not be impossible for a case to arise in which an expert is testifying to general principles but might nonetheless be affected by the testimony. As the court put it in *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 629–30 (6th Cir. 1978), “the very breadth of the permissible scope of testimony by an expert witness suggests that in some circumstances at least, the trial judge could be justified in holding that his presence in the courtroom was not essential and that his exclusion from the courtroom might in a given case make a more objective and, perhaps, more honest witness out of him.” But the argument is that the need to exclude an expert will be such an infrequent occurrence that the virtues of a bright-line rule might outweigh the minimal risk.

Under current law, the courts have rejected the argument that experts are always immune from exclusion under Rule 615. The rationale for rejecting a bright line rule is that it does not exist in the current text of the rule. *See, e.g., Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 629–

²⁰ See, e.g., *United States v. Forehand*, 943 F. Supp. 2d 1329, 1330–31 (M.D. Ala. 2013) (“Indeed, not all experts rely on trial, or even lay or fact, witness testimony for their opinions. Their opinions may be based on undisputed or stipulated facts or their opinions may go merely to support or refute a scientific principle advanced by a party. In short, many experts need not rely on courtroom testimony for their opinions and thus have no need whatsoever to be in court during the testimony of other witnesses.”).

²¹ See *Stryker Corp. v. Ridgeway*, 2016 WL 6583544, at *1 (W.D. Mich.) (“Typically, the risk of a witness tailoring testimony and testifying in a less than candid manner is greater in lay witnesses than expert witnesses.”); *Wielgus v. Ryobi Techs., Inc.*, 2012 WL 1853090, at *8 (N.D. Ill. May 21, 2012) (“The rationale for excluding ‘fact’ or ‘occurrence’ witnesses is premised on the concern that having heard the testimony of others, the witnesses may inappropriately tailor their testimony to conform to the testimony of previous witnesses. * * * No such danger is present with expert witnesses, whose testimony, by nature, is based on facts and information provided by others.”).

²² See *United States v. Conners*, 894 F.2d 987 (8th Cir. 1990) (error, if any, was harmless because the expert’s conclusion was not susceptible to being tainted by what he heard in the courtroom).

30 (6th Cir. 1978) (“That an expert witness may be assisted by being present in the courtroom to hear the testimony upon which he is expected to base his expert opinion, as set forth in Rule 703, does not in our judgment furnish an automatic basis for exempting him from sequestration under Rule 615. The reason for our conclusion is simple: had the framers intended it, they would have said so, or added a fourth exception.”); *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 629 (4th Cir. 1996) (“[W]e decline to adopt a *per se* rule exempting expert witnesses, even those who are expected only to render opinions, from sequestration. The rule does not provide such an exemption and section (3) vests in trial judges broad discretion to determine whether a witness is essential.”); *United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002) (“We decline to conclude, however, that an expert witness will *always* meet the criteria of Rule 615(3). The reason is simple: had the framers intended it, they would have said so, or added a fourth exception.”). Of course, this case law would not be a hindrance if the rule were changed to provide a *per se* exception from exclusion for experts.

While it would seem that a bright-line rule exempting experts from exclusion could be useful and beneficial, there are also at least two countervailing concerns:

1. As discussed above, the Federal Rules of Evidence are fundamentally grounded on trial court discretion. So any rule that would take away that discretion needs to be carefully considered. And certainly it would be odd to pair a bright-line expert proposal with a proposal like the one discussed above that would give courts discretion to determine whether an order of sequestration should be issued in the first place. That combination of giving courts discretion on the one hand and taking it away on the other would seem hard to explain.

2. Perhaps more importantly, a rule granting bright-line protection to all experts runs into problems when applied to an expert that is also a fact witness. It would seem that a trial court should have discretion to exclude such a witness if the expert/fact witness balance is such that the risks of tailoring the latter outweigh the benefits of being present for the former. The trial court in its discretion should be allowed to come up with alternatives, such as providing a factual basis for the expert part of the witness’s opinion other than through presence at the trial, or by allowing the witness to be present at certain times and not others. All of these possibilities tend to muddle the analysis and undermine the argument that a bright line rule is workable. And more muddling occurs by the fact that the line between expert and lay testimony is a vague one, as shown by the many decided cases on this question, with varying results.²³ Consequently, a bright line rule protecting “experts” raises some issues of application that would need to be addressed.

²³ See the Federal Rules of Evidence Manual at 701[03][12] and 702[03][58] (annotating more than 100 circuit court cases that try to distinguish expert and lay witness testimony).

IV. A Dispute in the Case Law About the Extent of a Rule 615 Order

Perhaps the most important reason for considering an amendment to Rule 615 is to address a problem that was not raised in Judge Woodcock's request. That problem is a dispute in the courts about the extent of a Rule 615 order.

On the face of the Rule, it would appear that under Rule 615, the court is limited to an order that excludes the witness from the trial. And that is how some courts have construed Rule 615. As the court stated in *United States v. Sepulveda*, 15 F.3d 1161, 1175–77 (1st Cir. 1993), “while the common law supported sequestration beyond the courtroom, Rule 615 contemplates a smaller reserve; by its terms, courts must ‘order witnesses excluded’ only from the courtroom proper.” It follows, under this construction, that nothing in Rule 615 prevents witnesses from talking to each other outside the courtroom, or prevents a prospective witness from reading the courtroom testimony of another witness.

It's pretty obvious that the effectiveness of Rule 615 is undermined if it is limited to exclusion of witnesses from the courtroom. The court in *Sepulveda* (a case in which three witnesses were incarcerated in the same cell during trial), opined that the solution was for the court to use its common law powers that extend beyond Rule 615:

[Rule 615] demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires. Outside of the heartland, the district court may make whatever provisions it deems necessary to manage trials in the interests of justice, including the sequestration of witnesses before, during, and after their testimony, and compelling the parties to present witnesses in a prescribed sequence. Rule 615 neither dictates when and how this case-management power ought to be used nor mandates any specific extra-courtroom prophylaxis, instead leaving the regulation of witness conduct outside the courtroom to the district judge's discretion. See *United States v. Arias-Santana*, 964 F.2d 1262, 1266 (1st Cir. 1992) (explaining that a federal trial court may enter non-discussion orders at its discretion). This is not to say, however, that sequestration orders which affect witnesses outside the courtroom are a rarity. As a practical matter, district courts routinely exercise their discretion to augment Rule 615 by instructing witnesses, without making fine spatial distinctions, that they are not to discuss their testimony. Indeed, such non-discussion orders are generally thought to be a standard concomitant of basic sequestration fare, serving to fortify the protections offered by Rule 615.

Judge Selya, in *Sepulveda*, made clear that if a party wants a sequestration order that goes further than that mandated by Rule 615, then it is up to the party to ask for it with specificity:

Here, appellants moved in advance of trial for sequestration without indicating to the court what level of restraint they thought appropriate. The court granted the motion in its simplest aspect, directing counsel “to monitor sequestration” and ordering “that

witnesses who are subject to [the court's] order are not to be present in the courtroom at any time prior to their appearance to render testimony.” * * * On these facts, the district court's denial of relief must be upheld. The court's basic sequestration order, which ploughed a straight furrow in line with Rule 615 itself, did not extend beyond the courtroom. There has been no intimation that the witnesses transgressed this order.

The arguable problem with the *Sepulveda* demarcation is that it may be a trap for the unwary. A party might think that a Rule 615 order is sufficient to protect against all possible tailoring, and might not be aware that it must, in essence, ask for two orders from the court (only one of which, by the way, must be granted). The contrary argument regarding a trap for the unwary is that the rule itself states its own limits, meaning that if you think it extends beyond the courtroom, you are not unwary, you are dumb. That said, the two-step process outlined in *Sepulveda* does not seem ideal.

Most courts applying Rule 615 have not followed the *Sepulveda* two-step analysis. Rather, they construe Rule 615 orders as extending to prevent disclosure of evidence to prospective witnesses outside of court --- that is to say, they construe Rule 615 to do more than it actually says it is doing. The recent case of *United States v. Robinson*, 85 F.3d 1206, 1214 (9th Cir. 2018), is a good example of this broader view. *Robinson* was a case in which a prospective witness for the government read a trial transcript. The trial judge had issued a sequestration order “under Rule 615.” The government argued, citing *Sepulveda*, that Rule 615 does not, by its terms, preclude potential trial witnesses from reviewing trial transcripts --- the violation would only occur if the witness heard the testimony while attending trial. The court rejected this literal view of Rule 615, and noted that most of the circuits agreed with the court's position:

In our view, an interpretation of Rule 615 that distinguishes between hearing another witness give testimony in the courtroom and reading the witness's testimony from a transcript runs counter to the rule's core purpose—“to prevent witnesses from tailoring their testimony to that of earlier witnesses.” *Larson v. Palmateer*, 515 F.3d 1057, 1065 (9th Cir. 2008). The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript. An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing. Therefore, we join those circuits that have determined there is no difference between reading and hearing testimony for purposes of Rule 615. *See United States v. McMahon*, 104 F.3d 638, 642–45 (4th Cir. 1997) (affirming the district court's conclusion that a witness violated a Rule 615 exclusion order by reading daily trial transcripts); *United States v. Friedman*, 854 F.2d 535, 568 (2^d Cir. 1988) (recognizing that “the reading of testimony may violate an order excluding witnesses issued by a district court under Rule 615”); *United States v. Jimenez*, 780 F.2d 975, 980, n.7 (11th Cir. 1986) (concluding that a witness violated a Rule 615 exclusion order by reading the testimony of another agent witness from a prior mistrial); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373–74 (5th Cir.

1981)(holding that providing a witness transcribed portions of another witness's testimony in preparation for his court appearance constitutes a violation of Rule 615). A trial witness who reads testimony from the transcript of an earlier, related proceeding violates a Rule 615 exclusion order just as though he sat in the courtroom and listened to the testimony himself.

So there is a conflict in the courts about the extent of a Rule 615 order. The conflict is *not* about whether the court can prevent prospective witnesses from talking to other witnesses or reading trial transcripts. The conflict is over whether a party must obtain a supplemental order (or supplemental language in a Rule 615 order) to prevent the practice --- or whether it is sufficient to simply have an application of "the witness rule" or "a Rule 615 order." To some extent this is a technical question, but it is surely a meaningful one if the order you end up with is only related to courtroom exclusion.²⁴

The problem is exacerbated by the fact that most Rule 615 orders appear to be terse and inspecific. The Ohio Advisory Committee makes the following point:

In practice, it is most common for trial courts to enter highly abbreviated orders on the subject. Normally a party will move for the "separation" (or "exclusion") of witnesses, and the court will respond with a general statement that the motion is granted. This is usually followed by an announcement to the gallery that prospective witnesses should leave the courtroom and by a statement that the parties are responsible for policing the presence of their own witnesses. Though some courts then orally announce additional limitations on communications to or by witnesses, the far more usual approach is simply to assume that the generic order of "separation" adequately conveys whatever limitations have been imposed.

Under these circumstances, there is a good argument that something should be added to the Rule to specify the extent of a Rule 615 order --- especially given the conflict in the case law.

Assuming the Committee would be interested in addressing the question of the extent of the sequestration order, it would seem that that the better answer is to provide that a Rule 615 order extends outside the courtroom, to prevent excluded witness from being informed about evidence that has been presented at trial. It seems clear that the threat of tailoring from, say, reading trial testimony or talking to a witness who testified, is exactly the same as the threat that arises from hearing it in court. And while the two-step approach of *Sepulveda* does address the out-of-court danger, it surely seems more efficient to have both concerns (out of court and in court) addressed under one rule, in one order.

²⁴ For more on the conflict regarding the extent of a Rule 615 order, see Carter, *Exclusion of Justice: The Need for a Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615*, 30 Univ. Dayton L.Rev. 63 (2004): "Courts should apply a uniform approach to the witness sequestration rule by applying it broadly, which automatically extends the scope of a separation order to include a prohibition on any communication among witnesses about what their testimony was or will be. Most circuit courts, numerous scholars, and several states have supported an augmentation of the Rule so that the policies supporting it are extended to the fullest capacity."

One complication extending Rule 615 to out-of-court contacts is that such an order, if added to the current rule, would be *mandatory*. The court would have no discretion. Arguably, the question of out-of-court contact is more fluid --- and in some circumstances less obvious --- than whether prospective witnesses are to be shooed out of court. That is to say, perhaps the terms and extent of the out-of-court preclusions should be something for judicial discretion.²⁵ Query whether the rule works if the in-court exclusion is mandatory but the terms of the out-of-court exclusion are discretionary. Perhaps extending the rule to out-of-court situations might have an impact on whether or not the in-court rule is mandatory or discretionary.

If the Committee were to agree that the Rule 615 order should be extended to out-of-court contexts, it seems clear that an amendment to the Rule would be necessary. The existing text simply doesn't extend to out-of-court contexts, and the fact that courts have so read it only means that they are going beyond the text to reach the better result. At any rate, some amendment would be necessary to resolve the conflict between the courts that read Rule 615 as it is written and those that do not. Moreover, an amendment is necessary to assure that people subject to the order have notice about what the order entails.

The question then is, what would be the best language for an amendment to extend the impact of a Rule 615 order? In this regard, there are a number of States that have extended the reach of the sequestration order --- and it appears that there are a number of different options. The most interesting fix, one that is the least disruptive to the existing rule, is found in **Pennsylvania Rule 615**. Here is the Pennsylvania fix as applied to existing Rule 615:

At a party's request, the court must order witnesses excluded so that they cannot ~~hear~~ learn of other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: * * *

The Pennsylvania comment states that "Pa.R.E. 615 uses the term 'learn of' rather than the word 'hear.' This indicates that the court's order may prohibit witnesses from using other means of learning of the testimony of other witnesses."

This solution seems elegant, but the possible problem is that it might be too subtle. Subtlety does not seem to be a virtue in evidence rulemaking --- it is hard enough to get courts and litigants to comply with obvious rules. Moreover, the violation of a Rule 615 order is grounds for sanctions. It would seem hard to sanction a person for not understanding the nice distinction between "learn of" and "hear."

Other states have provisions that more specifically extend the effect of a Rule 615 order outside the courtroom. For example, **Louisiana Rule 615** provides that the court may:

²⁵ See Ohio Advisory Committee Note to Ohio Rule 615 ("If witnesses and parties are bound by implicit additional restrictions whenever exclusion is ordered, then the additional restrictions are in fact automatic and non-discretionary.").

order that the witnesses be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case.²⁶

The problem with this language is that it does not prevent a witness from, for example, reading the transcript of another witness. So this is not an ideal iteration.

Another alternative is **Tennessee Rule 615** which provides:

At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. **The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. * * ***

This rule is more preclusive than the Louisiana version, because it prevents any person from disclosing trial evidence to an excluded witness.

New Hampshire Rule 615 provides a separate subdivision on the extent of a Rule 615 order. It seems helpful in terms of drafting to break off the problem of the extent of the order into a separate subdivision. The New Hampshire provision states as follows:

(b) A sequestration order issued under subsection (a) of this rule prohibits a sequestered witness:

- (1) from being present in the courtroom until after the witness has testified and is not subject to recall by any party; and
- (2) from discussing the testimony he or she has given in the proceeding with any other witness who is subject to sequestration and who has not yet testified.

Again there is a coverage problem because the order would not appear to prevent a lawyer (or someone else) from giving a transcript of trial testimony to an excluded witness. But the provision might be tweaked to cover the problem. See Part Five, below.

Finally, **Ohio Rule 615** takes an opposite, and interesting tack. It *specifically* limits the order to excluding witnesses from trial:

²⁶ **Wisconsin Rule 615** provides for a no-talk order, but it is not fully comprehensive:

“(3) The judge or circuit court commissioner may direct that all excluded and non-excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.”

* * * at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the “exclusion” or “separation” of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.²⁷

The idea here is to tell litigants, in the rule itself, that if they want something more than courtroom exclusion, they have to ask for it. The Ohio drafters believed that the Federal rule, as extended by most courts to out-of-court contacts, raised issues of notice. The drafters explain as follows:

Some courts, in Ohio and elsewhere, have suggested that at least some additional forms of separation are implicit even in generally stated orders. This approach, however, entails significant issues of fair warning, since the “implicit” terms of an order may not be revealed to the parties or witnesses until after the putative violation has occurred. That is especially so when the “violation” involves conduct or communications about which there is a great diversity of opinion and practice. * * * The imposition of sanctions without advance warning that the conduct is sanctionable raises obvious due-process concerns. Moreover, an “implicit-terms” approach is inconsistent with the principle that separation of witnesses beyond exclusion from the courtroom is neither automatic nor a matter of right: if witnesses and parties are bound by implicit additional restrictions whenever exclusion is ordered, then the additional restrictions are in fact automatic and non-discretionary.

* * * To the extent that a trial court, in the exercise of its discretion, determines to order forms of separation in addition to exclusion, it remains free to do so, but it can do so only by making the additional restrictions explicit and by giving the parties notice of the specific additional restrictions that have been ordered. Notice to the parties is required because, with the exception of contempt, sanctions for violation of the rule tend to have their greatest effect on the parties, rather on the witnesses.

These points are well-taken. The upshot of a concern over specificity and notice is that there is a good argument for amending Rule 615 *no matter* what substantive decision is made about the extent of a Rule 615 order. If the decision is made that the order should be only about exclusion from the court, then the rule should probably be amended to specifically state that, as Ohio does. That is because most circuits are now applying Rule 615 to out-of-court contacts --- raising the issues of notice and due process highlighted by the Ohio comment. On the other hand, if the decision is made that a Rule 615 order should preclude out of court contacts (on the ground that such contacts undermine the protections of the Rule), then the Rule should be amended to so provide, because it does not say that now.

²⁷ One problem with adopting the Ohio provision --- limiting Rule 615 orders to exclusion from court --- is that it would change the law in the majority of circuits. Currently the D.C., 2nd, 4th, 5th, 6th, 9th and 10th Circuits have held that a Rule 615 order extends to out-of-court contacts. See *United States v. Robinson, supra*, Carter, *Exclusion of Justice, supra*, for citations.

V. Drafting Illustration

What follows is an illustration of a draft that would incorporate the following points discussed above: 1) sequestration order within the discretion of the court; 2) timing specified; 3) experts protected from exclusion; and 4) order extended to out-of-court contacts.

There are obviously a lot of mix-and-match possibilities. For example, the expert provision could articulate specific grounds that need to be met before exception from exclusion, as discussed above. Each one of the options could be the opposite. But as this is just a preliminary memo to assess Committee interest, I figured one model to illustrate all the changes if they were accepted should do.

Rule 615. Excluding Witnesses

(a) General Rule. At a party's request, the court ~~must~~ may order witnesses excluded so that they cannot ~~hear~~ learn of other witnesses' testimony. Or the court may do so on its own. ~~But this~~

(b) Extent of Order. Unless the court, in its discretion, orders otherwise, an order issued under this rule prohibits:

(i) an excluded witness from being present in the courtroom until the witness testifies and is not subject to recall by any party; and

(ii) any person subject to the order from reporting or providing a record of the testimony or other evidence offered at trial to a witness who is subject to exclusion and who has not yet testified.

(c) Timing. A request to exclude witnesses must be made before any witnesses are called to testify, unless the court, for good cause, allows the motion to be made at a later time.

(d) Exceptions. This rule does not authorize excluding:

(a i) a party who is a natural person;

(b ii) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c iii) a person whose presence a party shows to be essential to presenting the party's claim or defense; ~~or~~

(iv) a person who will testify solely as an expert; or

(d v) a person authorized by statute to be present.

Draft Committee Note

Rule 615 has been amended in four respects:

1. The rule now provides that issuance of a sequestration order is discretionary with the court. This restores the common law rule, and is consistent with many state rules. The Committee determined that leaving the decision to the court's discretion is more consistent with the general tenor of the Federal Rules of Evidence, and more attuned to specific circumstances that might arise in individual cases. The Committee expects that requests to exclude witnesses will ordinarily be granted and that trial courts should deny such requests only in unusual circumstances.

2. Under the amendment, an order issued under this rule now extends to preclude contacts with excluded witnesses outside the courtroom. This change brings the rule into accord with most of the federal case law. Most courts have concluded that there is no distinction between hearing a witness give testimony, and hearing from a witness what they testified to or reading a transcript of the testimony. The core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial. That purpose can only be effectuated by regulating out-of-court contacts as well as in-court presence. However, given the many circumstances that might arise when an excluded witness is out of court, the rule allows the court, in its discretion, to limit the scope of any order it issues.

3. The rule now requires a request to exclude to be made before any witness testifies, unless the court on good cause allows the request to be made at a later time. A timeliness requirement prevents a party from acting strategically to move for exclusion after some of its witnesses have testified.²⁸

4. The amendment states that witnesses who are providing only expert testimony are exempt from any order excluding witnesses. Experts who rely on evidence presented at trial as a basis for their opinions have ordinarily been protected from exclusion because their presence was "essential to presenting the party's claim or defense" under then-Rule 615(b). Some courts excluded experts who were not relying on trial evidence, but exclusion in these circumstances is unnecessary because the risk of such a witness tailoring her expert testimony is negligible. The Committee determined that with regard to experts, the virtues of a bright line rule outweighed any interests that would support exclusion in the very few cases in which it might be warranted. However, if the witness is providing both expert and lay testimony, exclusion is within the discretion of the court, and is determined by whether the party opposed to exclusion establishes that the witness's presence is "essential" under Rule 615(d)(iii).

²⁸ It might be thought that the need for a timeliness requirement is reduced if the issuance of the order is changed to be discretionary rather than mandatory. If the court does have discretion, it can deny issuing the order if it thinks that the moving party's timing is suspicious.

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules

From: Daniel J. Capra, Reporter

Re: A Roadmap Rule for Article VI

Date: October 1, 2018

Two lawyers from Maryland suggest that the Committee consider adoption of an addition to Article VI of the Evidence Rules that would provide a roadmap for impeachment and rehabilitation of witnesses. Professor Lynn McLain was the Reporter to the Maryland Committee that drafted the Maryland Rules of Evidence. Those rules follow the Federal Rules with some variation. One of the variations, drafted by Professor McLain, is Maryland Rule 5-616, which is referred to as the “roadmap” rule.

The justification for a roadmap rule is that Article VI is notoriously spare when it comes to rules on impeachment and rehabilitation of witnesses. The exception is for impeachment for character for untruthfulness, the rules on which are set forth in detail in Rule 608 and 609. But there is nothing in Article VI about impeaching a witness for bias, or for contradiction, or for incapacity. And there is nothing in Article VI about the rules on rehabilitating a witness whose credibility has been attacked. And, outside of Rules 608 and 609, there is nothing about whether the adverse party can introduce extrinsic evidence to attack a witness.

Of course the default Rule running throughout the Federal Rules of Evidence is Rule 403. So the gaps in Article VI can be and are filled by a court using the balance of probative value and prejudicial effect provided by Rule 403.¹ The Supreme Court explained the backfilling required in *United States v. Abel*, 469 U.S. 45 (1984), a case involving an attack on a witness for having a motive to falsify, the question being whether extrinsic evidence was permissible when the witness denied the bad motivation. The Court of course noted the gap in coverage in Article VI, but found it unlikely that the drafters “intended to scuttle entirely the evidentiary availability of cross-

¹ See generally Imwinkelreid, *The Silence Speaks Volumes: A Brief Reflection on the Question of Whether It Is Necessary To Fill the Seeming Gaps in Article VI of the Federal Rules of Evidence, Governing the Admissibility of Evidence Logically Relevant to the Witness's Credibility*, 1998 Univ. Ill. 1013.

examination for bias.” The *Abel* Court essentially instructed that if there is a gap in coverage in Article VI, that gap is filled by Rule 403.

That said, it is frankly a bit embarrassing that the Federal Rules of Evidence has nothing to say about impeachment for bias, contradiction and capacity, nor anything to say about rehabilitation.² And from a practical perspective, it might well be useful to litigants and even courts to have a place to look for guidance on these important subjects, as opposed to “check out Rule 403.”

Hence, the roadmap. Maryland Rule 5-616 is used below as a template, but it is tweaked for purposes of the Federal Rules of Evidence.

Rule 616. Impeachment and Rehabilitation --- Generally

(a) Impeachment by Inquiry of the Witness. The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:

- (1) Proving under Rule 613 that the witness has made statements that are inconsistent with the witness’s present testimony;
- (2) Proving that the facts are not as testified to by the witness;
- (3) Proving that an opinion expressed by the witness is not held by the witness or is otherwise not worthy of belief;
- (4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or otherwise has a motive to testify falsely;
- (5) Proving lack of personal knowledge or weaknesses in the capacity of the witness to perceive, remember, or communicate; or
- (6) Proving the character of the witness for untruthfulness under Rule 608 or 609.

(b) Extrinsic Impeaching Evidence.

- (1) Extrinsic evidence of prior inconsistent statements may be admitted as provided in Rule 613(b).
- (2) Extrinsic evidence contradicting a witness’s testimony, or offered to prove bias or incapacity, may be admitted subject to Rule 403.

² See, e.g., John R. Schmertz, Jr., *The First Decade Under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion*, 30 Vill. L. Rev. 1367 (1985) (noting the “unfortunate” gaps in coverage in Article VI).

(3) Extrinsic evidence of the character of a witness for untruthfulness may not be admitted.

(4) Extrinsic evidence of prior convictions may be admitted as provided by Rule 609.

(5) Extrinsic evidence may be admitted to show that prior consistent statements offered under subsection (c)(2) of this Rule were not made.

(c) Rehabilitation. A witness whose credibility has been attacked may be rehabilitated by:

(1) Permitting the witness to deny or explain impeaching facts, except that a witness who has been impeached by prior conviction may not deny guilt of the earlier crime;

(2) Evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made rebuts the attack on the witness;

(3) Evidence through other witnesses of the impeached witness's character for truthfulness, as provided in Rule 608(a); or

(4) Other evidence that the court finds admissible under Rule 403 for the purpose of rehabilitation.

Reporter's comments:

1. The goal of a roadmap rule is not to make any substantive changes, but rather to provide a resource for litigants and courts in navigating the gap-filled Article VI. As such, the rule should not be particularly controversial. It doesn't require empirical research or vetting both sides of the "v." It is simply a matter of good housekeeping. The question for the Committee is whether it would be sufficiently helpful.

2. On the question of helpfulness, Judge Grimm states that "the chief utility of Rule 5-616 is that it collects in one place a succinct summary of the primary means of impeachment and rehabilitation, organized in a way that is logical and easy to follow at a glance. It is especially helpful for practitioners and judges, and it is easy to refer to in the middle of a trial." Grimm, *Impeachment and Rehabilitation under the Maryland Rule of Evidence: An Attorney's Guide*, 24 Univ. Balt. L.Rev. 95 (1994).

3. The placement of the rule raises a question. Maryland places the roadmap at the end of Article VI. This makes some sense, because putting it earlier would have placed the rest of Article 6 out of sequence with the Federal Model. But on the other hand it would not seem an ideal structure to have the roadmap at the very end of the rules on witnesses. That's like finding an actual roadmap --- after you take the trip.

A possible solution is to add the roadmap to Rule 607. Rule 607 is the shortest rule in the Federal Rules of Evidence. It just says that "Any party, including the party that called the witness,

may attack the witness's credibility." Rule 607 is really the gateway to impeachment and rehabilitation of witnesses. The rules on impeachment, such as they are, start immediately after that. So putting a roadmap in 607 is more like reading the map before you start the trip.

The mechanics for putting the roadmap in Rule 607 would be fairly simple. It would look something like this:

Rule 607. ~~Who May Impeach a Witness~~ General Rules on Impeaching and Rehabilitating a Witness.

(a) Who May Impeach. Any party, including the party that called the witness, may attack the witness's credibility.

(b) Impeachment by Inquiry of the Witness. The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:

[and so forth].

If the Committee is interested in further consideration of adding a roadmap to Article VI, a formal proposal will be prepared for the next meeting. Future research will include inquiries into Maryland case law and interviews with Maryland practitioners to see whether the roadmap rule has been helpful.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Amendment to Rule 404(b)
Date: October 1, 2018

At its last meeting, the Committee approved amendments to Rule 404(b), with the recommendation that the amendments be released for public comment. That recommendation was unanimously adopted by the Standing Committee at its June meeting. The proposed amendments were issued for public comment on August 15. The public comment period runs until February 15.

The proposed amendment and Committee Note is as follows:

Rule 404. Character Evidence; Other Crimes, Wrongs or ~~Other~~ Acts

* * *

(b) Other Crimes, Wrongs, or ~~Other~~ Acts.

(1) Prohibited Uses. Evidence of a any other crime, wrong, or ~~other~~ act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; ~~Notice in a Criminal Case~~*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in a criminal case, the prosecutor must:~~

(3) *Notice in a Criminal Case*. In a criminal case, the prosecutor must:

(A) provide reasonable notice ~~of the general nature~~ of any such evidence that the prosecutor intends to offer at trial; ~~and~~

(B) articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing ~~before trial~~ sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

- The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the “general nature” of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.

- The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided. In addition, notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. See Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is

important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied, even in cases in which a final determination as to the admissibility of the evidence must await trial.

- The good cause exception applies not only to the timing of the notice as a whole but also to the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

- Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided when the government moves in limine for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word “other” is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs and acts “other” than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

Comments Received on the Rule Thus Far

As is typical, the comment in the early portion of the public comment period is sparse. However, Rule 404(b) is obviously an important rule and significant public comment should be expected for the Committee’s review at the Spring meeting.

Thus far, the Committee has received only two public comments. Here is the summary:

Donald Wilkerson, NA (EV-2018-0004-0003): Mr. Wilkerson addresses the change from “crimes, wrongs or other acts” back to “other crimes, wrongs or acts.” He argues that the change

“would allow a prosecutor to argue, otherwise inappropriately, that, evidence, any evidence, of the crime charged is admissible to prove the defendant's bad character and that he acted in accordance with that bad character when he committed the crime charged.”

Comment: If the prosecution introduces evidence of the charged crime itself, Rule 404(b) is inapplicable. That’s always been the case. The rule prohibits character inferences from *uncharged* crimes. It is true that, in proving the crime, the evidence could raise an inference that the defendant is a bad person. But that is because of the charged crime itself. In any case, the proposed change simply restores the rule to what it was before the restyling --- no evidence is admissible under the amendment that wasn’t admissible before.

Ann Paiewonsky, Paiewonsky Law Firm, PLLC (EV-2018-0004-0004): Ms. Paiewonsky addresses the good cause language. She states that “if the intent is to give the defendant a fair opportunity to meet the evidence then it seems to me that the portion of the amendment that allows evidence during trial, even assuming good cause, does not address the defendant’s need for time and an opportunity to meet that evidence.” She argues that “[t]here is nothing in this amended rule that imposes a right and an obligation that defendant receive a fair opportunity to meet the evidence when it is first presented during trial” because the fair opportunity to meet the evidence language “only addresses notice before trial, not during trial.”

Comment: She has a point. The rule could be read in a way that the “fair opportunity” requirement does not apply if good cause is found. That would be a strange way to read the rule, but an amendment should account for possible strange readings.

If you look at the notice provision in the new Rule 807, it is constructed differently, in a way in which notice at trial is subject to the fair opportunity requirement:

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant’s name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

The Committee might consider a change to the Rule 404(b) notice provision that would bring it into line with the structure of the Rule 807 notice provision. If so, the notice provision would look like this (blacklined from the original):

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

- (A) provide reasonable notice ~~of the general nature~~ of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; and
- (B) articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
- (C) do so in writing before trial sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Essentially this moves up the “fair opportunity” standard so that it applies to all notices, pre- and post-trial --- as is the case with Rule 807.

In addition, the Committee Note to the new Rule 807 contains this proviso regarding notice during trial pursuant to good cause:

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

This provision seems equally applicable to Rule 404(b) notice given during trial. Indeed, its non-inclusion in the Rule 404(b) situation might be considered inconsistent. Therefore the Committee may wish to add this paragraph to the Rule 404(b) Committee Note. Even if there is no corresponding change to the text, the Committee Note may be used to address the concern raised by the public comment.¹

¹ I should have caught the inconsistency between the notice provisions in the amendments to Rules 807 and 404(b). I apologize for the oversight. It's not the first time that public comment has been useful in highlighting the Reporter's mistakes.

Comment made in the Standing Committee discussion: The proposed amendment states that the prosecutor must articulate the “non-propensity purpose for which the prosecutor intends to offer the evidence.” A Standing Committee member asked the Committee to consider a change from “non-propensity purpose” to “non-character” purpose. Another Standing Committee member suggested that the Committee consider “permitted” purpose --- thus referring back to Rule 404(b)(1).

Reporter’s comment: “Non-propensity” was chosen because that is the iteration used in the cases that are putting teeth back into Rule 404(b). See, e.g., *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014) (stating that Rule 404(b) is concerned with “the chain of reasoning that supports the non-propensity purpose for admitting the evidence”). “Non-character” seems like a fair substitute, and probably an improvement, as the term “character” is used throughout Rule 404. In contrast, “permitted” seems not as direct --- it requires a look back to another provision to determine what the word means. It arguably seems more iffy and less directive. In the end, however, there is probably not much difference in any of the three iterations.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: October 1, 2018

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The outline begins with a short discussion of the Court's two latest cases on confrontation, *Ohio v. Clark* and *Williams v. Illinois*, and then summarizes all the post-*Crawford* cases by subject matter heading.

I. (Relatively) Recent Supreme Court Confrontation Cases

A. *Ohio v. Clark*

The Court's most recent opinion on the Confrontation Clause and hearsay, *Ohio v. Clark*, 135 S.Ct. 2173 (2015), shed light on how to determine whether hearsay is or is not "testimonial." As shown in the outline below, the Court has found a statement to be testimonial when the "primary motivation" behind the statement is that it be used in a criminal prosecution. *Clark* raised three questions about the application of the primary motivation test:

1. Can a statement be primarily motivated for use in a prosecution when it is not made with the involvement of law enforcement? (Or put the other way, is law enforcement involvement a prerequisite for a finding of testimoniality?).
2. If a person is required to report information to law enforcement, does that requirement render them law enforcement personnel for the purpose of the primary motivation test?

3. How does the primary motivation test apply to statements made by children, who are too young to know about use of statements for law enforcement purposes?

In *Clark*, teachers at a preschool saw indications that a 3 year-old boy had been abused, and asked the boy about it. The boy implicated the defendant. The boy's statement was admitted at trial under the Ohio version of the residual exception. The boy was not called to testify --- nor could he have been, because under Ohio law, a child of his age is incompetent to testify at trial. The defendant argued that the boy's statement was testimonial, relying in part on the fact that under Ohio law, teachers are required to report evidence of child abuse to law enforcement. The defendant argued that the reporting requirement rendered the teachers agents of law enforcement.

The Supreme Court in *Clark*, in an opinion by Justice Alito for six members of the Court, found that the boy's hearsay statement was not testimonial.¹ It made no categorical rulings as to the issues presented, but did make the following points about the primary motive test of testimoniality:

1. Statements of young children are *extremely unlikely* to be testimonial because a young child is not cognizant of the criminal justice system, and so will not be making a statement with the primary motive that it be used in a criminal prosecution.

2. A statement made without law enforcement involvement is *extremely unlikely* to be found testimonial because if law enforcement is not involved, there is probably some other motive for making the statement other than use in a criminal prosecution. Moreover, the formality of a statement is a critical component in determining primary motive, and if the statement is not made with law enforcement involved, it is much less likely to be formal in nature.

3. The fact that the teachers were subject to a reporting requirement was essentially irrelevant, because the teachers would have sought information from the child whether or not there was a reporting requirement --- their primary motivation was to protect the child, and the reporting requirement did nothing to change that motivation. (So there may be room left for a finding of testimoniality if the government sets up mandatory reporting in a situation in which the individual would not otherwise think of, or be interested in, obtaining information).

¹All nine Justices found that the boy's statement was not testimonial. Justices Scalia and Ginsburg concurred in the judgment, but challenged some of the language in the majority opinion on the ground that it appeared to be backsliding from the *Crawford* decision. Justice Thomas concurred in the judgment, finding that the statement was not testimonial because it lacked the solemnity required to meet his definition of testimoniality.

B. Williams v. Illinois

In *Williams v. Illinois*, 567 U.S. 50 (2012), the Court brought substantial uncertainty to how courts are supposed to regulate hearsay offered against an accused under the Confrontation Clause. The case involved an expert who used testimonial hearsay as part of the basis for her opinion. The expert relied in part on a Cellmark DNA report to conclude that the DNA found at the crime scene belonged to Williams. The splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the Confrontation Clause bar on testimonial hearsay.

The question in *Williams* was whether an expert's testimony violates the Confrontation Clause when the expert relies on hearsay. A plurality of four Justices, in an opinion written by Justice Alito, found no confrontation violation for two independent reasons:

1) First, the hearsay (the report of a DNA analyst) was never admitted for its truth, but was only used as a basis of the expert's own conclusion that Williams's DNA was found at the crime scene. Justice Alito emphasized that the expert witness conducted her own analysis of the data and did not simply parrot the conclusions of the out-of-court analyst.

2) Second, the DNA test results were not testimonial in any event, because at the time the test was conducted the suspect was at large, and so the DNA was not prepared with the intent that it be used against a *targeted individual*.

Justice Kagan, in a dissenting opinion for four Justices, rejected both of the grounds on which Justice Alito relied to affirm Williams's conviction. She stated that it was a "subterfuge" to say that it was only the expert's opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert's opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. As to Justice Alito's "targeting the individual" test of testimoniality, Justice Kagan declared that it was not supported by the Court's prior cases defining testimoniality in terms of primary motive. Her test of "primary motive" is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was.²

² Justice Breyer wrote a concurring opinion. He argued that rejecting the premise that an expert can rely on testimonial hearsay --- as permitted by Fed.R.Evid. 703 --- would end up requiring the government to call every person who had anything to do with a forensic test. That was a result he found untenable. He also set forth several possible approaches to permitting/limiting experts' reliance on lab reports, some of which he found "more compatible

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan’s critique of Justice Alito’s two grounds for affirming the conviction. But Justice Thomas concurred in the judgment nonetheless, because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently “formalized.” He declared that the Cellmark report

lacks the solemnity of an affidavit of deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . And, although the report was introduced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

Fallout from Williams:

The irony of *Williams* is that *eight* members of the Court rejected Justice Thomas’s view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. Yet if a court is counting Justices, it appears that it might be necessary for the government to comply with the rather amorphous standards for “informality” established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of “primary motive” but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then it can be argued that the government must establish that the hearsay is not tantamount to a formal affidavit --- because five members of the Court rejected the argument that the Confrontation Clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert’s opinion.

There is a strong argument, though, that counting Justices after *Williams* is a fool’s errand for now --- because of the death of Justice Scalia and the uncertainty over Justice Gorsuch’s view of the Confrontation Clause.

with *Crawford* than others” and some of which “seem more easily considered by a rules committee” than the Court.

The problem of course with consideration of these alternatives by a rules committee is that if the Confrontation Clause bars these approaches, the rules committee is just wasting its time. And given the uncertainty of *Williams*, it is fair to state that none of the approaches listed by Justice Breyer are clearly constitutional.

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor “I’ve just been shot by Bill. Call an ambulance.” Surely that statement --- admissible against the accused as an excited utterance --- satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfies the less restrictive Alito view. Thus Justice Thomas’s “formality” test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would find no constitutional problem with its admission. See *Michigan v. Bryant*, 562 U.S. 344 (2011) (Thomas, J., concurring) (excited utterance of shooting victim “bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.”).

Similarly, there is extensive case law both before and after *Williams* allowing admission of testimonial statements on the ground that they are not offered for their truth. For example, if a statement is legitimately offered to show the background of a police investigation, or offered to show that the statement is in fact false, then it is not hearsay and it also does not violate the right to confrontation. This is because if the statement is not offered for its truth, there is no reason to cross-examine the declarant, and cross-examination is the procedure right that the Confrontation Clause guarantees. As will be discussed further below, while both Justice Thomas and Justice Kagan in *Williams* reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause “does not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted.” And they both approve of the result in *Tennessee v. Street*, 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant’s own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true --- and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

II. Post-*Crawford* Cases Discussing the Relationship Between the Confrontation Clause and the Hearsay Rule and its Exceptions, Arranged By Subject Matter

“Admissions” --- Hearsay Statements by the Defendant

Defendant’s own hearsay statement was not testimonial: *United States v. Lopez*, 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford*. The court declared that “for reasons similar to our conclusion that appellant’s statements were not the product of custodial interrogation, the statements were also not testimonial.” That is, the statement was spontaneous and not in response to police interrogation.

Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. See *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006) (admission of defendant’s own statements does not violate *Crawford*); *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012): “The Sixth Amendment simply has no application [to the defendant’s own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself.”

Defendant’s own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson*, 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford*. But the court held that Gibson’s statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Text messages were properly admitted as coming from the defendant: *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014). In a prosecution for sex trafficking, text messages sent to a prostitute were admitted against the defendant. The defendant argued that admitting the texts violated his right to confrontation, but the court disagreed. The court stated that the texts were properly admitted as statements of a party-opponent, because the government had established by

a preponderance of the evidence that the texts were sent by the defendant. They were therefore “not hearsay” under Rule 801(d)(2)(A), and “[b]ecause the messages did not constitute hearsay their introduction did not violate the Confrontation Clause.”

Note: The court in *Brinson* was right but for the wrong reasons. It is true that if a statement is “not hearsay” its admission does not violate the Confrontation Clause. (See the many cases collected under the “not hearsay” headnote, *infra*). But party-opponent statements are only technically “not hearsay.” They are in fact hearsay because they are offered for their truth --- they are hearsay subject to an exemption. The Evidence Rules’ technical categorization in Rule 801(d)(2) cannot determine the scope of the Confrontation Clause. If that were so, then coconspirator statements would automatically satisfy the Confrontation Clause because they, too, are classified as “not hearsay” under the Federal Rules. That would have made the Supreme Court’s decision in *Bourjaily v. United States* unnecessary; and the Court in *Crawford* would not have had to discuss the fact that coconspirator statements are ordinarily not testimonial. The real reason that party-opponent statements are not hearsay is that when the defendant makes a hearsay statement, he has no right to confront himself.

***Bruton* --- Testimonial Statements of Co-Defendants**

***Bruton* line of cases not applicable unless accomplice's hearsay statement is testimonial:** *United States v. Figueroa-Cartagena*, 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

***Bruton* does not apply unless the testimonial hearsay directly implicates the nonconfessing codefendant:** *United States v. Lung Fong Chen*, 393 F.3d 139, 150 (2^d Cir. 2004): The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton*, not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause. *See also Chrysler v. Guiney*, 806 F.3d 104 (2nd Cir. 2015) (noting that if an accomplice confession is properly redacted to satisfy *Bruton*, then *Crawford* is not violated because the accomplice is not a witness "against" the defendant within the meaning of the Confrontation Clause).

***Bruton* protection limited to testimonial statements:** *United States v. Berrios*, 676 F.3d 118 (3rd Cir. 2012): "[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings." *See also United States v. Shavers*, 693 F.3d 363 (3rd Cir. 2012) (admission of non-testifying co-defendant's inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore "no resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent").

Bruton protection does not apply unless the codefendant's statements are testimonial: *United States v. Dargan*, 738 F.3d 643 (4th Cir. 2013): The court held that a statement made to a cellmate in an informal setting was not testimonial --- therefore admitting the statement against the nonconfessing codefendant did not violate *Bruton*, because the premise of *Bruton* is that the nonconfessing defendant's confrontation rights are violated when the confessing defendant's statement is admitted at trial. But after *Crawford* there can be no confrontation violation unless the hearsay statement is testimonial.

Bruton remains in place to protect against admission of testimonial hearsay against a non-confessing co-defendant: *United States v. Ramos-Cardenas*, 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford*. But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant (because he has no right to confront himself); nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court found that the reference to the other defendants in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Codefendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper*, 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh*, and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton*. The court concluded that because "the Supreme Court has so far taken a pragmatic approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton*."

Bruton inapplicable to statement made by co-defendant to another prisoner, because that statement was not testimonial: *United States v. Vasquez*, 766 F.3d 373 (5th Cir. 2014): The defendant's co-defendant made a statement to a jailhouse snitch that implicated the defendant in the crime. The defendant argued that admitting the codefendant's statement at his trial violated *Bruton*, but the court disagreed. It stated that *Bruton* "is no longer applicable to a non-testimonial prison yard conversation because *Bruton* is no more than a by-product of the Confrontation

Clause.” The court further stated that “statements from one prisoner to another are clearly non-testimonial.”

***Bruton* protection does not apply unless codefendant’s statements are testimonial:** *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009): The court held that after *Crawford*, *Bruton* is applicable only when the codefendant’s statement is testimonial.

***Bruton* protection does not apply unless codefendant’s statements are testimonial:** *United States v. Dale*, 614 F.3d 942 (8th Cir. 2010): The court held that after *Crawford*, *Bruton* is applicable only when the codefendant’s statement is testimonial.

Statement admitted against co-defendant only does not implicate *Crawford*: *Mason v. Yarborough*, 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant’s name was never mentioned --- *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a “witness against” the defendant. “Because Fenton’s words were never admitted into evidence, he could not ‘bear testimony’ against Mason.”

Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson*, 713 F.3d 1237 (10th Cir. 2013): The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. *See also United States v. Clark*, 717 F.3d 790 (10th Cir. 2013) (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was not testimonial); *United States v. Morgan*, 748 F.3d 1024 (10th Cir. 2014) (statement admissible as a coconspirator statement cannot violate *Bruton* because “*Bruton* applies only to testimonial statements” and the statements were made between coconspirators dividing up the proceeds of the crime and so “were not made to be used for investigation or prosecution of crime.”).

Child-Declarants

Statements of young children are extremely unlikely to be testimonial: *Ohio v. Clark*, 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement from a young child is extremely unlikely to be testimonial because the child is not aware of the possibility of use of statements in criminal prosecutions, and so cannot be speaking with the primary motive that the statement will be so used. The Court refused to adopt a bright-line rule, but it is hard to think of a case in which the statement of a young child will be found testimonial under the primary motivation test.

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Co-Conspirator Statements

Co-conspirator statement not testimonial: *United States v. Felton*, 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford*. **Accord** *United States v. Sanchez-Berrios*, 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). *See also* *United States v. Turner*, 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial); *United States v. Ciresi*, 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are "by their nature" not testimonial because they are "made for a purpose other than use in a prosecution.").

Statements made pursuant to a conspiracy to commit kidnapping are not testimonial: *United States v. Stimler*, 864 F.3d 253 (3rd Cir. 2017): The defendants were prosecuted for conspiracy to kidnap and related crimes arising out of Orthodox Jewish divorce proceedings. Statements were made at a *beth din* which was convened when the alleged victim of one of the kidnappings had challenged the validity of the *get* he signed. The court found that those statements were made pursuant to the kidnapping conspiracy, and reasoned that "none of the individuals at the *beth din* --- all of whom were charged in the conspiracy --- would have reasonably believed that they were making statements for the purpose of assisting a criminal prosecution."

Surreptitiously recorded statements of coconspirators are not testimonial: *United States v. Hendricks*, 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. **Accord** *United States v. Bobb*, 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not testimonial under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. **Accord** *United States v. Delgado*, 401 F.3d 290 (5th Cir. 2005); *United States v. Olguin*, 643 F.3d 384 (5th Cir. 2011); *United States v. Alaniz*, 726 F.3d 586 (5th Cir. 2013). *See also* *United States v. King*, 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that definition would mean that all hearsay is testimonial simply by being offered at

trial. The court observed that “*Crawford’s* emphasis clearly is on whether the statement was testimonial at the time it was made.”

Statement by an anonymous coconspirator is not testimonial: *United States v. Martinez*, 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford* because it was not written with the intent that it would be used in a criminal investigation or prosecution. *See also United States v. Mooneyham*, 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them “has no awareness or expectation that his or her statements may later be used at a trial”; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); *United States v. Stover*, 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis*, “co-conspirators’ statements made in pendency and furtherance of a conspiracy are not testimonial” and therefore that the defendant’s right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); *United States v. Damra*, 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator “by their nature are not testimonial”) *United States v. Tragas*, 727 F.3d 610 (6th Cir. 2013) (“As coconspirator statements were made in furtherance of the conspiracy, they were categorically non-testimonial.”).

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove*, 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator’s statements were testimonial, but the court disagreed. It held that “*Crawford* did not affect the admissibility of coconspirator statements.” The court specifically rejected the defendant’s argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, “the Supreme Court specifically cited *Bourjaily* --- which as here involved a coconspirator’s statement made to a government informant --- to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause.”

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements to be admissible must be made during the course and in furtherance of the conspiracy, they cannot be the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford*. The court reached the same result on co-conspirator hearsay in *United States v. Reyes*, 362 F.3d 536 (8th Cir. 2004); *United States v. Singh*, 494 F.3d 653 (8th Cir. 2007); and *United States v. Hyles*, 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to

co-conspirators); *United States v. Furman*, 867 F.3d 981 (8th Cir. 2017) (statements by a coconspirator over a prison telephone were not testimonial even though the declarant knew the statements were recorded by law enforcement: “[A]lthough Gerald was aware that law enforcement might listen to his telephone conversations and use them as evidence, the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution.”).

Statements in furtherance of a conspiracy are not testimonial: *United States v. Allen*, 425 F.3d 1231 (9th Cir. 2005): The court held that “co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford’s* holding.” *See also United States v. Larson*, 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial); *United States v. Grasso*, 724 F.3d 1077 (9th Cir. 2013) (“co-conspirator statements in furtherance of a conspiracy are not testimonial”); *United States v. Cazares*, 788 F.3d 956 (9th Cir. 2015) (“a conversation between two gang members about the journey of their burned gun is not testimonial”).

Statements admissible under the co-conspirator exemption are not testimonial: *United States v. Townley*, 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant’s argument that hearsay is testimonial under *Crawford* whenever “confrontation would have been required at common law as it existed in 1791.” It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. *Accord United States v. Ramirez*, 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); *United States v. Patterson*, 713 F.3d 1237 (10th Cir. 2013) (same); *United States v. Morgan*, 748 F.3d 1024 (10th Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they “were not made to be used for investigation or prosecution of crime.”).

Statements made during the course and in furtherance of the conspiracy are not testimonial: *United States v. Underwood*, 446 F.3d 1340 (11th Cir. 2006): In a narcotics prosecution, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements “clearly were not made under circumstances which would have led [Darryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.” The court concluded as follows:

Although the foregoing discussion would probably support a holding that the evidence challenged here is not “testimonial,” two additional aspects of the *Crawford*

opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

See also United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011): co-conspirator's statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely "bragging to a friend" and not a formal statement intended for trial.

Cross-Examination

Cross-examination of a witness during prior testimony was adequate even though defense counsel was found ineffective on other grounds: *Rolan v. Coleman*, 680 F.3d 311 (3rd Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford*. The question was whether the witness --- who was unavailable for the second trial --- was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be constitutionally ineffective at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate --- that court found “baseless” the defendant’s argument that counsel had failed to explore the witness’s immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that “[t]here is no Supreme Court precedent to suggest that Goldstein’s cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court’s finding was not contrary to, or an unreasonable application of, *Crawford*.”

Attorney’s cross-examination at a prior trial was adequate and therefore admitting the testimony at a later trial did not violate the right to confrontation: *United States v. Richardson*, 781 F. 3d 287 (5th Cir. 2015): The defendant was convicted on drug and gun charges, but the conviction was reversed on appeal. By the time of retrial on mostly the same charges, a prosecution witness had become unavailable, and the trial court admitted the transcript of the witness’s testimony from the prior trial. The court found no violation of the right to confrontation. The court found that *Crawford* did not change the long-standing rule as to the opportunity that must be afforded for cross-examination to satisfy the Confrontation Clause. What is required is an “adequate opportunity to cross-examine” the witness: enough to provide the jury with “sufficient information to appraise the bias and the motives of the witness.” The court noted that while the lawyer’s cross-examination of the witness at the first trial could have been better, it was adequate, as the lawyer explored the witness’s motive to cooperate, his arrests and convictions, his relationship with the defendant, and “the contours of his trial testimony.”

State court was not unreasonable in finding that cross-examination by defense counsel at the preliminary hearing was sufficient to satisfy the defendant’s right to confrontation: *Williams v. Bauman*, 759 F.3d 630 (9th Cir. 2014): The defendant argued that his right to confrontation was violated when the transcript of the preliminary hearing testimony of an eyewitness was admitted against him at his state trial. The witness was unavailable for trial and

the defense counsel cross-examined him at the preliminary hearing. The court found that the state court was not unreasonable in concluding that the cross-examination was adequate, thus satisfying the right to confrontation. The court noted that “there is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause purposes” but concluded that there was “reasonable room for debate” on the question, and therefore the state court’s decision to align itself on one side of the argument was beyond the federal court’s power to remedy on habeas review.

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

Accomplice’s jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial: *United States v. Pelletier*, 666 F.3d 1 (1st Cir. 2011): The defendant’s accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements “to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility.” For similar reasons, the hearsay was not testimonial under *Crawford*. The court stated that the statements were made “not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier.”

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget*, 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant’s accomplice spoke to an undercover officer, trying to enlist him in the defendant’s criminal scheme. The accomplice’s statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States*, hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice’s statement was not barred by *Williamson*, because it was made to an undercover officer---the accomplice didn’t know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford* --- it was not the kind of formalized statement to law enforcement, prepared for trial, such as a “witness” would provide. *See also United States v. Williams*, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant’s argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. *Accord United States v. Wexler*, 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends found admissible under Rule 804(b)(3) and not testimonial).

Intercepted conversations were admissible as declarations against penal interest and were not testimonial: *United States v. Berrios*, 676 F.3d 118 (3rd Cir. 2012): Authorities intercepted a conversation between two criminal associates in a prison yard. The court held that the statements were non-testimonial, because neither of the declarants “held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there

is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance.” A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant “only to complain that he crashed the getaway car.”

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan*, 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice’s statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: “To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates.” The court also found the accomplice’s statement properly admitted as a declaration against interest. The court elaborated as follows:

Here, although Brown’s statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, by extension, for Tabon’s murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice’s statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor*, 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant’s husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband’s statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued that a statement is testimonial if the *government’s* primary motivation is to prepare the statement for use in a criminal prosecution --- and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the *husband’s* primary motivation was not to prepare a statement for any criminal trial. The court observed that the “intent of the police officers or investigators is relevant to the determination of whether a statement is

testimonial only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially.”

Note: This case was decided before *Michigan v. Bryant, infra*, but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication --- and that all of them must be primarily motivated to have the statement used in a criminal prosecution for the statement to be testimonial.

Accomplice’s confessions to law enforcement agents were testimonial: *United States v. Harper*, 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception --- but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

Accomplice’s statements to a friend, implicating both the accomplice and the defendant in the crime, were not testimonial: *Ramirez v. Dretke*, 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice’s roommate. The court found that these statements were not testimonial under *Crawford*: “There is nothing in *Crawford* to suggest that testimonial evidence includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context.”

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin*, 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant’s accomplices (Clarke), was speaking to a friend (Wright) sometime after the robbery. Wright told Clarke that he looked “stressed out.” Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke’s hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark’s interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke’s statement was not testimonial under *Crawford*:

Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke’s statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame"); *United States v. Johnson*, 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones*, 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson*, 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony’s statement was against his own interest, and rejected Watson’s contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: “A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes.” **Accord** *United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014): Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v. Bryant*, had in the interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry “is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had.” Applying this objective approach, the court concluded that the conversation “looks like a casual, confidential discussion between co-conspirators.”

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre*, 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancée that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was “not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.”

Accomplice statements to cellmate were not testimonial: *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007): The defendant’s accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Accomplice’s confession to law enforcement was testimonial, even if redacted: *United States v. Shaw*, 758 F.3d 1187 (10th Cir. 2014): At the defendant’s trial, the court permitted a police officer to testify about a confession made by the defendant’s alleged accomplice. The accomplice was not a co-defendant, but the court, relying on the *Bruton* line of cases, ruled that

the confession could be admitted so long as all references to the defendant were replaced with a neutral pronoun. The court of appeals found that this was error, because the confession to law enforcement was, under *Crawford*, clearly testimonial. It stated that “[r]edaction does not override the Confrontation Clause. It is just a tool to remove, in appropriate cases, the prejudice to the defendant from allowing the jury to hear evidence admissible against the codefendant but not admissible against the defendant.” The trial court’s reliance on the *Bruton* cases was flawed because in those cases the accomplice is joined as a codefendant and the confession is admissible against the accomplice. In this case, where the defendant was tried alone and the confession was offered against him only, it was inadmissible for any purpose, whether or not redacted.

Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: *United States v. Smalls*, 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. And the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.*, 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair’s penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was “part of a private conversation” and no law enforcement personnel were involved.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington and Hammon v. Indiana*, 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis*, the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon*, the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to one of the statements in *Hammon*. The Court set the dividing line for such statements as follows:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant*, 562 U.S. 344 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter --- and admitted as an excited utterance under a state rule of evidence --- was not testimonial under *Davis* and *Crawford*. The Court applied the test for testimoniality established by *Davis* --- whether the primary motive for making the statement was to have it used in a criminal prosecution --- and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.

2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's

primary purpose. An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency --- unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with

questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a primary purpose “to establish or prove past events potentially relevant to later criminal prosecution.” For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them “to meet an ongoing emergency” --- essentially, who shot the victim and where did the act occur. Nothing in the victim’s responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency --- apprehending a suspect with a gun --- and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law --- he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux*, 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant’s girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events “in real time, as she witnessed them transpire”; 2) she specifically requested police assistance; 3) the dispatcher’s questions were tailored to identify “the location of the emergency, its nature, and the perpetrator”; and 4) the daughter was “hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe.” The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the “primary motivation” for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant’s right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward “legal ramifications.” The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances “usually speaks out of

urgency and a desire to obtain a prompt response.” In this case the 911 call was properly admitted because the caller stated that she had “just” heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in “imminent personal peril” when the call was made and therefore her report was not testimonial. The court also found that the 911 operator’s questioning of the caller did not make the answers testimonial, because “it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher --- a question that only momentarily interrupted an otherwise continuous stream of consciousness.”

911 call --- including statements about the defendant’s felony status --- was not testimonial: *United States v. Proctor*, 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant’s brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant’s felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the “primary purpose” test and evaluated the call in the following passage:

Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency --- not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

See also *United States v. Mouzone*, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as “each caller simply reported his observation of events as they unfolded”; the 911 operators were not attempting to “establish or prove past events”; and “the transcripts simply reflect an effort to meet the needs of the ongoing emergency”).

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: *United States v. Arnold*, 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances --- Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is not testimonial: *United States v. Thomas*, 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements as follows:

[T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person’s identification of a person with a gun was not testimonial: “In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.”).

Statement made by a child immediately after an assault on his mother was admissible as excited utterance and was not testimonial: *United States v. Clifford*, 791 F.3d 884 (8th Cir. 2015): In an assault trial, the court admitted a hearsay statement from the victim’s three-year-old son, made to a trusted adult, that the defendant “hurt mama.” The statement was made immediately after the event and the child was shaking and crying; the statement was in response to the adult asking “what happened?” The court of appeals held that the statement was admissible as an excited utterance and was not testimonial. There was no law enforcement involvement and the court noted that the defendant “identifies no case in which questions from a private individual acting without any direction from state officials were determined to be equivalent to police interrogation.” The court also noted that the interchange between the child and the adult was informal, and was in response to an emergency. Finally, the court relied on the Supreme Court’s most recent decision in *Ohio v. Clark*:

As in *Clark*, the record here shows an informal, spontaneous conversation between a very young child and a private individual to determine how the victim had just been injured. [The child’s] age is significant since “statements by very young children will rarely, if ever, implicate the Confrontation Clause.”

911 calls and statements made to officers responding to the calls were not testimonial: *United States v. Brun*, 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant’s home. One was from the defendant’s 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant’s girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant’s right to confrontation after *Crawford*. The court first found that the nephew’s 911 call was not testimonial because it was not the kind of statement that was equivalent to courtroom testimony. The court had “no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated.” The court used similar reasoning to find that the girlfriend’s 911 call was not testimonial. The court also found that the girlfriend’s

statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon* and then *Bryant*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime. The *Brun* decision is especially consistent with the pragmatic approach to finding an emergency (and to the observation that emergency is only one factor in the primary motive test) that the Court found in *Michigan v. Bryant*.

Statements made by mother to police, after her son was taken hostage, were not testimonial: *United States v. Lira-Morales*, 759 F.3d 1105 (9th Cir. 2014): The defendant was charged with hostage-taking and related crimes. At trial, the court admitted statements from the hostage's mother, describing a telephone call with her son's captors. The call was arranged as part of a sting operation to rescue the son. The court found that the mother's statements to the officers about what the captors had said were not testimonial, because the primary motive for making the call --- and thus the report about it to the police officers --- was to rescue the son. The court noted that throughout the event the mother was "very nervous, shaking, and crying in response to continuous ransom demands and threats to her son's life." Thus the agents faced an "emergency situation" and "the primary purpose of the telephone call was to respond to these threats and to ensure [the son's] safety." The defendant argued that the statements were testimonial because an agent attempted, unsuccessfully, to record the call that they had set up. But the court rejected this argument, noting that the agent "primarily sought to record the call to obtain information about Aguilar's location and to facilitate the plan to rescue Aguilar. Far from an attempt to build a case for prosecution, Agent Goyco's actions were good police work directed at resolving a life-threatening hostage situation. * * * That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation."

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's

statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

Although the question is close, we do not believe that Elg’s statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Note: The court’s decision in *Leavitt* preceded the Supreme Court’s treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant*.

911 call that a man had put a gun to another person’s head was not testimonial: *United States v. Hughes*, 840 F.3d 1368 (11th Cir. 2016): In a felon-firearm prosecution, the trial court admitted a 911 call in which a bystander reported that the defendant had cocked a gun and put it to the head of a couple of people. The defendant argued that the 911 call was testimonial, but the court of appeals found no error. It concluded that “Hughes fails to distinguish the 911 caller’s statements from those in *Davis* in any way whatsoever.”

Expert Witnesses

Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois*, 567 U.S. 50 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. At this stage, the answer appears to be that an expert can rely on testimonial hearsay so long as it is not in the form of an affidavit or certificate --- that proviso would then get Justice Thomas's approval. As seen elsewhere in this outline, some courts have found *Williams* to have no precedential effect other than over cases that present the same facts as *Williams*. And many courts have held that the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008): The court found that an expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

Note: This opinion precedes *Williams* and is questionable if you count the votes in *Williams*. But the case is quite consistent with the Alito opinion in *Williams* and many --- allowing the expert to use testimonial hearsay as long as the hearsay is not introduced at trial and the expert is not simply parroting the hearsay. And lower courts are treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.

Confrontation Clause violated where expert does no more than restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez*, 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant's vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz*, and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant's right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) (“[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay,” there is likely a *Crawford* violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007) (“ [T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion.”). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to “say what are the results of the test,” and he did exactly that, responding “[b]oth bricks were positive for cocaine.” This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

Note: Whatever *Williams* may mean, the court’s analysis in *Ramos-Gonzalez* surely remains valid. Five members of the *Williams* Court rejected the proposition that an expert can rely *at all* on testimonial hearsay even if the expert testifies to his own opinion. And even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Confrontation Clause not violated where testifying expert conducts his own testing that confirms the results of a testimonial report: *United States v. Soto*, 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant’s laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico*, in which the Court held that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through Agent Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The court reviewed the votes in *Bullcoming* and found that "it appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination." This count resulted from the fact that Justice Ginsburg, joined by Justice Scalia, stated that the Confrontation problem in *Bullcoming* could have been avoided if the testifying expert had simply retested the substance and testified on the basis of the retest.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

See also Barbosa v. Mitchell, 812 F.3d 62 (1st Cir. 2016): On habeas review, the court found it not clearly established that expert reliance on a testimonial lab report violates the Confrontation Clause. The defendant was convicted in the time between *Melendez-Diaz* and *Williams*. The Court held that, "[t]o the contrary, four Justices [in *Williams*] later read *Melendez-Diaz* as not establishing at all, much less beyond doubt" the principle that such testimony violates the Confrontation Clause.

Expert reliance on a manufacturing label to conclude on point of origin did not violate the Confrontation Clause, because the label was not testimonial: *United States v. Torres-Colon*, 790 F.3d 26 (1st Cir. 2015): In a trial on a charge of unlawful possession of a firearm, the government’s expert testified that the firearm was made in Austria. He relied on a manufacturing inscription on the firearm that stated “made in Austria.” The court found no confrontation violation in the expert’s testimony. The statement on the firearm was clearly not made by the manufacturer with the primary purpose of use in a criminal prosecution.

No relief under AEDPA where expert relied on informal notations regarding testing of buccal swab: *Washington v. Griffin*, 876 F.3d 395 (2nd Cir. 2017) (Livingston, J.): In this habeas petition, the constitutional challenge in state court presented facts close to those of *Williams*: a buccal swab of the defendant was subjected to DNA testing, and an expert relied on notations by lab personnel indicating the process of extraction, amplification, and chain of custody. The expert who testified was not involved in conducting or supervising that process, but the expert did conduct her own review and made an independent conclusion that the DNA from the buccal swab matched the DNA from the crime scene. The court held that the petitioner had not established a clear violation of the Confrontation Clause --- as required under AEDPA --- when the state court allowed the expert to testify and did not require production of the lab analysts. The court found that *Melendez-Diaz* and *Bullcoming* were distinguishable because “Washington does not rely on a lab analyst’s affidavit, as in *Melendez-Diaz*, or on the formal certificate of an analyst attesting to his results, as in *Bullcoming*, to make out his constitutional claim. He instead points to a medley of unsworn, uncertified notations by often unspecified lab personnel * * * . Such notations, standing alone, are potentially as suggestive of a purpose to record tasks, in order to accomplish the lab’s work, as of any purpose to make an out-of-court statement for admission at trial.” The court also noted that the lab reports on the buccal swab were never entered into evidence. The court found that the disarray in *Williams* only highlighted the fact that the state court had not violated clearly established law in allowing the expert to testify and not requiring the lab analysts to do so.

Judge Katzmann, concurring, suggested that the prosecution could avoid any litigation risk by simply having the expert supervise a new test when the case is going to trial. He noted, and the court agreed, that the supervising analyst “need not conduct every step of the process herself. Instead, by supervising the process, she could personally attest to the extraction and correct labeling of the sample, that a proper chain of custody was maintained, and that the DNA profile match was in fact a comparison of the defendant’s DNA to that of the DNA found on the crime scene evidence.

Expert’s reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury: *United States v. Lombardozi*, 491 F.3d 61 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that “it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted.” The court concluded that the expert’s testimony would violate the Confrontation Clause “only if he communicated out-of-court testimonial statements . . . directly to the jury in the

guise of an expert opinion.” *See also United States v. Mejia*, 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Statements made to psychiatric expert were testimonial and were used by the jury for their truth at trial: *Lambert v. Warden*, 861 F.3d 459 (3rd Cir. 2017): Tillman shot two people and Lambert drove him to and from the crime. Tillman challenged his mental capacity and called a psychiatric expert to whom he made statements. Tillman did not testify at trial. The court found that the jury may have used these statements, related inferentially in the expert’s testimony, against Lambert for their truth --- in which case there would have been a confrontation violation. The government argued that the statements were not offered to prove anything, only for judging the expert’s opinion, but the court found that in the context of the case this was not a “legitimate” not for truth purpose --- the prosecutor raised the statements as inferential proof of Lambert’s involvement and the trial court gave no limiting instruction. The court remanded for an assessment of whether the defense counsel’s failure to object constituted ineffective assistance of counsel.

Expert reliance on printout from machine does not violate Crawford: *United States v. Summers*, 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government’s failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a “pure instrument read-out.” The court stated that “[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine” should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. *See also United States v. Shanton*, 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*: “[W]e believe five justices would affirm: Justice Thomas on the ground that the statements at issue were not testimonial and Justice Alito, along with the three justices who joined his plurality opinion, on the ground that the statements were not admitted for the truth of the matter asserted.”).

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford*: *United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court recognized that it is “appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay.” But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. “Instead, each expert presented his independent judgment and specialized understanding to the jury.” Because the experts “did not become mere conduits” for the testimonial hearsay, their consideration of that hearsay “poses no *Crawford* problem.” *Accord United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts “did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury.”). *Accord United States v Palacios*, 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert “did not specifically reference” any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

Note: These cases are in doubt if you count the votes in *Williams*, but most courts have come to the same result after *Williams*: Finding no confrontation problem where an expert relies on testimonial hearsay, so long as the hearsay is not admitted into evidence and the expert draws his own conclusion from the data (rather than just parroting it).

Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants: *United States v. Garcia*, 752 F.3d 382 (4th Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied, in coming to her conclusion, on input from coconspirators whom she had debriefed. The court distinguished *Johnson, supra*, on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that “the question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.” In this case, “we cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just as well have been the result of the Government’s failure to elicit a proper foundation for Agent Dayton’s interpretations.” The government argued that the information from the coconspirators only served to confirm the Agent’s interpretations after the fact, but the court concluded that “[t]he record is devoid of evidence that this was, in fact, the sequence of Dayton’s analysis, to Garcia’s prejudice.”

Expert testimony on gangs, based in part on testimonial hearsay, did not violate the Confrontation Clause when the hearsay was not transmitted to the jury: *United States v. Rios*, 830 F.3d 403 (6th Cir. 2016): In a prosecution of Latin Kings gang members for racketeering and drug offenses, the court found it was not error to allow a law enforcement officer to testify as an expert about the organization of the gang. The testimony was based in large part on listening to jail conversations and interviewing former members. The court found no violation of the Confrontation Clause to the extent the underlying statements were not transmitted to the jury. The one instance in which a statement was related to the jury was found to be harmless error.

Expert opinion based in part on information learned during custodial interrogation did not violate *Crawford* where expert was more than a conduit: *United States v. Lockhart*, 844 F.3d 501 (5th Cir. 2016): In a sex trafficking prosecution, an officer testified as an expert that the defendants were gang members. The defendant argued that the testimony violated his right to confrontation because the officer, in reaching his conclusion, relied on statements made during custodial interrogations, as well as statements of other officers describing their experiences during interrogations. But the court found no error. The court explained that *Crawford* “in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence.” It further stated that “when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.” The court concluded that in this case the expert “did not serve as a conduit for inadmissible testimonial hearsay.”

Police officer’s reliance on statements from people he had arrested for drug crimes did not violate *Crawford*: *United States v. Collins*, 799 F.3d 554 (6th Cir. 2015): In a trial involving manufacture of methamphetamine, a law enforcement officer testified as an expert on the conversion ratio between pseudoephedrine and methamphetamine. He relied in part on statements from people he had interviewed after he had arrested them for manufacturing methamphetamine. The court found no plain error because there was “no evidence that the suspected methamphetamine manufacturers Agent O’Neil questioned throughout his career ‘intended to bear testimony’ against Collins or his co-defendants.” Thus the expert was not relying on testimonial hearsay.

Note: The court appears to be applying --- maybe without realizing it --- Justice Alito’s definition of testimoniality in *Williams*. The court is saying that the arrestees did not *target* their testimony toward the defendant. But under the view of five Justices in *Williams*, the statements of the arrestees would probably be testimonial, as they were under arrest --- just like Mrs. Crawford --- and the statements could be thought to be motivated toward *some* criminal prosecution.

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Note: The court makes two holdings in *Moon*. The first is that expert reliance on a machine output does not violate *Crawford* because the machine is not a witness. That holding appears unaffected by *Williams* --- at least it can be said that *Williams* says nothing about whether machine output is testimonial. The second holding, that an expert's reliance on lab notes he did not prepare, is at the heart of *Williams*. It would appear that such a practice would be permissible even after *Williams* because 1) *post-Williams* courts have found that an expert may rely on testimonial hearsay so long as the expert does his own analysis and the hearsay is not introduced at trial ; and 2) in any case, lab "notes" are not certificates or affidavits so they do not appear to be the kind of formalized statement that Justice Thomas finds to be testimonial.

Expert reliance on drug test conducted by another does not violate the Confrontation Clause --- though on remand from *Williams* the court states that part of the expert's testimony might have violated the Confrontation Clause, but finds harmless error: *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7th Cir. 2013) : At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant --- the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford*. The court found no error, emphasizing that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own.

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams*. On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum "casts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge." But the court noted that even after *Williams*, much of what the expert testified to was permissible because it was based on personal knowledge:

We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury how suspect substances are tested using gas chromatography, mass spectrometry, and infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. * * *

As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion. Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

The *Turner* court on remand saw two Confrontation problems in the expert's testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, "Block necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony strengthened

the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine.” And while the case was much like *Williams*, the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito’s not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the report was “certified” and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results --- the certification was made by the Attorney General to the effect that the report was a correct copy of the *report*. Yet the court implied that it was sufficiently formal in any case, because it was “both official and signed, it constituted a formal record of the result of the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report.”

Ultimately the court found it unnecessary to decide whether the defendant’s Confrontation rights were violated because the error, if any, in the use of the analyst’s report was harmless.

No confrontation violation where expert did not testify that he relied on a testimonial report: *United States v. Maxwell*, 724 F.3d 724 (7th Cir. 2013): In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying * * * , she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

The court concluded that concluded that “Maxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that Gee relied on Nied’s data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance.”

Expert’s reliance on report of another law enforcement agency did not violate the right to confrontation: *United States v. Huether*, 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. The court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

No confrontation violation where expert who testified did so on the basis of his own retesting: *United States v. Ortega*, 750 F.3d 1020 (8th Cir. 2014): In a drug conspiracy prosecution, the defendant argued that his right to confrontation was violated because the expert who testified at trial that the substances seized from a coconspirator’s car were narcotics had tested composite samples that another chemist had produced from the substances found in the car. But the court found no error, because the testifying expert had personally conducted his own test of the composite substances, and the original report of the other chemist who prepared the composite (and who concluded the substances were narcotics) was not offered by the government; nor was the testifying expert asked about the original test. The court noted that any objection about the composite really went to the chain of custody --- whether the composite tested by the expert witness was in fact derived from what was found in the car --- and the court observed that “it is up to the prosecution to decide what steps are so crucial as to require evidence.” The defendant made no showing of bad faith or evidence tampering, and so any question about the chain of custody was one of weight and not admissibility. Moreover, the government’s introduction of the original chemist’s statement about creating the composite sample did not violate the Confrontation Clause because “chain of custody alone does not implicated the Confrontation Clause” as it is “not a testimonial statement offered to prove the truth of the matter asserted.”

No Confrontation Clause violation where expert’s opinion was based on his own assessment and not on the testimonial hearsay: *United States v. Vera*, 770 F.3d 1232 (9th Cir. 2014): Appealing from convictions for drug offenses, the defendants argued that the testimony of a prosecution expert on gangs violated the Confrontation Clause because it was nothing but a conduit for testimonial hearsay from former gang members. The court agreed with the premise that expert testimony violates the Confrontation Clause when the expert “is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation.” But the court disagreed that the expert operated as a conduit in this case. The court found that the witness relied on his extensive experience with gangs and that his opinion “was not merely repackaged testimonial hearsay but was an original product that could have been tested through cross-examination.”

Expert’s reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo*, 625 F.3d 1285 (10th Cir. 2010), *on remand for reconsideration under Williams*, 696 F.3d 1280 (10th Cir. 2012): The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert’s opinion --- which the court found to be permissible under Rule 703. The court observed that “[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant’s confrontation rights * * * is a matter of degree.” According to the court, if an expert “simply parrots another individual’s testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay.” In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that “we need not decide the precise mandates and limits of *Williams*, to the extent they exist.” The court noted that five members of the *Williams* Court “might find” that the expert’s reliance on the lab test in this case was for its truth. But “we cannot say the district court plainly erred in admitting Ms. Snider’s testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission.” The court explained as follows in a parsing of *Williams*:

On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in *Williams*. The four-Justice plurality in *Williams* likely would determine that Ms. Snider’s testimony was not offered for the truth of the matter asserted in Ms. Dick’s report, but rather was offered for the separate purpose of evaluating Ms. Snider’s credibility as an expert witness per Fed.R.Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite “solemnity” required for the statements therein to be considered testimonial for purposes of the Confrontation Clause. Since Ms. Dick’s report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas’s solemnity test. In sum, it is not clear or obvious under current law

that the district court erred in admitting Ms. Snider's testimony, so reversal is unwarranted on this basis.

The *Pablo* court on remand concluded that “the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4-1-4 divide of opinions in *Williams*.”

Expert’s testimony on gang structure and practice did not violate the Confrontation Clause even though it was based in part on testimonial hearsay, where expert applied his own expertise. *United States v. Kamahele*, 748 F.3d 984 (10th Cir. 2014): Appealing from convictions for gang-related activity, the defendants argued that a government expert’s testimony about the structure and operation of the gang violated the Confrontation Clause because it was based in part on interviews with cooperating witnesses and other gang members. The court found no error and affirmed, concluding that the admission of expert testimony violates the Confrontation Clause “only when the expert is simply parroting a testimonial fact.” The court noted that in this case the expert “applied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion.” Therefore, no testimonial hearsay was offered for its truth against the defendant. *Compare United States v. Garcia*, 793 F.3d 1194 (10th Cir. 2015) (gang-expert’s testimony violated the Confrontation Clause, where he parroted statements from former gang members that were testimonial hearsay: “The government cannot plausibly argue that Webb applied his expertise to this statement. It involves no interpretation of gang culture or iconography, no calibrated judgment based on years of experience and the synthesis of multiple sources of information. He simply relayed what DV gang members told him. Admission of the testimony violated the Confrontation Clause.”).

Forfeiture

Constitutional standard for forfeiture --- like Rule 804(b)(6) --- requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California*, 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial*. Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to invoke the Confrontation Clause, because he murdered the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial --- presumably because the primary motivation for making such statements is for something other than use at trial.

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez*, 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding --- rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate more than one bad motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Fleeing prosecution constitutes forfeiture: *United States v. Ponzio*, 853 F.3d 558 (1st Cir. 2017): At the defendant's racketeering trial the government offered prior testimony of a witness from the trial of the defendant's coconspirators. The defendant was not tried with his

coconspirators because he had fled prosecution. By the time he was caught and tried, the witness had died. The defendant argued that admitting the dead witness's testimony at his trial violated his right to confrontation, but the court found that the defendant had forfeited that right by absenting himself from the prior trial. It reasoned as follows: "Had Ponzo been at the 1988 trial, he could have cross-examined Hildonen. But like a defendant who obtains a witness's absence by killing him, by fleeing and remaining on the lam for years, Ponzo effectively schemed to silence Hildonen's testimony against him. And Hildonen's subsequent unavailability signifies the success of that scheming. So Ponzo forfeited his confrontation rights. To hold otherwise would allow Ponzo to profit from his own wrong and would undermine the integrity of the criminal-trial system --- which we cannot allow."

Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture: *United States v. Jackson*, 706 F.3d 262 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant's drug operation and as retaliation for robbing one of the defendant's friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

Forfeiture can be found on the basis of *Pinkerton* liability: *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, "the Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts."

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson*, 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in

the bank robbery prosecution in 1981.” Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Forfeiture of confrontation rights, like forfeiture under Federal Rule 804(b)(6), is found upon a showing by a preponderance of the evidence: *United States v. Johnson*, 767 F.3d 815 (9th Cir. 2014): The court affirmed convictions for murder and armed robbery. At trial hearsay testimony of an unavailable witness was admitted against the defendant, after the government made a showing that the defendant had threatened the witness; the trial court found that the defendant had forfeited his right under both the hearsay rule and the Confrontation Clause to object to the hearsay. The court found no error. It held that a forfeiture of the right to object under the hearsay rule and under the Confrontation Clause is governed by the same standard: the government must establish by a preponderance of the evidence that the defendant acted wrongfully to cause the unavailability of a government witness, with the intent that the witness would not testify at trial. The defendant argued that the Constitution requires a showing of clear and convincing evidence before forfeiture of a right to confrontation can be found. But the court disagreed. It noted that a clear and convincing evidence standard had been applied by some lower courts when the Confrontation Clause regulated the admission of unreliable hearsay. But now, after *Crawford v. Washington*, the Confrontation Clause does not bar unreliable hearsay from being admitted; rather it regulates testimonial hearsay. The court stated that after *Crawford*, “the forfeiture exception is consistent with the Confrontation Clause, not because it is a means for determining whether hearsay is reliable, but because it is an equitable doctrine designed to prevent defendants from profiting from their own wrongdoing.” The court also noted that the Supreme Court’s post-*Crawford* decisions of *Davis v. Washington* and *Giles v. California* “strongly suggest, if not squarely hold, that the preponderance standard applies.” On the facts, the court concluded that “the evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did. This was sufficient to satisfy the preponderance standard.”

Evaluating the kind of action the defendant must take to justify a finding of forfeiture: *Carlson v. Attorney General of California*, 791 F.3d 1003 (9th Cir. 2015): Reviewing the denial of a habeas petition, the court found that statements of victims to police were testimonial, but that the state trial court was not unreasonable in finding that the petitioner had forfeited his right to confront the declarants. In a careful analysis of Supreme Court cases, the court provided “a standard for the kind of action a defendant must take” to be found to have forfeited the right to confrontation. The court concluded that

[T]he forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case. Simple tolerance of, or failure to foil, a third party’s previously unexpressed decision either to skip town himself rather than

testifying or to prevent another witness from appearing [is] not a sufficient reason to foreclose a defendant's Sixth Amendment confrontation rights at trial.

On the merits --- and applying the standard of deference required by AEDPA, the court concluded that the trial court could reasonably have found, on the basis of circumstantial evidence, that the petitioner more likely than not was actively involved in procuring unavailability, with the intent to keep the witness from testifying.

Note: The court says that a defendant's mere "acquiescence" is not enough to justify forfeiture. That language might raise a doubt as to whether a forfeiture may be found by the defendant's mere membership in a conspiracy; many courts have found such membership to be sufficient where disposing of a witness is within the course and furtherance of the underlying conspiracy. See, e.g., *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012). The *Carlson* court, however, cited the conspiracy cases favorably, and noted that in such cases, the defendant *has* acted affirmatively and committed wrongdoing by joining a conspiracy in which a foreseeable result is killing witnesses.

A different panel of the Ninth Circuit, in a case decided around the same time as *Carlson*, upheld a finding of forfeiture based on conspiratorial liability. See *United States v. Cazares*, 788 F.3d 956 (9th Cir. 2015).

The *Carlson* court noted that the restyled Rule 804(b)(6) provides that mere passive agreement with the wrongful act of another is not enough to find forfeiture, but that that forfeiture can be found if a defendant "acquiesced in wrongfully causing" the absence of the witness --- and that would include joining a conspiracy where one of the foreseeable consequences is to kill witnesses. The court found the restyling to be a helpful clarification of what the original rule meant by "acquiescence."

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno*, 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford*. The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See also** *United States v. Becker*, 502 F.3d 122 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: “any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all”); *United States v. Snype*, 441 F.3d 119 (2nd Cir. 2006) (plea allocution of the defendant’s accomplice was testimonial even though all direct references to the defendant were redacted); *United States v. Gotti*, 459 F.3d 296 (2nd Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); *United States v. Al-Sadawi*, 432 F.3d 419 (2nd Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort’s plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer’s guilty plea: *United States v. Head*, 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend’s guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford*’s statement that “prior testimony that the defendant was unable to cross-examine” is one of the “core class of ‘testimonial’ statements.”

Grand jury testimony is testimonial: *United States v. Wilmore*, 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of “testimonial” (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Implied Testimonial Statements

Testimony that a police officer’s focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant’s right to confrontation: *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer’s focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that “any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant’s statements into another witness’s testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form.” *Compare United States v. Occhiuto*, 784 F.3d 862 (1st Cir. 2015): In a narcotics prosecution, an officer testified that he arranged for a cooperating informant to buy drugs from the defendant; that he monitored the transactions; and that the drugs that were in evidence were the same ones that the defendant had sold to the informant. The defendant argued that the officer’s conclusion about the drugs must have rested on assertions from the informant, and therefore his right to confrontation was violated. The defendant relied upon *Meises*, but the court distinguished that case, because here the officer’s testimony was based on his own personal observations and did not necessarily rely on anything said by the informant. The fact that the officer’s surveillance was not airtight did not raise a confrontation issue, rather it raised a question of weight as to the officer’s conclusion.

Testimonial statements to law enforcement were admitted by implication, in violation of the Confrontation Clause: *United States v. Kizzee*, 877 F.3d 650 (5th Cir. 2017): The defendant was suspected of drug-dealing; an officer arrested Brown after leaving the defendant’s house and Brown implicated the defendant. At trial, the officer was asked only whether he asked Brown about the defendant’s drug activity. The officer responded that he asked but did not state Brown’s answers. The officer was asked what he did after receiving Brown’s answers and he responded that he got a warrant to search the defendant’s house. The court found that the officer’s testimony “introduced Brown’s out-of-court testimonial statements by implication” and that an officer’s testimony “that allows a fact-finder to infer the statements made to him --- even without revealing the content of those statements --- is hearsay.”

Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: *Ocampo v. Vail*, 649

F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court's denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant's testimonial hearsay statement. It reasoned as follows:

Where the government officers have not only "produced" the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language --- contradictions, hesitations, and other clues often used to test credibility --- are lost, and instead a veneer of objectivity conveyed.

* * *

Whatever locution is used, out-of-court statements admitted at trial are "statements" for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

See also United States v. Brooks, 772 F.3d 1161 (9th Cir. 2014): An agent testified that he telephoned a postal supervisor and provided him a description of the suspect, and then later searched a particular parcel with a tracking number and mailing information he had been provided over the phone as identifying the package mailed by the suspect. The postal supervisor was not produced for trial. The government argued that the agent's testimony did not violate the Confrontation Clause because the postal supervisor's actual statements were never offered at trial. But the court declared that "out-of-court statements need not be repeated verbatim to trigger the protections of the Confrontation Clause." Fairly read, the agent's testimony revealed the substance of the postal supervisor's statements. And those statements were made with the motivation that they be used in a criminal prosecution. Therefore the agent's testimony violated the Confrontation Clause.

Informal Circumstances, Private Statements, No Law Enforcement Involvement, etc.

Statement of young child to his teacher is not sufficiently formal to be testimonial: *Ohio v. Clark*, 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement is extremely unlikely to be found testimonial in the absence of some participation by or with law enforcement. The presence of law enforcement is what signifies that a statement is made formally with the motivation that it will be used in a criminal prosecution. The Court did not establish a bright-line rule, however, leaving at least the remote possibility that an accusation might be testimonial even if law enforcement had no role in the making of the statement.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia*, 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people “in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial.” There was no indication that the statements were made “to police, in an investigative context, or in a courtroom setting.”

Threats to cooperating witness were not testimonial: *United States v. Kirk Tang Yuk*, 855 F.3d 57 (2nd Cir. 2018): A cooperating witness testified that he felt intimidated by two inmates who were friends of the defendant. The defendant argued that the threats were testimonial, but the court held that the threats were obviously not intended to be used as part of an investigation or prosecution, and so were not testimonial.

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan*, 385 F.3d 196 (2nd Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford*. The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant’s hotel room; 5) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 6) it was not written to curry favor with the authorities or with anyone

else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between defendant and undercover informant was not testimonial under *Davis: United States v. Burden*, 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, "anything he said was meant not as an accusation in its own right but as bait."

Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden*, but using a different analysis: 1) admitting the defendant's statement does not violate the Confrontation Clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context --- therefore it does not violate the right to confrontation because it is not offered as an accusation.

Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones*, 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that "a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent" and that "just because recorded statements are used at trial does not mean they were created for trial." The court also noted that a prison "has significant institutional reasons for recording phone calls outside or procuring forensic evidence --- i.e., policing its own facility by monitoring prisoners' contact with individuals outside the prison."

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to

take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps*, 686 F.3d 281 (5th Cir. 2012): The court found no error in the state court's admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements "unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial." The court elaborated further:

The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become available at trial. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal-Mart parking lot. An objective analysis would conclude that the primary purpose of the unidentified individuals' statements was to arrange the drug deal. Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause.

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter*, 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." *See also United States v. Boyd*, 640 F.3d 657 (6th Cir. 2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not to go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could “reasonably anticipate” that the note would be passed on to law enforcement --- especially because the declarant was a former police officer.

Note: The court’s “reasonable anticipation” test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant*. The Court in *Davis* looked to the “primary motivation” of the speaker. In this case, the “primary motivation” of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.

Informal statements made about planned criminal activity are not testimonial: *United States v. Klemis*, 899 F.3d 436 (7th Cir. 2017): In a narcotics prosecution in which a user died, the court held that statements by the victim to a friend, that he had stolen from her in order to pay a drug debt to the defendant, were not testimonial. The court reasoned that the Supreme Court in *Ohio v. Clark* declared that a statement was very unlikely to be testimonial if it was made outside the law enforcement context. Here, spontaneous statements to a friend about attempts to borrow or steal from her to pay a drug debt, were not “efforts to create an out-of-court substitute for trial testimony.”

Statements made by an accomplice to a jailhouse informant are not testimonial: *United States v. Honken*, 541 F.3d 1146 (8th Cir. 2008): When the defendant’s murder prosecution was pending, the defendant’s accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime --- but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant’s trial, over the defendant’s objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn’t know that he was speaking to a government agent. It explained as follows:

Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a “solemn declaration” or a “formal statement.” Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a “testimonial” statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Incriminary statements made by an accomplice from a telephone in jail are not testimonial: *United States v. LeBeau*, 867 F.3d 960 (8th Cir. 2017): The defendant’s codefendant made coded calls while in jail to further drug activity. The defendant argued that these statements were testimonial because the codefendant was aware --- based on a message played at the beginning of the call --- that his call was being monitored by law enforcement. But the court rejected this argument, stating that even though the codefendant might have anticipated that his statements were used in a criminal prosecution, his primary motivation was not related to law enforcement: “the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution.” The fact that the codefendant spoke in code was strong evidence that his primary motivation was *not* to have his statement used in a criminal prosecution.

Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright*, 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court’s statement in *Giles v. California* that “statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment,” are not testimonial.

Accusatory statements in a victim’s diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim’s diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Jailhouse conversations among coconspirators were not testimonial: *United States v. Alcorta*, 853 F.3d 1123 (10th Cir. 2017): Affirming drug convictions, the court rejected the defendant’s argument that admitting jailhouse conversations of his coconspirators violated his right to confrontation. The court stated that to be testimonial, the statements must be made “with the primary purpose of creating evidence for the prosecution.” The court concluded that “[t]he statements here --- jailhouse conversations between criminal codefendants (none of whom were

cooperating with the government) --- do not satisfy that definition because that was not their purpose; quite the opposite.”

Private conversation between mother and son is not testimonial: *United States v. Brown*, 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant’s mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother’s reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford*. The court reasoned as follows:

We need not divine any additional definition of “testimonial” evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Defendant’s lawyer’s informal texts with I.R.S. agent found not testimonial: *United States v. Wilson*, 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting checks that he knew to be issued as a result of fraudulently filed income tax returns. He claimed that he was a legitimate cashier and did not know that the checks were obtained by fraud. The trial court admitted texts sent by the defendant’s lawyer to the I.R.S. The texts involved the return of certain records that the I.R.S. agent had allowed the defendant to take to copy; the texts contradicted the defendant’s account at trial that he didn’t know he had to return the boxes (in essence a showing of consciousness of guilt). The defendant argued that the lawyer’s texts to the I.R.S. agent were testimonial, but the court disagreed: “Here, the attorney communicated through informal text messages to coordinate the delivery of the boxes. The cooperative and informal nature of those text messages was such that an objective witness would not reasonably expect the texts to be used prosecutorially.” *See also United States v. Mathis*, 767 F.3d 1264 (11th Cir. 2014) (text messages between defendant and a minor concerning sex were informal, haphazard communications and therefore not made with the primary motive to be used in a criminal prosecution).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony recounting the interpreter's translation does not violate *Crawford*: *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012): At the defendant's drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter's statements about what the defendant said violated his right to confrontation. The court found that the interpreter had acted as a "mere language conduit" and so he was not a witness against the defendant within the meaning of the Confrontation Clause. The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as "which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." The court found that these factors cut in favor of the lower court's finding that the interpreter in this case had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, "the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself." *See also United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012)(where an interpreter served only as a language conduit, the defendant's own statements were properly admitted under Rule 801(d)(2)(A), and the Confrontation Clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself); *United States v. Aifang Ye*, 808 F.3d 395 (9th Cir. 2015) (adhering to pre-*Crawford* case law that a translator acting as a language conduit does not implicate the Confrontation Clause, because that case law "is not clearly irreconcilable with *Crawford*"; finding on the facts that the translator was a language conduit, by applying the four-factor test from *Orm Hieng*). .

Interpreter's statements were testimonial: *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant's statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter's translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, *supra*. *See also United States v. Curbelo*, 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator's implicit out-of-court representation that the translation was correct, and the translator's implicit assertions were testimonial; but there was no violation of the Confrontation Clause because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

Interrogations, Tips to Law Enforcement, Etc.

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford*. Whatever the limits of the term "testimonial," it clearly covers sworn statements by accomplices to police officers.

Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez*, 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth --- to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh*, 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes a formal statement to government officers bears testimony." *See also United States v. McGee*, 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Circuit Court's opinion that an anonymous tip to law enforcement is testimonial was reversed by the Supreme Court on AEPDA grounds: *Etherton v. Rivard*, 800 F.3d 737 (6th Cir. 2015), *rev'd sub nom.*, *Woods v. Etherton*, 136 S.Ct. 1149 (2016): On habeas review, the court held that an anonymous tip to law enforcement, accusing the defendant of criminal misconduct, was testimonial. It further held that the defendant's right to confrontation was violated at his trial where the tip was admitted into evidence for its truth. It noted that "[t]he prosecutor's repeated references both to the existence and the details of the tip went far beyond what was necessary for background --- thereby indicating the content of the tip was admitted for its truth." **But the Supreme Court, in a per curiam opinion, reversed the Sixth Circuit**, holding that it gave insufficient deference to the state court's determination that the anonymous tips were properly admitted for the non-hearsay purpose of explaining the context of the police investigation. The Court stated that a "fairminded jurist" could conclude "that repetition of the tip did not establish

that the uncontested facts it conveyed were submitted for their truth. Such a jurist might reach that conclusion by placing weight on the fact that the truth of the facts was not disputed. No precedent of this Court clearly forecloses that view.”

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen*, 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during an interrogation. The court noted that even the first part of Volz’s statement --- that she did not have access to the floor safe --- violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers*, 414 F.3d 1287 (10th Cir. 2005): The defendant’s accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, “How did you guys find us?” The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford*. The court explained as follows:

Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed’s statement * * * implicated himself and thus was loosely akin to a confession.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez*, 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant’s accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers’ reactions to the statements. But the court found that “testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay.” The court also found that the accomplice’s statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Investigative Reports

Reports by a law enforcement officer on prior statements made by a cooperating witness were testimonial: *United States v. Moreno*, 809 F.3d 766 (3rd Cir. 2016): After a cooperating witness testified on direct, defense counsel attacked his credibility on the ground that he had made a deal. On redirect, the trial court allowed the witness to read into evidence the reports of a law enforcement officer who had interviewed the witness. The reports indicated that the witness had made statements consistent with his in-court testimony. The court of appeals found a violation of the Confrontation Clause, because the officer's hearsay statements (about what the witness had told him) were testimonial and the officer was not produced for cross-examination. The court found that the reports were "investigative reports prepared by a government agent in actual anticipation of trial."

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen*, 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine*, 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also *United States v. Ballesteros-Selinger*, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse’s primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Accusations made to child psychologist appointed by law enforcement were testimonial: *McCarley v. Kelly*, 759 F.3d 535 (6th Cir. 2014): A three year old boy witnessed a murder but would not talk to the police about it. The police sought out a child psychologist, who interviewed the boy with the understanding that she would try to “extract information” from him about the crime and refer that information to the police. Helping the child was, at best, a secondary motive. Under these circumstances, the court found that the child’s statements to the psychologist were testimonial and erroneously admitted in the defendant’s state trial. The court noted that the sessions “were more akin to police interrogations than private counseling sessions.”

Note: *McCarley* was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *McCarley* differs in one respect from *Clark*, though. In *McCarley*, the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result in *McCarley* is questionable after *Clark* -- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.

Police officer’s count of marijuana plants found in a search is testimonial: *United States v. Taylor*, 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant’s premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer’s hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker’s interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant’s state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that “this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation.” The court found it important that the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker “was simply acting as a surrogate interviewer for the police.”

Note: *Bobadilla* was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *Bobadilla* differs in one respect from *Clark*, though. In *Bobadilla*, the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result in *Bobadilla* is questionable after *Clark* -- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.

Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford*. The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a “forensic” interview . . . That [the victim’s] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

Note: This case was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. This case differs in one respect from *Clark*, though --- the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result here is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.

Moreover, the court concedes that there may have been a dual motive here --- treatment being the other motive. At a minimum, a court would have to make the finding that the prosecutorial motive was primary, and the court did not do this.

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). *Compare United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child’s statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: “Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.”); *United States v. DeLeon*, 678 F.3d 317 (4th Cir. 2012) (discussed below under “medical statements” and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machine-Generated Information

Printout from machine is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine --- that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

The technicians could neither have affirmed or denied independently that the blood contained PCP and alcohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

Note: The result in *Washington* appears unaffected by *Williams*, as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert's reliance on a "pure instrument read-out" did not violate the Confrontation Clause because such a read-out is not "testimony").

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Google satellite images, and machine-generated location markers, are not hearsay and therefore, even if prepared for trial, their admission does not violate the Confrontation Clause: *United States v. Lizarraga-Tirado*, 789 F.3d 1107 (4th Cir. 2015): The defendant was convicted of illegal entry as a previously removed alien. The defendant contended that when he was arrested, he was still on the Mexican side of the border. At trial the arresting officer testified that she contemporaneously recorded the coordinates of the defendant's arrest using a handheld GPS device. To illustrate the location of these coordinates, the government introduced a Google Earth satellite image. The image contained a "tack" showing the location of the coordinates to be on the United States side of the border. There was no testimony on whether the tack was automatically generated or manually placed and labeled. The defendant argued that both the satellite image and the tack were inadmissible hearsay and that their admission violated his right to confrontation. As to the satellite image itself, the court found that "[b]ecause a satellite image, like a photograph, makes no assertion, it isn't hearsay." The court found the tack to be a more difficult question. It noted that "[u]nlike a satellite image itself, labeled markers added to a satellite image do make clear assertions. Indeed, that is what makes them useful." The court concluded that if a tack is placed manually and then labeled, "it's classic hearsay" --- for example, a dot manually labeled with the name of a town "asserts that there's a town where you see the dot." On the other hand, "[a] tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay" because it is completely machine-generated and so no assertion is being made.

In this case, the court took judicial notice that the tack was automatically generated because the court itself accessed Google Earth and typed in the same coordinates to which the arresting officer testified --- which resulted in a tack identical to the one shown on the satellite image admitted at trial. Thus the program "analyze[d] the GPS coordinates and, without any human intervention, place[d] a labeled tack on the satellite image." The court concluded that "[b]ecause the program makes the relevant assertion --- that the tack is accurately placed at the labeled GPS coordinates --- there's no statement as defined by the hearsay rule." The court noted that any issues of malfunction or tampering present questions of authenticity, not hearsay, and the defendant made no authenticity objection. Finally, "[b]ecause the satellite images and tack-coordinates pair weren't hearsay, their admission also didn't violate the Confrontation Clause."

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons*, 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a CD of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the CD was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable

is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9).” The court concluded that there was no hearsay statement at issue, and therefore the Confrontation Clause was inapplicable.

Medical/Therapeutic Statements

Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon*, 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant*. The court also recognized that the Air Force program “incorporates reporting requirements and a security component” but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the “primary motive” test was not met in the following passage:

We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan’s answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.

Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties’ actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan --- not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon’s Sixth Amendment rights.

Note: The court’s analysis is strongly supported by the subsequent Supreme Court decision in *Ohio v. Clark*. The *Clark* Court held that: 1) Statements by children are extremely unlikely to be primarily motivated for use in a criminal prosecution; and 2) public officials do not become an agent of law enforcement by asking about suspected child abuse.

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse’s primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2005): “Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.”

Miscellaneous

Labels on electronic devices, indicating that they were made in Taiwan, are not testimonial: *United States v. Napier*, 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government proved the interstate commerce element by offering two cellphones used to commit the crimes. The cellphones were each labeled “Made in Taiwan.” The defendant argued that the statements on the labels were hearsay and testimonial. But the court found that the labels clearly were not made with the primary motive of use in a criminal prosecution.

Note: The court in *Napier* reviewed the confrontation argument for plain error, because the defendant objected at trial only on hearsay grounds; a hearsay objection does not preserve a claim of error on confrontation grounds.

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pflizer*, 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor’s next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they “were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed.” Finally, while Taylor’s statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Non-Testimonial Hearsay and the Right to Confrontation

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford*. His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a “watershed” rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts*. It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

Crawford overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.

With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O’Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred “in anything but the exceptional case”). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford’s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* is not retroactive (the holding in *Bochtling*) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts*. Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

Non-Verbal Information

Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation: *United States v. Wallace*, 753 F.3d 671 (7th Cir. 2014): In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was

a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was “confronted.” [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define “statement” to include “nonverbal conduct,” but only if the person whose conduct it was “intended it as an assertion.” We can’t fit the videotape in this definition.

Photographs of seized evidence was not testimony so its admission did not violate the Confrontation Clause: *United States v. Brooks*, 772 F.3d 1161 (9th Cir. 2014): In a narcotics trial, the defendant objected to the admission of photographs of a seized package on the ground it would violate his right to confrontation. But the court disagreed. It noted that the *Crawford* Court defined “testimony” as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” The photographs did not meet that definition because they “were not ‘witnesses’ against Brooks. They did not ‘bear testimony’ by declaring or affirming anything with a ‘purpose.’”

See also the cases under the heading “Machine-Generated Evidence” supra.

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant's own statements: *United States v. Bostick*, 791 F.3d 127 (D.C.Cir. 2015): In a surreptitiously taped conversation, the defendant made incriminating statements to a confidential informant in the course of a drug transaction. The defendant argued that admitting the informant's part of the conversation violated his right to confrontation because the informant was motivated to develop the conversation for purposes of prosecution. But the court found that the Confrontation Clause was inapplicable because the informant's statements were not offered for their truth, but rather to provide "context" for the defendant's own statements regarding the drug transaction. (And the defendant had no right to confront his own statements). Statements that are not hearsay cannot violate the Confrontation Clause even if they fit the definition of testimoniality.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant's own statements: *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* --- as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements not offered for their truth. *Accord United States v. Walter*, 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."); *United States v. Santiago*, 566 F.3d 65 (1st Cir. 2009) (statements were not offered for their truth "but as exchanges with Santiago essential to understand the context of Santiago's own recorded statements arranging to 'cook' and supply the crack"); *United States v. Liriano*, 761 F.3d 131 (1st Cir. 2014) (even though statements were testimonial, admission did not violate the Confrontation Clause where they were properly offered to place the defendant's responses in context). *See also Furr v. Brady*, 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth;

rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito’s analysis that the Confrontation Clause was not violated because the testimonial lab report was not admitted for its truth. The question from *Williams* is whether those five Justices (now four, actually) are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which (in their personal view) the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert’s use of the lab report from the prosecution’s admission of an accomplice’s confession in *Tennessee v. Street*, where the confession “was not introduced for its truth, but only to impeach the defendant’s version of events.” In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele’s confession. Peele’s confession was introduced not for its truth but only to show that it differed from Street’s. For that purpose, it didn’t matter whether it was true. Justice Thomas stated that “[u]nlike the confession in *Street*, statements introduced to explain the basis of an expert’s opinion are not introduced for a plausible nonhearsay purpose” because “to use the inadmissible information in evaluating the expert’s testimony, the jury must make a preliminary judgment about whether this information is true.” Justice Kagan in her opinion essentially repeats Justice Thomas’s analysis and agrees with his distinction between legitimate and illegitimate use of the “not-for-truth” argument. Both Justices Kagan and Thomas agree with the Court’s statement in *Crawford* that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible*.

It follows that the cases under this “not-for-truth” headnote are probably unaffected by *Williams*, as they largely permit admission of testimonial statements as offered “not-for-truth” only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.*

Statements by informant to police officers, offered implausibly to prove the “background” of the police investigation, probably violate *Crawford*, but admission is not plain error: *United States v. Maher*, 454 F.3d 13 (1st Cir. 2006): At the defendant’s drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because “the statements were made while the police were interrogating Johnson after Johnson’s arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson’s shoes would understand that the statement would be used in prosecuting Maher at trial.” The court then addressed the government’s argument that the informant’s statements were not admitted for their truth, but to explain the background of the police investigation:

The government’s articulated justification --- that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* --- is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford*’s constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon “information received,” or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant’s statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony “was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs.”

Accomplice statements purportedly offered for “background” were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera*, 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted for the purpose of explaining the police investigation. The government at trial emphasized the details of the

accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford*.

Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams*. The prosecution's was not offering the accusations for any legitimate not-for-truth purpose.

Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks*, 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford*. But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements." *See also United States v. Occhiuto*, 784 F.3d 862 (1st Cir. 2015) (statements by undercover informant made to defendant during a drug deal were properly admitted; they were offered not for their truth but to provide context for the defendant's own statements, and so they did not violate the Confrontation Clause).

Accomplice's confession, when offered in rebuttal to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Cruz-Diaz*, 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford*. But the court found the confession to be not hearsay --- as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford*.

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough investigation it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" --- for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case." *See also United States v. Diaz*, 670 F.3d 332 (1st Cir. 2012) (testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: "The government offered Perez's out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.").

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: *United States v. Logan*, 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant’s statements: *United States v. Paulino*, 445 F.3d 211 (2nd Cir. 2006): The court stated: “It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant’s Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary.”

Note: This typical use of “context” is not in question after *Williams*, because the focus is on the defendant’s statements and not on the truth of the declarant’s statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant’s statements. See, e.g., *United States v. Powers* from the Sixth Circuit, *infra*.

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart*, 433 F.3d 273 (2nd Cir. 2006): In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant’s statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford*, even though they were “provided in a testimonial setting.” It noted first that to the extent the statements were false, they did not violate *Crawford* because “*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted.” The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make

the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams*. That is, to the extent some members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.

Accomplice statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala*, 386 F.3d 536 (3rd Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore*, 430 F.3d 190 (3rd Cir. 2005)** (relying on *Trala*, the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie*, 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government

offered and the court admitted evidence that twenty-four other users identified by the administrator confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Accomplice's testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel*, 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant's confession on a number of details. The court found no error in the admission of the accomplices' confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.

Note: The use of the cohort's confessions to show differences from the defendant's confession is precisely the situation reviewed by the Court in *Tennessee v. Street*. As noted above, while some Justices in *Williams* rejected the "not-for-truth" analysis as applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street*.

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes*, 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source --- recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." *See also United States v. Gurrola*, 898 F.3d 524 (5th Cir. 2018) ("The Confrontation Clause does not bear on non-testimonial statements. And it is well-settled in this circuit that co-conspirator statements are not testimonial."); *United States v. Acosta*, 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness --- by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime --- did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect); *United States v. Smith*, 822 F.3d 755 (5th Cir. 2016)(testimonial statement from an accomplice did not violate the Confrontation Clause because it was "introduced in the context of how Agent Michalik developed suspects . . . for the charged bank robberies. This court has consistently held that out-of-court statements providing background information to explain the actions of investigators are not hearsay" and so do not violate the Confrontation Clause); *United States v. Sosa*, 897 F.3d 615 (5th Cir. 2018) (admitting a tip to police about a cohort of the defendant, offered to explain why the officer investigated the cohort, did not violate the right to confrontation; courts must be "vigilant" in assuring that attempts to explain an officer's actions "do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for their truth"; but the greatest risks of backdoor use occur when the statement implicates the defendant directly; this one did not, and the jury already knew about the cohort, so "at a minimum it was not obvious that this statement was offered for its truth").

Informant's accusation, purportedly offered to explain the police investigation, was hearsay and violated the Confrontation Clause: *United States v. Kizzee*, 877 F.3d 650 (5th Cir. 2017): In a drug and firearm prosecution, an officer testified (implicitly) that he received

information from an arrestee that the arrestee had purchased drugs from the defendant, and he used that information (as well as other observations of the residence) to obtain a warrant. The government argued that the testimony did not violate the hearsay rule (and so could not violate the Confrontation Clause) because it was offered at trial only to explain the background of the police investigation. But the court disagreed and reversed the conviction. The court stated that the information from the arrestee “was not necessary to explain Detective Schulz’s actions” because “there was minimal need for Detective Schulz to explain the details forming the basis of the search warrant” and his own observations “would have been sufficient to explain his investigatory actions and provide background information.”

Informant’s accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: *United States v. Deitz*, 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz’s drug activity. The court found that the informant’s statement was testimonial --- because it was an accusation made to a police officer --- but it was not hearsay and therefore its admission did not violate Deitz’s right to confrontation. The court found that admitting the testimony “explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor’s case.” The court also observed that “had defense counsel objected to the testimony at trial, the court could have easily restricted its scope.” *See also United States v. Al-Maliki*, 787 F.3d 784 (6th Cir. 2015) (in a prosecution for child sex abuse, the trial court admitted the defendant’s wife’s statement to police accusing the defendant of sexual abuse; the court found no error because it was offered for the limited purpose of explaining why an official investigation began: “Two conclusions follow: It is not hearsay, * * * and the government did not violate the Confrontation Clause”); *United States v. Doxey*, 833 F.3d 692 (6th Cir. 2016) (informant’s tip leading to search of the defendant’s vehicle was not hearsay as it was offered “merely by way of background”); *United States v. Davis*, 577 F.3d 660 (6th Cir. 2009): A woman’s statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay ---and so even though testimonial did not violate the defendant’s right to confrontation --- because it was offered only to explain the police investigation that led to the defendant and the defendant’s conduct when he learned the police were looking for him. *Accord United States v. Napier*, 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government offered a document from Time Warner cable, obtained pursuant to a government subpoena, showing that an email address was accessed at the defendant’s home and that the defendant was the subscriber to the account. The court found no confrontation violation because the document was offered not for its truth, but rather “to

demonstrate how the Cincinnati office of the FBI located Napier.” The court noted that the trial court gave the jury a limiting instruction that the document could be considered only to prove the course of the investigation.

Undercover statements offered to show representations about money-laundering, in a sting operation, were not offered for truth and so admitting them did not violate the Confrontation Clause: *United States v. King*, 865 F.3d 848 (6th Cir. 2017) (Sutton, J.): The defendant was the target of a sting operation. The undercover informant represented in several conversations with the defendant that he had drug money to launder, and the defendant responded with the details of how he would launder the money. The defendant argued that the undercover informant’s part of the conversation was testimonial because it was primarily motivated for use in a criminal prosecution. But the court noted that the threshold requirement for violating the Confrontation Clause is that the out-of-court statement is admitted for its truth. That was not the case here. They were not offered to prove, for example, that the informant had drug money and wanted to clean it. Rather, the prosecution used the statements to prove that the informant made representations about having drug money and the defendant believed him.

Statement offered to prove the defendant’s knowledge of a crime was non-hearsay and so did not violate the accused’s confrontation rights: *United States v. Boyd*, 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had told police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson’s statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: “Davidson’s statements to Boyd were offered to prove Boyd’s knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted.”

Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams*, 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were

erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was “minimal at best”; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

Informant’s statements were not properly offered for “context,” so their admission violated *Crawford*: *United States v. Powers*, 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant’s prior criminal activity from a confidential informant. The government argued on appeal that even though the informant’s statements were testimonial, they did not violate the Confrontation Clause, because they were offered “to show why the police conducted a sting operation” against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that “details about Defendant’s alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation.” *See also United States v. Hearn*, 500 F.3d 479 (6th Cir.2007) (confidential informant’s accusation was not properly admitted for background where the witness testified with unnecessary detail and “[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments”).

Admitting informant’s statement to police officer for purposes of “background” did not violate the Confrontation Clause: *United States v. Gibbs*, 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, “because the testimony did not bear on Gibbs’s alleged possession of the .380 Llama pistol with which he was charged.” Rather, it was admitted “solely as background evidence to show why Gibbs’s bedroom was searched.” *See also United States v. Macias-Farias*, 706 F.3d 775 (6th Cir. 2013) (officer’s testimony that he had received information from someone was offered not for its truth but to explain the officer’s conduct, thus no confrontation violation).

Statement offered to prove it was false was not hearsay and so could not violate the defendant's right to confrontation: *United States v. Porter*, 886 F.3d 562 (6th Cir. 2018): In a prosecution against a mayor for theft from federal programs and bribery, the government offered statements by an accomplice to investigators. The trial court found that the statements were properly admitted to prove they were false, and that the government established the falsity of statements with independent evidence. The court of appeals held that “because the government’s position was that Chet Crace’s prior statements to investigators during the April 10, 2015 interview were false, Atkins’s statements were not hearsay and did not implicate Porter’s confrontation rights.”

Admission of the defendant’s conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant’s part of the conversation is offered only for “context”: *United States v. Nettles*, 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government had an undercover informant contact him and ostensibly offer to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant’s part of the conversation was not barred by the Confrontation Clause, and the informant’s part of the conversation was admitted only to place the defendant’s part in “context.” Because the informant’s statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the “context” doctrine, stating: “We note that there is a concern that the government may, in future cases, seek to submit based on ‘context’ statements that are, in fact, being offered for their truth.” But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not “put words in Nettles’s mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit.” *See also United States v. Tolliver*, 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator’s statements: “*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused.”); *United States v. Bermea-*

Boone, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; *United States v. York*, 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth"); *United States v. Hicks*, 635 F.3d 1063 (7th Cir. 2011): (undercover informant's part of conversations were not hearsay, as they were offered to place the defendant's statements in context; because they were not offered for truth their admission did not violate the defendant's right to confrontation); *United States v. Gaytan*, 649 F.3d 573 (7th Cir. 2011) (undercover informant's statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: "Gaytan's responses ['what you need?' and 'where the loot at?'] would have been unintelligible without the context provided by Worthen's statements about his or his brother's interest in 'rock'"; the court noted that there was no indication that the informant was "putting words in Gaytan's mouth"); *United States v. Foster*, 701 F.3d 1142 (7th Cir. 2012) ("Here, the CI's statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant's acts and make his statements intelligible. The defendant's statement to 'give me sixteen fifty' (because the original price was 17) would not have made sense without reference to the CI's comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation."); *United States v. Faruki*, 803 F.3d 847 (7th Cir. 2015) (no confrontation violation where out-of-court statements were offered to place the defendant's own statements in context).

For more on "context" see *United States v. Wright*, 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant's statement to a confidential informant that he was "stocked up" would have been unintelligible without providing the context of the informant's statements inquiring about drugs, "and a jury would not have any sense of why the conversation was even happening." The court also noted that "most of the CI's statements were inquiries and not factual assertions." The court expressed concern, however, that the district court's limiting instruction on "context" was boilerplate, and that the jury "could have been told that the CI's half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI's statements standing alone were not to be considered as evidence of Wright's guilt."

In *United States v. Smith*, 816 F.3d 479 (7th Cir. 2016), a public corruption case, the court rejected the use of "context" where placing the defendant's statement in "context" only worked if

the informant's statement to the defendant were true. In *Smith*, the court gave an example of an informant saying to the defendant "Last week I paid you \$7000 for a letter that my client will use to seek a grant. Do you remember?" And the defendant says "Yes." The court noted that the informant's statement puts the defendant's answer in context, but only if the informant was speaking the truth. In that situation, the informant's statement would be hearsay and potentially triggered the right to confrontation --- but that right was not violated in this case because the informant's statements were not offered for truth but rather were verbal acts establishing a corrupt agreement. *See also United States v. Amaya*, 828 F.3d 518 (7th Cir. 2016), where an informant's statement "that was a big ass pistol" was offered to put the defendant's statement "Hell yea" in context. But the court found that context was unworkable because the informant's statement was only relevant to context if it were true --- only if a gun was present would the "Hell yea" mean anything pertinent to the case. Yet the informant's statement was found not testimonial, because it was simply blurted out, and so was not made with the primary motive that it would be used in a criminal prosecution.

Note: The concerns expressed in *Nettles* and the other 7th Circuit cases discussed above --- about possible abuse of the "context" usage --- are along the same lines as those expressed by Justices Thomas and Kagan in *Williams*, when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If context is a pretext and the statement is in fact offered for the truth, then the statement is not being offered for a legitimate not-for-truth purpose.

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price*, 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert" identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted." *See also United States v. Ambrose*, 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked;

because the statements were not offered for their truth, there was no violation of the right to confrontation).

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds*, 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because “the problem that *Crawford* addresses is the admission of hearsay” and the witness’s statement was not hearsay. It was not admitted for its truth --- that the witness saw the man he described pointing a gun at people --- but rather “to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given.” The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. *See also United States v. Taylor*, 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers’ actions in the course of their investigation: “for example, why they looked across the street * * * and why they handcuffed Taylor when he approached.” The court noted that absent “complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem.” The court found no “complicating circumstances” in this case.

Note: The Court’s reference in *Taylor* to the possibility of exploiting a not-for-truth purpose runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams*.

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford*: *United States v. Adams*, 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant’s car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to buy crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant’s statement not for the truth of the assertion but as “foundation for what the officer did.” The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the

informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context --- even if the CI's statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

See also United States v. Walker, 673 F.3d 649 (7th Cir. 2012) (confidential informant's statements to the police --- that he got guns from the defendant --- were not properly offered for context but rather were testimonial hearsay: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that 'the informant said he got this gun from X' as proof that X supplied the gun."); *Jones v. Basinger*, 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

Note: *Adams*, *Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams*.

Statements by a confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: *United States v. Holmes*, 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent --- after defense counsel had questioned the connection of the defendant to the residence --- the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the

propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and did not dispute the propriety of the investigation. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh." *Compare United States v. Brooks*, 645 F.3d 971 (8th Cir. 2011) ("In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted --- that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes*. In *Holmes*, it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI's information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here."). *See also United States v. Shores*, 700 F.3d 366 (8th Cir. 2012) (confidential informant's accusation made to police officer was properly offered to prove the propriety of the investigation: "From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting."); *United States v. Wright*, 739 F.3d 1160 (8th Cir. 2014) (Officer's statement to another officer, "come into the room, I've found something" was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel's argument that the officer entered the room in response to a loud noise: "If the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant's Sixth Amendment rights.").

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford*: *United States v. Brown*, 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not

hearsay when offered to explain why an officer conducted an investigation in a certain way.” The defendant argued that the purported nonhearsay purpose for admitting the evidence “was only a subterfuge to get Williams’ statement about Brown before the jury.” But the court responded that the defendant “did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value.” The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, “it does not implicate the confrontation clause.”

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford*: *United States v. Spears*, 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government’s good-faith basis was the confession of the defendant’s associate to having taken part in the prior robberies. The defendant argued that the associate’s statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate’s statements were not admitted for their truth --- indeed they were not admitted at all. The court noted that there was “no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause.”

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer*, 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant’s statements were statements by a party-opponent and admitting the defendant’s own statements cannot violate the Confrontation Clause. The informant’s statements were not hearsay because they were admitted only to put the defendant’s statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding*, 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that “the point of the

prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause: *United States v. Young*, 753 F.3d 757 (8th Cir. 2014): Young was accused of conspiring with Mock to murder Young's husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The statement was remarkably consistent in all details with the alibi that Young had independently provided, and many of the assertions were false. The government offered Mock's statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock's statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock's statement was not offered for its truth but rather "to show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock's statements to Deputy Salsberry are valuable to the government because they are false."

Statement offered for impeachment was not hearsay and therefore admission did not violate the defendant's right to confrontation: *United States v. Cotton*, 823 F.3d 430 (8th Cir. 2016): "Cotton first argued that admission of Frazier's post-arrest statement violated his rights under the Confrontation Clause. Because the statement was offered for impeachment [as a prior inconsistent statement of a hearsay declarant] and not to prove the truth of the matter asserted, there was no Confrontation Clause violation in this case."

Informant's part of a conversation with a coconspirator was properly admitted for context and not for truth: *United States v. Barragan*, 871 F.3d 689 (9th Cir. 2017): In a prosecution for racketeering and drug crimes, the trial court admitted a taped conversation between a defendant's coconspirator and an undercover informant. The defendant conceded that the coconspirator's statement was admissible under Rule 802(d)(2)(E), but contended that admitting the informant's part of the conversation violated his right to confrontation. But the court found no

error, because the informant's statements were offered only to place the coconspirator's statements in context, and the jury was instructed to that effect. The court stated that the informant's statements "were not admitted for their truth, and the admission of such context evidence does not offend the Confrontation Clause."

Accusation offered to rebut the defendant's charge of a sloppy investigation were legitimately offered for a non-hearsay purpose and so admission did not violate the right to confrontation: *United States v. Johnson*, 875 F.3d 1265 (9th Cir. 2017): The defendant was charged with felon-firearm possession. He claimed that the gun belonged to Jakith Martin and argued at trial that the police investigation was sloppy. The government countered with testimony from an officer that the defendant's girlfriend told him that the gun was the defendant's. The girlfriend's statement was definitely testimonial. But the court found no error, because the Confrontation Clause does not apply to a statement that is not hearsay. In this case, the statement was offered not to prove that the defendant possessed the gun, but rather to show that the police investigation was proper (and not sloppy) when it focused on the defendant. The court noted that "Courts must exercise caution to ensure that out-of-court testimonial statements, ostensibly offered to explain the course of a police investigation, are not used as an end-around *Crawford* and hearsay rules, particularly when those statements directly inculcate the defendant." But in this case, the statements were "relevant to rebutting Johnson's theory of the case: that the police were sloppy and had no reason to investigate Johnson's property rather than investigate Jakith Martin's." The court emphasized that the trial court "properly and contemporaneously instructed the jury that the statements were to be considered only for nonhearsay purposes" and that the jury "was again reminded of this admonition in the final jury instructions."

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner*, 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." *See also United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause); *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) (In a prosecution for sex trafficking, statements made to an undercover police officer that set up a meeting for sex were properly admitted as not hearsay and so their admission did not violate the Confrontation Clause: "The prosecution did not present the out-of-court statements to prove the truth of the statements about the location, price, or lack of a condom. Rather, the prosecution offered these statements to explain why Officer Osterdyk went to Room 123, how he

knew the price, and why he agreed to pay for oral sex.”; the court also found that the statements were not testimonial anyway because the declarant did not know she was talking to a police officer.); *United States v. Ibarra-Diaz*, 805 F.3d 908 (10th Cir. 2015) (confidential informant’s statements to a police officer about the defendant’s interest in doing a drug deal were testimonial, but the right to confrontation was not violated because the statements were offered to “explain why the officer did not put a body wire on the CI for this significant drug transaction --- i.e., because, unlike situations where the detective is in control of the informant from the outset and * * * of the circumstances of the informant’s dealings with a potential target, in this instance the CI just called the detective ‘out of the blue’ about the possible drug transaction”; other statements from accomplices were properly admitted because they were not offered for their truth but to explain the conduct of the detective who heard the statements).

Accomplice’s confession, offered to explain a police officer’s subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez*, 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice’s confession in the defendant’s drug conspiracy trial. The police officer who had taken the accomplice’s confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer’s credibility and to suggest that he was lying about the circumstances of the interviews and about the defendant’s confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice’s confession was properly admitted to explain the officer’s motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

Note: The court assumed that the accomplice’s confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, “that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton’s testimony” because “there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence.”

See also United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant’s statements “were not offered for the truth of the matters asserted, but rather to provide context for [the defendant’s] own statements”).

Present Sense Impression

911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant: United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction --- together with the bystander's answers to questions from the 911 operators --- was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander's statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency --- rather the caller was simply recording that a crime was taking place across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive of whether statements about a crime are testimonial. Ultimately the court found that the caller's statements were not testimonial, reasoning as follows:

[A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. * * * The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession.

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford*, 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford*, but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial: *United States v. Solorio*, 669 F.3d 943 (9th Cir. 2012): Appealing from a conviction arising from a “buy-bust” operation, the defendant argued that hearsay statements of DEA agents at the scene --- which were admitted as present sense impressions --- were testimonial and so should have been excluded under *Crawford*. The court disagreed. It concluded that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, “by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly.” Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation “was a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs” and also that the defendant was visibly wary of the situation.

Records, Certificates, Etc.

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009): In a drug case, the trial court admitted three “certificates of analysis” showing the results of the forensic tests performed on the seized substances. The certificates stated that “the substance was found to contain: Cocaine.” The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were “testimonial” under *Crawford* and therefore admitting them without a live witness violated the defendant’s right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of “testimonial” statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that “[w]e can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose --- as stated in the relevant state-law provision --- was reprinted on the affidavits themselves.”

The implications of *Melendez-Diaz* --- beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation --- are found in the parts of the majority opinion that address the dissent’s arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that “documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.” Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close --- the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not “accusatory” witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment “contemplates two classes of witnesses: those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.” This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford*. These cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were

a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, “the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh’s Case.”

4. The majority noted that cross-examining a forensic analyst may be necessary because “[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination.” This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all because a machine can’t make a “statement,” and have also held that a machine’s output is not “testimony” within the meaning of the Confrontation Clause. This case law appears to survive the Court’s analysis in *Melendez-Diaz* and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford*. For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(A)(ii) and (A)(iii).

6. In response to an argument of the dissent, the majority states that certificates that merely authenticate proffered documents are not testimonial. As seen below, this probably means that certificates of authenticity prepared under Rules 902(11), (13) and (14) may be admitted without violating the Confrontation Clause.

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record:

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk’s statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk’s certificate would qualify as an official record under respondent’s definition --- it was prepared by a public officer in the regular course of his official duties --- and although the clerk was certainly not a “conventional witness” under the dissent’s approach, the clerk was nonetheless subject to confrontation. See *People v. Bromwich*, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of a certificate of absence of a public record in a criminal case is prohibited. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and became effective December 1, 2013.

It should be noted that the continuing viability of *Melendez-Diaz* has been placed into some doubt by the death of Justice Scalia, who wrote the majority opinion.

Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz: Bullcoming v. New Mexico*, 564 U.S. 647 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Justice Ginsburg, writing for the Court, declared as follows:

The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification --- made for the purpose of proving a particular fact --- through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti*, 519 F.3d 319 (D.C. Cir. 2007): The court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, “the challenge could presumably take the form of calling a certificate’s signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause.” In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Warrant of deportation is not testimonial: *United States v. Garcia*, 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held “that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation” because such officers have no motivation to do anything other than “mechanically register an unambiguous factual matter.”

Note: Other circuits before Melendez-Diaz reached the same result on warrants of deportation. See, e.g., *United States v. Valdez-Matos*, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because “the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter”); *United States v. Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation “are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions.”); *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial “because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter.”); *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation “is recorded routinely and not in preparation for a criminal trial”).

Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition that crime has not been committed at the time the certificate is prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. See also *United States v. Lopez*, 747 F.3d 1141 (9th Cir. 2014) (adhering to pre-*Melendez-Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco*, 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

The Court in *Crawford* plainly characterizes business records as “statements that by their nature [are] not testimonial.” 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz*, as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.

Business records are not testimonial: *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not “resemble the formal statement or solemn declaration identified as testimony by the Supreme Court.” *See also United States v. Baker*, 458 F.3d 513 (6th Cir. 2006) (“The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.”).

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz*, because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.

Post office box records are not testimonial: *United States v. Vasilakos*, 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz*.

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* --- despite the fact that both records were prepared with the knowledge that they would be used in a prosecution. As to the medical reports, the *Ellis* court concluded as follows:

While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. * * * They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are somewhat

similar to those in *Melendez-Diaz*. That said, toxicology tests conducted by *private* organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz*, the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility. Primary motive for use in a prosecution is obviously less likely to be found if the tester is a private organization.

Note that the Seventh Circuit, in a case after *Melendez-Diaz*, adhered fully to its ruling in *Ellis* that business records are not testimonial. *United States v. Brown*, 822 F.3d 966 (7th Cir. 2016) (relying on *Ellis* to find that Western Union records of wire transfers were not testimonial: “Logically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.”).

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about *Ellis*, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Note: Three circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz*, and that 902(11) certificates are not testimonial. See *United States v. Yeley-Davis*, 632 F.3d 673 (10th Cir. 2011), *United States v. Johnson*, 688 F.3d 494 (8th Cir. 2012), and *United States v. Anekwu*, 695 F.3d 967 (9th Cir. 2012) all *infra*. See also *Washington v. Griffin*, 876 F.3d 395 (2nd Cir. 2017) (noting that a certification of a business record “does not transform the underlying notations of the lab analysts into formalized testimonial materials” and relying on the passage from *Melendez-Diaz* which stated that a clerk’s authenticating affidavit authenticating an otherwise admissible record

does not violate the Confrontation Clause). *See also, United States v. Farrad*, 895 F.3d 859, 876 (6th Cir. 2018)(holding that the defendant forfeited his argument that a 902(11) certificate violated his confrontation rights; but even if not forfeited, “it is unlikely that it would have been a winning argument * * * in light of the Supreme Court’s discussion of the ‘narrowly circumscribed’ exception at common law that allowed a clerk to present a certification authenticating an official record.”).

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford*. He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation --- the crime had not occurred at the time the records were prepared.

Tax returns are business records and so not testimonial: *United States v. Garth*, 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and

the defendant made no argument that they were prepared for litigation, “as is expected of testimonial evidence.”

Note: this result is unaffected by *Melendez-Diaz*.

Certificate of a record of a conviction found not testimonial: *United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: “Not only are such certifications a ‘routine cataloging of an unambiguous factual matter,’ but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly.”

Note: The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz*. Nonetheless, certificates of conviction are quite probably non-testimonial, because the *Melendez-Diaz* majority states that a certificate is not testimonial if it does nothing more than authenticate another document --- and specifically uses as an example a certificate of conviction.

In *United States v. Albino-Loe*, 747 F.3d 1206 (9th Cir. 2014), the court adhered to its ruling in *Weiland*, declaring that a routine certification of authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they “did not accomplish anything other than authenticating the A-file documents to which they were attached.”

Absence of records in database is not testimonial; and drug ledger is not testimonial: *United States v. Mendez*, 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is “a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization.” The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records “are not prepared for litigation or prosecution, but rather administrative and regulatory purposes.” The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or

prosecution; and under *Crawford*, “the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial.”

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford*. The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a “tool of the trade.” As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because “[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry.” (emphasis the court’s). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise “any piece of evidence which aids the prosecution would be testimonial.”

Note: Both holdings in the above case survive *Melendez-Diaz*. The first holding is about the absence of public records, where the records themselves were not prepared in testimonial circumstances. If that absence had been proved by a *certificate*, then the Confrontation Clause, after *Melendez-Diaz*, would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial. Drug ledgers in particular are absolutely not prepared for purposes of litigation.

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz*: *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that “it appears from an examination of the files in this office” that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation --- they “respond[ed] to a prosecutor’s question with an answer.”

Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz*. The clerk’s letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.

Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz*: *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

The Office of the Medical Examiner is required by D.C.Code 5-1405(b)(11) to investigate “[d]eaths for which the Metropolitan Police Department [“MPD”], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation.” The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: “Mobile crime diagram (not [Medical Examiner] --- use for info only).” Still another report included a “Supervisor's Review Record” from the MPD Criminal Investigations Division commenting: “Should have indictment re John Raynor for this murder.” Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled “reports.” These factors, combined with the fact that each autopsy found the manner of death to be a

homicide caused by gunshot wounds, are “circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Melendez-Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent.

Finally, the court rejected the government’s argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence. *See also United States v. McGill*, 815 F.3d 846 (D.C.Cir. 2016) (relying on *Moore* to find a Confrontation violation where drug analysis reports and autopsy reports were admitted through testimony from witnesses other than the reports’ authors).

State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial: *Nardi v. Pepe*, 662 F.3d 107 (1st Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. The court reasoned as follows:

Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez-Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir.2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with “clearly established” law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

Immigration interview form was not testimonial: *United States v. Phoeun Lang*, 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses. Thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But the court found no error. The court concluded that the form was not “primarily to be used in court proceedings.” Rather it was a record prepared as “a matter of administrative routine, for the primary purpose of determining Lang’s eligibility for naturalization.” For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between “documents produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii).” The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

Note: This case was decided before *Williams*, but it would appear to satisfy both the Alito and the Kagan version of the “primary motive” test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification --- the statement is testimonial only if it was made to be used in the defendant’s criminal prosecution. In *Phoeun Lang* the first premise was not met --- the statements were made for administrative purposes, and not primarily for use in any criminal prosecution.

Expert’s reliance on standard samples for comparison does not violate the Confrontation Clause because any communications regarding the preparation of those samples was not testimonial: *United States v. Razo*, 782 F.3d 31 (1st Cir. 2015). A chemist testified about the lab analysis she performed on a substance seized from the defendant’s coconspirator. The crime lab used a “known standard” methamphetamine sample to create a reference point for comparison with seized evidence. That sample was received from a chemical company. The chemist testified that in comparing the seized sample with the known standard sample, she relied on the manufacturer’s assurance that the known standard sample was 100% pure. The court found no confrontation violation because the known standard sample --- and the manufacturer’s assurance about it --- were not testimonial. Any statements regarding the known

standard sample were not made with the primary motivation that they would be used at a criminal trial, because the sample was prepared for general use by the laboratory. The court noted that the chemist's conclusions about the *seized* sample would raise confrontation questions, but the government produced the chemist to be cross-examined about those conclusions. As to the standard sample, it was prepared "prior to and without regard to any particular investigation, let alone any particular prosecution."

Note: In reaching its result, the *Razo* court provided a good interpretation of *Williams*. The court saw support in the fact that the Alito plurality would find any communications regarding the known standard sample to be non-testimonial because that sample was "not prepared for the primary purpose of accusing a targeted individual." And the fifth vote of support would come from Justice Thomas, because nothing about the known standard sample was in the nature of a formalized statement.

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that admission of certain records about suspicious internet activity violated the defendant's right to Confrontation Clause. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report --- called a "CP Report"--- to the National Center for Missing and Exploited Children (NCMEC), listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant's computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. But the court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because the primary purpose for the reports was to record past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a "suspect" screen name, email address, and IP address --- and Yahoo did not treat its customers as "suspects" in the ordinary

course of its business; 2) before a CP Report is created, someone in the legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users' IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that "[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible."

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams*. Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had "no way of knowing whether it will turn out to be incriminating or exonerating." In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: "Yahoo's employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody*."

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user's account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

Note: *Cameron* cannot be read to hold that business records admissible under Rule 803(6) can be testimonial under *Crawford*. The court notes that under *Palmer v. Hoffman*, 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz*. The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman*: they were not made for business purposes, but rather for purposes of litigation. Thus according to the court, the Yahoo reports were probably not admissible as business records anyway.

Airline records of passengers on a plane are not testimonial: *Tran v. Roden*, 847 F.3d 44 (1st Cir. 2017): On habeas review of a murder conviction, the court reviewed whether the admission of a manifest prepared by United Airlines violated the defendants' right to confrontation. The manifest showed that two people with the same names as the defendants were on a flight out of the country. This was evidence of consciousness of guilt. The court found that the manifest was a business record prepared by United, outside the context of litigation, and therefore it was not testimonial. The defendants argued that the record was testimonial because it was *delivered* by United to the prosecution. But the court found this irrelevant, because the question under the Confrontation Clause is whether a document was *prepared* with the primary motive of use in a criminal prosecution. The defendants relied on *Cameron*, immediately above, but the court distinguished *Cameron* by noting that the Yahoo records in that case were *prepared* by Yahoo with the intent to send them to the government in order to investigate and prosecute child pornography.

Telephone records are not testimonial: *United States v. Burgos-Montes*, 786 F.3d 92 (1st Cir. 2015): The government introduced phone records of a conspirator. They were accompanied by a certification made under Rule 902(11). The defendant argued that the phone records were testimonial but the court disagreed. The defendant argued that the records were produced by the phone company in response to a demand from the government, but the court found this irrelevant. The records were gathered and maintained by the phone company in the routine course of business. "The fact that the print-out of this data in this particular format was requested for litigation does not turn the data contained in the print-out into information created for litigation."

Routine autopsy report was not testimonial: *United States v. James*, 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law --- stating that autopsy reports were not testimonial --- was still valid. The court adhered to its view that "routine" autopsy reports were not testimonial because they are not prepared with the primary motivation that they will be used in a criminal trial. Applying the test of "routine" to the facts presented, the court found as follows:

Somaipersaud's autopsy was nothing other than routine --- there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. [A government expert] testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report

itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."

The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. [N]either the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that "something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations." It distinguished the 11th Circuit's opinion --- discussed below --- which found an autopsy report to be testimonial, noting that "the decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office." Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit's view.

Note: In considering the effect of *Williams*, the court found that in fact there was no lesson at all to be derived from *Williams*, as there was no rationale on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only cases exactly like it.

Business records are not testimonial: *United States v. Bansal*, 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that "the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

Admission of credit card company's records identifying customer accounts that had been compromised did not violate the right to confrontation: *United States v. Keita*, 742 F.3d 184 (4th Cir. 2014): In a prosecution for credit card fraud, the trial court admitted "common point of purchase" records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact

law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that “business records are generally admissible absent confrontation.” The court concluded that the records were primarily prepared for the administration of Amex’s regularly conducted business.

Warrant of removal, offered in an illegal reentry prosecution, is non-testimonial: *United States v. Garcia*, 887 F.3d 205 (5th Cir. 2018): In an illegal re-entry prosecution, to prove that the defendant had been deported, the government offered the warrant of removal that was entered just after the defendant was removed. The defendant argued that the warrant was testimonial under *Melendez-Diaz*, but the court disagreed. The court stated that the problem with the forensic certificates in *Melendez-Diaz* was that they were produced specifically for purposes of trial. In contrast, warrants of removal are prepared “to memorialize an alien’s departure --- not specifically or primarily to prove facts in a hypothetical future criminal prosecution.”

Admission of purported drug ledgers violated the defendant’s confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson*, 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant’s participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a “qualified witness” under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant’s accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement --- and because the accomplice was not produced to testify --- admission of the ledger against the defendant violated his right to confrontation under *Crawford*.

Note: The *Jackson* court does not hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to authenticate the business record --- the cohort’s production of the records at a proffer session --- was testimonial.

Pseudoephedrine logs are not testimonial: *United States v. Towns*, 718 F.3d 404 (5th Cir. 2013): In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies

of pseudoephedrine purchases. The court found that the logs --- and the certifications to the logs provided by the pharmacies --- were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that “the regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage.” As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) ---the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver’s license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

Court rejects the “targeted individual” test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera*, 737 F.3d 988 (5th Cir. 2013): The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant’s grandmother, prepared 40 years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant’s parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant’s mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was not targeted toward the defendant, as he was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used “at a later trial.” Finally, the court contended that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be confronted with the “*witnesses against him.*” In this case, the grandmother, by way of affidavit, was a witness against the defendant.

***Reporter’s Note:* The court’s construction of the Confrontation Clause could come out the other way. The reference to “witnesses against him” in the Sixth Amendment could be interpreted as *at the time the statement was made*, it was being directed at the defendant. The *Duron-Caldera* court reads “witnesses” as of the time the statement is being introduced. But at that time, the witness is not there. All the “witnessing” is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying “against him.”**

Another note from *Duron-Caldera*: The court notes that there is no rule to be taken from *Williams* under the *Marks* test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In *Williams*, there is nothing on which the plurality and Justice Thomas agreed.

Pseudoephedrine purchase records are not testimonial: *United States v. Collins*, 799 F.3d 554 (6th Cir. 2015): Relying on the Fifth Circuit’s decision in *United States v. Towns, supra*, the court held that pharmaceutical records of pseudoephedrine purchases were not testimonial. The court noted that while law enforcement officers use the records to track purchases, the “system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions” and accordingly was not primarily motivated to generate evidence for a prosecution.

Pseudoephedrine logs are not testimonial: *United States v. Lynn*, 851 F.3d 786 (7th Cir. 2017): Affirming convictions for methamphetamine manufacturing and related offenses, the court found no error in admitting logs of pseudoephedrine purchases prepared by pharmacies. These logs indicated that the defendant and associates had purchased pseudoephedrine, a necessary ingredient of methamphetamine. The defendant argued that introducing the logs violated his right to confrontation because they were prepared in anticipation of a prosecution and so were testimonial. But the court disagreed. It stated that “regulatory bodies may have legitimate interests in maintaining these records that far exceed their evidentiary value in a given case. For example, requiring identification for each pseudoephedrine purchase may deter misuse or pseudoephedrine-related drug offenses.” The logs were therefore not testimonial.

Preparing an exhibit for trial is not testimonial: *United States v. Vitrano*, 747 F.3d 922 (7th Cir. 2014): In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because the technician who prepared the phone calls as an exhibit did not testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that “[p]reparing an exhibit for trial is not itself testimonial.”

Records of wire transfers are not testimonial: *United States v. Brown*, 822 F.3d 966 (7th Cir. 2016): In a drug prosecution, the government offered records of Western Union wire transfers. The court found that the records were not testimonial, noting that “[l]ogically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.” It concluded that the records were “routine and prepared in the ordinary course of business, not in anticipation of prosecution.”

Note: The Western Union records in *Brown* were proven up by way of certificates offered under Rule 902(11). The court did not even mention any possible concern that those certifications would themselves be testimonial. It focused only on the testimoniality of the underlying records.

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz*: *United States v. Mashek*, 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz*, but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his

confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, “*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; see *Melendez-Diaz*, 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial).” **Accord, *United States v. Ali***, 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as “*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business.”); ***United States v. Wells***, 706 F.3d 908 (8th Cir. 2013) (*Melendez-Diaz* did not preclude the admission of pseudoephedrine logs, because they constitute non-testimonial business records under Federal Rule of Evidence 803(6)).

Rule 902(11) authentication was not testimonial: *United States v. Thompson*, 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit, the court stated that “[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights.” The court emphasized that “[b]oth the majority and dissenting opinions in *Melendez-Diaz* noted that a clerk's certificate authenticating a record --- or a copy thereof --- for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial.” It concluded that “[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument.” **See also *United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

GPS tracking reports were properly admitted as non-testimonial business records: *United States v. Brooks*, 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant's argument that admission at trial of GPS tracking

reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit --- not for use at trial. The court stated that “[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union’s security company for the purpose of locating a robber and recovering stolen money.”

Certificates attesting to Indian blood are not testimonial: *United States v. Rainbow*, 813 F.3d 1097 (8th Cir. 2016): To prove a jurisdictional element of a charge that the defendants committed an assault within Indian Country, the government offered certificates of degree of Indian blood. The certificates certified that the respective defendants possessed the requisite degree of Indian blood. The defendants argued that, because the certificates were formalized and prepared for litigation, they were testimonial and so admitting them violated their right to confrontation. The certificates were prepared by a clerk of an officer of the BIA, and introduced at trial by the assistant supervisor of that office. The certificates reflected information about what was in records regularly kept by the BIA. The court found that the certificates were not testimonial. It explained as follows:

Although Archambault [the assistant supervisor] testified that he had these particular certificates prepared for his testimony, BIA officials regularly certify blood quantum for the purpose of establishing eligibility for federal programs available only to Indians. Archambault explained that his office maintained the records of tribal enrollment and of each member's blood quantum. He could look up an individual's enrollment status and blood quantum at any time—that information existed regardless of whether any crime was committed. Unlike the analysts in *Melendez–Diaz* and *Bullcoming*, the enrollment clerk here did not complete forensic testing on evidence seized during a police investigation, but instead performed the ministerial duty of preparing certificates based on information that was kept in the ordinary course of business. An objective witness would not necessarily know that the certificates would be used at a later trial, because certificates of degree of Indian blood are regularly used in the administration of the BIA's affairs. Simply put, the enrollment clerk prepared certificates using records maintained in the ordinary course of business by the Standing Rock Agency, and the BIA routinely issues certificates in the administration of its affairs. Thus, the certificates were admissible as non-testimonial business records.

Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: *United States v. Causevic*, 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter --- specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

Note: The statements of facts underlying the prior conviction are testimonial under both versions of the primary motive test contested in *Williams*. They meet the Kagan test because they were obviously prepared for purpose of --- indeed as part of --- a criminal prosecution. And they meet the Alito proviso because they targeted the specific defendant against whom they were used at trial.

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante*, 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Philippines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines, and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records “created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.”

Melendez-Diaz, 129 S.Ct. at 2539-40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *Melendez-Diaz*, despite being labeled a copy of the certificate, Exhibit 1 is “quite plainly” an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

Filed statement of registered car owner, made after impoundment, that he sold the car to the defendant, was testimonial: *United States v. Esparza*, 791 F.3d 1067 (9th Cir. 2015): The defendant was arrested entering the United States with marijuana hidden in the gas tank and dashboard; the fact in dispute was the defendant’s knowledge, and specifically whether he owned the car he was driving. At the time of arrest, the registered owner was Donna Hernandez. The government relied on two hearsay statements made in records filed with the DMV by Hernandez that she had sold the car to the defendant six days before the defendant’s arrest. But these records were filed *after* the defendant was arrested and Hernandez had received a notice indicating that the car had been seized because it was used to smuggle marijuana into the country. Under the circumstances, the court found that the post-hoc records filed by Hernandez with the DMV were testimonial. The court noted that Hernandez did not create the record “for the routine administration of the DMV’s affairs.” Nor was Hernandez merely “a private citizen who, in the course of a routine sale, simply notified the DMV of the transfer of her car. Instead, her car had already been seized for serious criminal violations, and she sent the transfer form to the DMV only after receiving a notice of seizure from [Customs and Border Protection].”

Note: This is an interesting case in which a statement was found testimonial in the absence of significant law enforcement involvement in the generation of the statement. As the Court has noted in *Bryant* and *Clark*, law enforcement involvement is critical to finding a statement testimonial, because a statement not made to or with law enforcement is unlikely to be sufficiently formal, and unlikely to be primarily motivated for use in a criminal trial. But at least it can be said that there is formality here --- Hernandez filed formal statements claiming that the ownership was transferred. And there was involvement of the state both in spurring her interest in filing (by sending her the notice) and in receiving her filing.

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood*, 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz*. (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz*. On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* that record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation, after the crime has been committed. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz*. The court reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal --- or, for that matter, any business or public record --- could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction. *See also United States v. Rojas-Pedroza*, 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant's argument that it had been undermined by *Bullcoming* and *Bryant*; holding that a Notice of Intent in the defendant's A-File --- which apprises the alien of the determination that he is removable --- was non-testimonial because its "primary purpose is to effect removals, not to prove facts at a criminal trial."); *United States v. Lopez*, 762 F.3d 852 (9th Cir. 2014) (verification of removal, recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal "is that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the removal of aliens following a hearing before an immigration

judge”; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the Rule’s apparent exclusion of law enforcement reports); *United States v. Albino-Loe*, 747 F.3d 1206 (9th Cir. 2014) (statements concerning the defendant’s alienage in a notice of removal --- which is the charging document for deportation --- are not testimonial in an illegal entry case; the primary purpose of a notice of removal “is simply to effect removals, not to prove facts at a criminal trial”); *United States v. Torralba-Mendia*, 784 F.3d 652 (9th Cir. 2015) (I-213 Forms, offered to show that passengers detained during an investigation were deported, were admissible under the public records hearsay exception and were not testimonial: “The admitted record of a deportable alien contains the same information as a verification of removal: The alien’s name, photograph, fingerprints, as well as the date, port and method of departure[T]he admitted forms are a ministerial, objective observation [and] Agents complete I-213 forms regardless of whether the government decides to prosecute anyone criminally.”).

Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez*, 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents a --- Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge --- were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

Forms prepared by border patrol agents interdicting aliens found not testimonial: *United States v. Morales*, 720 F.3d 1194 (9th Cir. 2013): In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien’s possession, and basic biographical data about the alien, and also provides the alien options, including the making of a concession that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant’s argument that these forms were testimonial. It stated that “a Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of ‘testimonial.’” The

court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error. (The court appears wrong about the hearsay rule because statements coming from the alien would be admissible as party-opponent statements in a public record.)

Return of Service, offered to prove that the Defendant had been provided with notice of a hearing on a domestic violence protection order, was not testimonial: *United States v. Fryberg*, 854 F.3d 1126 (9th Cir. 2017): The defendant was convicted for possession of a firearm by a prohibited person. The prohibition was that he was subject to a domestic violence protection order. Critical to the validity of that order was that the defendant was served with notice of a hearing on a permanent protection order. As proof of that the defendant was served with that notice, the government offered the return of service by a law enforcement officer, completed on the day that service was purportedly made. The court held that the return of service was admissible over a hearsay exception as a public record; it was not barred by the law enforcement prohibition of Rule 803(8) because it was a ministerial, non-adversarial record, proving only that service was made. The court further held that the return of service was admissible over a confrontation objection, because it was not testimonial. The court likened the return of service to the certificate of deportation upheld in *Orozco-Acosta, supra*. The court stated that the primary purpose for preparing the return of service was not to have it used as evidence in a prosecution but rather to inform the court “that the defendant had been served with notice of the hearing on the protection order, which enabled the hearing to proceed.” At the time the notice was filed, no crime had yet occurred and so the return of service was not primarily prepared for the purpose of a criminal prosecution.

Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant’s conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8), and also that its admission violated his right to confrontation. The court disagreed, reasoning that “a SSA interviewer completes the application as part of a routine administrative process” and such a record is prepared for each and

every request for benefits. “No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose.” The court quoted *Melendez-Diaz* for the proposition that “[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because --- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial --- they are not testimonial.” The court concluded as follows:

[N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavit seeking to amend a birth certificate, prepared by border patrol agents for use at trial, was testimonial: *United States v. Macias*, 789 F.3d 1011 (9th Cir. 2015): The defendant was arrested for illegal reentry but claimed that he had a California birth certificate and was a U.S. citizen. He was charged with illegal reentry and making a false claim of citizenship. During his trial he introduced a “delayed registration of birth” document issued by the State of California, and the jury deadlocked. After the trial, border patrol agents conducted an investigation into the defendant’s place of birth, interviewing family members and reviewing family documents, and determined that he had been born in Mexico. They then attempted to correct the birthplace on the California document; pursuant to California law, they submitted sworn affidavits in an application to amend the California document. At the second trial, the government introduced the delayed registration as well as the amending affidavit. On appeal, the defendant argued that the amending affidavit was testimonial and its admission violated his right to confrontation. The court reviewed this claim for plain error because at trial the defendant’s objection was on hearsay grounds only. The court found that the amending affidavit was clearly testimonial, as its sole purpose was to create evidence for the defendant’s second trial. However, the court found that the plain error did not affect the defendant’s substantial rights, because the government at trial introduced the defendant’s Mexican birth certificate, as well as testimony from family members that the defendant was born in Mexico.

Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu*, 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C. § 3505 for foreign records in criminal cases. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit's decision in *Yeley-Davis*, immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate other records are not testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis*, 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis*, *supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis*. *
* * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." *Id.* at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also *id.* at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*).

The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

The court found *Yeley-Davis* “dispositive” in *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014), in which the court admitted a certificate of authenticity of credit card records. The court again distinguished *Melendez-Diaz* as a case concerned with affidavits showing the results of a forensic analysis --- whereas the certificate of authenticity “does not contain any ‘analysis’ that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial statement of authenticity.” See also *United States v. Keck*, 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they “were created for the administration of Moneygram’s affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian’s actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation.”

Notation on a fax attaching documents sent to law enforcement was not testimonial: *United States v. Stegman*, 873 F.3d 1215 (10th Cir. 2017): In a tax fraud prosecution, the government introduced the defendant’s records, as sent by the defendant’s accountant. The defendant objected that the fax cover sheet transmitting the document contained a notation made by the accountant that was potentially incriminating. The court found that the notation was not testimonial. It explained that the accountant’s notation was “cooperative and informal in nature and there is no indication that [the accountant] would have reasonably expected the notation to be used prosecutorially.”

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo*, 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admissible. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records --- the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz*. The court distinguished *Melendez-Diaz* in the following passage:

Like a Warrant of Deportation * * * (and unlike the certificates of analysis in *Melendez-Diaz*), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the United States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *

The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. The district court properly ruled that the primary purpose of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

Summary charts of admitted business records is not testimonial: *United States v. Naranjo*, 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and “[b]usiness records are not testimonial.” And “[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial.”

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz*: *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz*. The court relied heavily on the fact that the autopsy reports were filed by an arm of law enforcement. The court reasoned as follows:

We think the autopsy records presented in this case were prepared “for use at trial.” Under Florida law, the Medical Examiners Commission was created and exists within the

Department of Law Enforcement. Fla. Stat. 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. *Id.* The medical examiner for each district “shall determine the cause of death” in a variety of circumstances and “shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney.” Fla. Stat. 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section 406.11 has a duty to report the death to the medical examiner. Failure to do so is a first degree misdemeanor.

* * *

In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

Note: The Court’s test for testimoniality is broader than that used by the Supreme Court. The Supreme Court finds statements to be testimonial only when they are *primarily motivated* to be used in a criminal prosecution. The 11th Circuit’s “reasonable anticipation” test would cover many more statements, and accordingly the court’s decision in *Ignasiak* is subject to question.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton’s accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian’s statements were not “testimonial” within the meaning of *Crawford*. The court explained that the statements “were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial.”

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta*, 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction --- those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause. *See also, United States v. Smith*, 822 F.3d 755 (5th Cir. 2016) (defendant's accomplice gave testimonial statements to a police officer, but admission of those statements did not violate the right to confrontation because the accomplice testified at trial subject to cross-examination).

Crawford inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell*, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford*. But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been

more effective if the victims had been older. “Under *Owens*, however, that is not enough to establish a Confrontation Clause violation.”

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial --- even though the declarant did not recall making the statements: *Cookson v. Schwartz*, 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim’s hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted into evidence. The court found no error in admitting the victim’s testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory about the statements. But the court found this argument was foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case “could remember the underlying events described in the hearsay statements.” *See also United States v. Al-Alawi*, 873 F.3d 592 (7th Cir. 2017) (admission of the victim’s videotaped statement to police, accusing the defendant of sexual abuse, did not violate the Confrontation Clause, because the victim testified at trial: “When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”).

Witness’s reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau*, 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that “*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person.”

Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant’s statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. “He may not have remembered the interview, but the Confrontation Clause

includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections.”

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen*, 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. *See also United States v. Lindsey*, 634 F.3d 541 (9th Cir. 2011) (“Although Gibson’s statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey’s counsel.”).

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed *arguendo* that the accusation was testimonial --- even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant’s confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant’s “failure to seize this opportunity demolishes his Sixth Amendment claim.” The court observed that the defendant had a better opportunity to confront the victim “than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation.”

Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she

witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial --- as is necessary to qualify a record under Rule 803(5) --- and was subject to unrestricted cross-examination.

Unavailability

Admitting deposition testimony did not violate the defendant's right to confrontation where the declarant was properly found unavailable: *United States v. Porter*, 886 F.3d 562 (6th Cir. 2018): The defendant objected to the trial court's decision to allow a witness to be deposed. He argued that the witness was available to testify at trial. The court found that the trial court did not err in finding that the witness would not be available to testify at trial. The witness had stage IV cancer and was unable to get out of bed. The court noted that the doctor's letter to the court "was specific as to the nature of Miller's illness and very clearly opined that Miller's health would be jeopardized if she were required to testify at trial." The court concluded that "because Porter was able to, and did, cross-examine Miller at her deposition, and because the government sufficiently demonstrated her unavailability to testify at trial, no Confrontation Clause violation occurred."

Waiver

Waiver found where defense counsel's cross-examination opened the door for testimonial hearsay: *United States v. Lopez-Medina*, 596 F.3d 716 (10th Cir. 2010): In a drug trial, an officer testified about the investigation that led to the defendant. On cross-examination, defense counsel inquired into the information that the officer received from an informant --- presumably to discredit the basis for the police having targeted the defendant. The trial court then on redirect allowed the government to question the officer and elicit some of the accusations about the defendant that the informant's had made to the officer. The court found no error. It recognized that "a confidential informant's statements to a law enforcement officer are clearly testimonial." But the court concluded that the defendant "opened the door to further questioning of Officer Johnson regarding the information he received from the confidential informant. Where, as here, defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic." The court observed that a waiver would not be found if there was any indication that the defendant had disagreed with defense counsel's decision to open the door. But there was no indication of dissent in this case. **Accord,** *United States v. Acosta*, 475 F.3d 677 (5th Cir. 2007) (waiver found where defense counsel opened the door to testimonial hearsay). **Contra, and undoubtedly wrong,** *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004) ("the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation").

**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	H.R. 720 <i>Sponsor:</i> Smith (R-TX) <i>Co-Sponsors:</i> Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	<p>Bill Text (as passed by the House without amendment, 3/10/17): https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/10/17: Passed House (230–188) • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the House
Lawsuit Abuse	S. 237 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsor:</i> Rubio (R-FL)	CV 11	<p>Bill Text: https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf</p> <p>Summary (authored by CRS): This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing</p>	<ul style="list-style-type: none"> • 11/8/17: Senate Judiciary Committee Hearing held – “The Impact of Lawsuit Abuse on American Small Businesses and Job Creators” • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the Senate; referred to Judiciary Committee

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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Reduction Act of 2017, cont.			<p>the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: None.</p>	
Innocent Party Protection Act	<p>H.R. 725</p> <p><i>Sponsor:</i> Buck (R-CO)</p> <p><i>Co-Sponsors:</i> Farenthold (R-TX) Franks (R-AZ) Goodlatte (R-VA) Sessions (R-TX) Smith (R-TX)</p>		<p>Bill Text: https://www.congress.gov/115/bills/hr725/BILLS-115hr725rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends procedures under which federal courts determine whether a case that was removed from a state court to a federal court on the basis of a diversity of citizenship among the parties may be remanded back to state court upon a motion opposed on fraudulent joinder grounds that: (1) one or more defendants are citizens of the same state as one or more plaintiffs, or (2) one or more defendants properly joined and served are citizens of the state in which the action was brought.</p> <p>Joinder of such a defendant is fraudulent if the court finds: actual fraud in the pleading of jurisdictional facts with respect to that defendant, state law would not plausibly impose liability on that defendant, state or federal law bars all claims in the complaint against that defendant, or no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant. In determining whether to grant or deny such a motion for remand, the court: (1) may permit pleadings to be amended; and (2) must consider the pleadings, affidavits, and other evidence submitted by the parties.</p> <p>A federal court finding that all such defendants have been fraudulently joined must: (1) dismiss without prejudice the claims against those defendants, and (2) deny the motion for remand.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt17/CRPT-115hrpt17.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate; referred to Judiciary Committee • 3/9/17: Passed House (224-194) • 2/24/17: Reported by the Judiciary Committee • 1/30/17: Introduced in the House; referred to Judiciary Committee;

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<p>Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017</p>	<p>H.R. 985 <i>Sponsor:</i> Goodlatte (R-VA)</p> <p><i>Co-Sponsors:</i> Sessions (R-TX) Grothman (R-WI)</p>	<p>CV 23</p>	<p>Bill Text (as amended and passed by the House, 3/9/17): https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf</p> <p>Summary (authored by CRS): (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:</p> <ul style="list-style-type: none"> • in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; • no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and • in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. <p>The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.</p> <p>No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.</p> <p>Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons.</p> <p>A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.</p> <p>A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/9/17: Passed House (220–201) • 3/7/17: Letter submitted by AO Director (sent to House Leadership) • 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) • 2/15/17: Mark-up Session held (reported out of Committee 19–12) • 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 2/9/17: Introduced in the House
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<p>H.R. 985, cont.</p>			<p>Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action.</p> <p>Appeals courts must permit appeals from an order granting or denying class certification.</p> <p>(Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs.</p> <p>A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements.</p> <p>(Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf</p>	
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<p>Stopping Mass Hacking Act</p>	<p>S. 406 <i>Sponsor:</i> Wyden (D-OR)</p> <p><i>Co-Sponsors:</i> Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)</p>	<p>CR 41</p>	<p>Bill Text: https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf</p> <p>Summary: (Sec. 2) "Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016."</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 1110 <i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Amash (R-MI) Conyers (D-MI) DeFazio (D-OR) DelBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)</p>	<p>CR 41</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf</p> <p>(Sec. 2) "(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.</p> <p>(b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant."</p> <p>Summary (authored by CRS): This bill repeals an amendment to [R]ule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 2/16/17: Introduced in the House; referred to Judiciary Committee

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<p>Back the Blue Act of 2017</p>	<p>S. 1134 <i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Co-Sponsors:</i> Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)</p>	<p>§ 2254 Rule 11</p>	<p>Bill Text: https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 2437 <i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Barletta (R-PA) Johnson (R-OH) Graves (R-LA) McCaul (R-TX) Olson (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)</p>	<p>§ 2254 Rule 11</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 5/16/17: Introduced in the House; referred to Judiciary Committee

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<p>To amend section 1332 of title 28, United States Code, to provide that the requirement for diversity of citizenship jurisdiction is met if any one party to the case is diverse in citizenship from any one adverse party in the case.</p>	<p>H.R. 3487 <i>Sponsor:</i> King (R-IA)</p> <p><i>Co-Sponsor:</i> Smith (R-TX)</p>	<p>CV</p>	<p>Bill Text:</p> <ul style="list-style-type: none"> • Substitute: https://judiciary.house.gov/wpcontent/uploads/2018/09/HR-3487-ANS.pdf • Original Bill Text: https://www.congress.gov/115/bills/hr3487/BILLS-115hr3487ih.pdf <p>Summary (authored by CRS): This bill amends the federal judicial code to specify that U.S. district courts have jurisdiction on the basis of diversity of citizenship if at least one adverse party does not share the same citizenship as another adverse party. [Bill would require a \$700 filing fee for the defendant’s removal of a civil action from a state court to a federal district court.]</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 9/13/18: markup held; no final action taken • 9/11/18: “Amendment in the Nature of a Substitute” • 9/6/17: referred to Subcommittee on the Constitution and Civil Justice • 7/27/17: Introduced in the House; referred to Judiciary Committee
<p>To amend title 28, United States Code, to limit the authority of district courts to provide injunctive relief, and for other purposes.</p>	<p>H.R. 4927 <i>Sponsor:</i> Brat (R-VA)</p>	<p>CV</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr4927/BILLS-115hr4927ih.pdf</p> <p>Summary (authored by CRS): This bill limits the authority of federal district courts to issue injunctions. Specifically, it prohibits a district court from issuing an injunction unless the injunction applies only: (1) to the parties to the case before that district court, or (2) in the federal district in which the injunction is issued.</p> <p>Report: None.</p> <p><i>See infra</i> H.R. 6730.</p>	<ul style="list-style-type: none"> • 2/5/18: Introduced in the House; referred to Judiciary Committee
<p>Litigation Funding Transparency Act of 2018</p>	<p>S. 2815 <i>Sponsor:</i> Grassley (R-IA)</p> <p><i>Co-Sponsors:</i> Cornyn (R-TX) Tillis (R-NC)</p>	<p>CV</p>	<p>Bill Text: https://www.congress.gov/115/bills/s2815/BILLS-115s2815is.pdf</p> <p>Summary: Section 2: Transparency and Oversight of Third-Party Litigation Funding in Class Actions. Amends chapter 114 of Title 28 (Class Actions) by adding a § 1716. Section 1716 would provide that in any class action, class counsel must disclose to the court and all named parties the identities of any commercial enterprise, other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the</p>	<ul style="list-style-type: none"> • 5/10/2018: Introduced in the Senate; referred to Judiciary Committee

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<p>Litigation Funding Transparency Act of 2018, cont.</p>			<p>contingent right. Also includes timing provisions.</p> <p>Section 3: Transparency and Oversight of Third-Party Litigation Funding in Multi-District Litigation. Amends 28 U.S.C. § 1407 (Multidistrict Litigation) to include similar disclosure, production, and timing provisions as those that apply to class actions above.</p> <p>Section 4: Applicability. Provides that the amendments made by the Act would apply to any case pending on or commenced after the date of enactment.</p> <p>Report: None.</p>	
<p>Federal Courts Access Act of 2018</p>	<p>S. 3249 <i>Sponsor:</i> Lee (R-UT)</p>		<p>Bill Text: https://www.congress.gov/115/bills/s3249/BILLS-115s3249is.pdf</p> <p>Summary: (1) raises the ordinary amount in controversy requirement to \$125K but lowers the Class Action Fairness Act (CAFA) amount in controversy from \$5M to \$125K. (But retains the CAFA provision that allowing aggregation of class members' damages for amount in controversy purposes.); (2) eliminates the complete diversity requirement; (3) eliminates § 1332(d)(3) & (4)'s discretionary and mandatory carveouts for CAFA cases (i.e., the tests under which district courts either could or must decline to exercise CAFA jurisdiction); (4) deletes § 1332(d)(11) (concerning mass actions); (5) permits removal of § 1332(a) diversity cases featuring in-state defendants so long as at least one defendant is out-of-state; (6) removes the 1-year time limit on removing diversity cases that become removable later than the initial pleading; and (7) revises the criteria for class action diversity removal (including by eliminating the § 1453(b) proviso that removal is "without regard to whether any defendant is a citizen of the State in which the action is brought")</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 7/19/2018: Introduced in the Senate; referred to Judiciary Committee
<p>Anti-Corruption and Public Integrity Act</p>	<p>S. 3357 <i>Sponsor:</i> Warren (D-MA)</p>	<p>CV 12</p>	<p>Bill Text: https://www.congress.gov/115/bills/s3357/BILLS-115s3357is.pdf</p> <p>Summary: Section 403: makes the Code of Conduct for United States Judges applicable to the Supreme Court; requires the JCUS to establish enforcement procedures; such</p>	<ul style="list-style-type: none"> • 8/21/18: Introduced in the Senate; referred to Finance Committee

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<p>Anti-Corruption and Public Integrity Act, cont.</p>		<p>procedures must be submitted to Congress Section 404: amends disclosure requirements with respect to financial reports, recusal decisions, and speeches; requires livestreaming of appellate proceedings (subject to exceptions); provisions publicizing case assignments; making websites user-friendly Section 405: places ALJ positions in the competitive service Section 406: provision regarding reporting on judicial diversity Section 407: amends Civil Rule 12 to add a subdivision j: (j) Pleading Standards. A court shall not dismiss a complaint under Rule 12(b)(6), (c) or (e): (1) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief; or (2) on the basis of a determination by the court that the factual contents of the complaint do not show the plaintiff’s claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged. Section 408: amends the E-Government Act of 2002 regarding the public availability of judicial opinions Report: None.</p>	
<p>Injunctive Authority Clarification Act of 2018</p>	<p>H.R. 6730 <i>Sponsor:</i> Goodlate (R-VA)</p>	<p>Bill Text (Amendment): https://www.congress.gov/115/bills/hr6730/BILLS-115hr6730ih.pdf Summary: Prohibits federal courts from issuing an order “that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority” unless the non-party is represented “by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.” Report: None. <i>See supra</i> H.R. 4927.</p>	<ul style="list-style-type: none"> • 9/13/18: markup held; reported favorably out of Committee (14-6) • 9/11/18: “Amendment in the Nature of a Substitute” • 9/10/18: Introduced in the House; referred to Judiciary Committee