

**ADVISORY COMMITTEE  
ON  
RULES OF EVIDENCE**

**Washington, D.C.  
May 3, 2019**

# TAB 1

# TAB 1A

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# ADVISORY COMMITTEE ON EVIDENCE RULES

## AGENDA FOR COMMITTEE MEETING

Washington, D.C.

May 3, 2019

### I. Opening Business

- Approval of the minutes of the Fall 2018 meeting.
- Report on the January 2019 meeting of the Standing Committee.

### II. Rule 404(b)

- Tab A Reporter's Memo
- Tab B Proposed Amended Rule 404(b)

### III. Rule 702

- Tab A Reporter's Memo
- Tab B Forensic Caselaw Digest (Spring 2019)

### IV. Rule 106

- Tab A Reporter's Memo
- Tab B Memo from Professor Liesa Richter Regarding State Counterparts to Rule 106

### V. Rule 615

- Reporter's Memo

### VI. Crawford Outline

- Reporter's Memo

# TAB 1B

**ADVISORY COMMITTEE ON EVIDENCE RULES**

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| <b>Chair, Advisory Committee<br/>on Evidence Rules</b>    | <b>Honorable Debra Ann Livingston</b><br>United States Court of Appeals<br>Thurgood Marshall United States Courthouse<br>40 Centre Street, Room 2303<br>New York, NY 10007-1501   |
| <b>Reporter, Advisory Committee<br/>on Evidence Rules</b> | <b>Professor Daniel J. Capra</b><br>Fordham University School of Law<br>150 West 62nd Street<br>New York, NY 10023  |
| <b>Members, Advisory Committee<br/>on Evidence Rules</b>  | <b>Honorable James P. Bassett</b><br>Associate Justice<br>New Hampshire Supreme Court<br>One Charles Doe Drive<br>Concord, NH 03301<br><br><b>Daniel P. Collins, Esq.</b><br>Munger Tolles & Olson LLP<br>350 South Grand Avenue, 50 <sup>th</sup> Floor<br>Los Angeles, CA 90071<br><br><b>Honorable Shelly Dick</b><br>United States District Court<br>Russell B. Long Federal Building<br>777 Florida Street, Room 301<br>Baton Rouge, LA 70801<br><br><b>Traci L. Lovitt, Esq.</b><br>Jones Day<br>100 High Street, 21 <sup>st</sup> Floor<br>Boston, MA 02110-1781<br><br><b>Honorable John Thomas Marten</b><br>United States District Court<br>United States Courthouse<br>401 North Market Street, Room 232<br>Wichita, KS 67202-2000<br><br><b>Kathryn N. Nester</b><br>Federal Defenders of San Diego, Inc.<br>225 Broadway, Suite 900<br>San Diego, CA 92101 |

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| <p><b>Members, Advisory Committee on Evidence Rules (cont'd)</b></p>   | <p><b>Honorable Edward O'Callaghan</b><br/> Acting Principal Associate Deputy Attorney General<br/> (ex officio)<br/> Office of the Deputy Attorney General<br/> United States Department of Justice<br/> 950 Pennsylvania Avenue, N.W.<br/> Washington DC 20530</p> <p><b>Honorable Thomas D. Schroeder</b><br/> United States District Court<br/> Hiram H. Ward Federal Building and<br/> United States Courthouse<br/> 251 North Main Street, Room 231<br/> Winston Salem, NC 27101-7101</p>  |
| <p><b>Consultant, Advisory Committee on Evidence Rules</b></p> <p><b>Liaison Members, Advisory Committee on Evidence Rules</b></p> | <p><b>Professor Liesa Richter</b><br/> William J. Alley Professor of Law<br/> Thomas P. Hester Presidential Professor<br/> University of Oklahoma School of Law<br/> 300 Timberdell Road<br/> Norman, OK 73019</p> <p><b>Honorable Carolyn B. Kuhl</b> (<i>Standing</i>)<br/> Superior Court of the State of California,<br/> County of Los Angeles<br/> 312 North Spring Street, Department 12<br/> Los Angeles, CA 90012</p> <p><b>Honorable Sara Lioi</b> (<i>Civil</i>)<br/> United States District Court<br/> John F. Seiberling Federal Building and<br/> United States Courthouse<br/> Two South Main Street, Room 526<br/> Akron, OH 44308</p> <p><b>Honorable James C. Dever III</b> (<i>Criminal</i>)<br/> United States District Court<br/> Terry Sanford Federal Building<br/> 310 New Bern Avenue, Room 716<br/> Raleigh, NC 27601-1418</p> |
| <p><b>Secretary, Standing Committee and Rules Committee Chief Counsel</b></p>  | <p><b>Rebecca A. Womeldorf</b><br/> Secretary, Committee on Rules of Practice &amp;<br/> Procedure and Rules Committee Chief Counsel<br/> Thurgood Marshall Federal Judiciary Building<br/> One Columbus Circle, N.E., Room 7-240<br/> Washington, DC 20544<br/> Phone 202-502-1820<br/> Fax 202-502-1755<br/> Rebecca_Womeldorf@ao.uscourts.gov</p>   |

**RULES COMMITTEE LIAISON MEMBERS**

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| <p><b>Liaisons for the Advisory Committee on Appellate Rules</b></p> | <p><b>Judge Frank Mays Hull</b>      <i>(Standing)</i></p><br><p><b>Judge Pamela Pepper</b>      <i>(Bankruptcy)</i></p>   |
| <p><b>Liaison for the Advisory Committee on Bankruptcy Rules</b></p> | <p><b>Judge William J. Kayatta, Jr.</b> <i>(Standing)</i></p>  |
| <p><b>Liaisons for the Advisory Committee on Civil Rules</b></p>     | <p><b>Peter D. Keisler, Esq.</b>      <i>(Standing)</i></p><br><p><b>Judge A. Benjamin Goldgar</b> <i>(Bankruptcy)</i></p>   |
| <p><b>Liaison for the Advisory Committee on Criminal Rules</b></p>   | <p><b>Judge Jesse M. Furman</b>      <i>(Standing)</i></p>   |
| <p><b>Liaisons for the Advisory Committee on Evidence Rules</b></p>  | <p><b>Judge Carolyn B. Kuhl</b>      <i>(Standing)</i></p><br><p><b>Judge Sara Lioi</b>      <i>(Civil)</i></p><br><p><b>Judge James C. Dever III</b>      <i>(Criminal)</i></p> |

**ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS**

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| <p><b>Rebecca A. Womeldorf</b><br/>Chief Counsel<br/>Rules Committee Staff – Office of General Counsel<br/>Administrative Office of the U.S. Courts<br/>Thurgood Marshall Federal Judiciary Building<br/>One Columbus Circle, N.E., Room 7-300<br/>Washington, DC 20544<br/>Phone: 202-502-1820<br/>rebecca_womeldorf@ao.uscourts.gov</p> |   |
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| <p><b>Julie Wilson</b><br/>Counsel (<i>Civil / Criminal / Standing</i>)<br/>Phone: 202-502-3678<br/>Julie_Wilson@ao.uscourts.gov</p>  |   |

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# TAB 1C

**Advisory Committee on Evidence Rules**  
Minutes of the Meeting of October 19, 2018  
University of Denver Sturm College of Law  
Denver, Colorado

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 19, 2018 at the University of Denver, Sturm College of Law in Denver, Colorado.

*The following members of the Committee were present:*

Hon. Debra A. 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.  
Kathryn N. Nester, 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 (by phone)  
Hon. Sara Lioi, Liaison from the Civil Rules Committee (by phone)  
Hon. James C. Dever III, Liaison from the Criminal Rules Committee  
Hon. James O. Browning

Professor Daniel R. Coquillette, Reporter to the Standing Committee (by phone)  
Professor Catherine T. Struve, Associate Reporter to the Standing Committee (by phone)  
Professor Daniel J. Capra, Reporter to the Committee  
Professor Liesa L. Richter, Academic Consultant to the Committee

Dr. Timothy Lau, Esq., Federal Judicial Center  
Dr. Tim Reagan, Esq., Federal Judicial Center  
Paul Shechtman, Esq.  
Eric G. Lasker, Esq.  
Aimee H. Wagstaff, Esq.  
Professor Christopher B. Mueller  
Ted Hunt, Esq., Department of Justice  
Kira Antell, Esq., Department of Justice

Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel  
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure

## **I. Opening Business**

### ***Announcements***

The Chair opened the meeting by welcoming Kathy Nester, Federal Public Defender for the District of Utah, to the Committee. Judge Livingston noted Kathy Nester's many notable professional accomplishments, including her involvement in important public service and in trying over fifty jury trials. Thereafter, the Committee welcomed Kathy with a round of applause.

The Chair expressed the appreciation of the Committee to Sturm College of Law for hosting the Committee's roundtable discussion (discussed below) and Committee meeting.

### ***Approval of Minutes***

A motion was made to approve the minutes of the April 26-27, 2018 Advisory Committee meeting at the Thurgood Marshall Building in Washington D.C. The motion was seconded and approved by the full Committee.

### ***Standing Committee Meeting***

The Chair reported on the June 2018 meeting of the Standing Committee. She explained that the proposed amendments to Federal Rules of Evidence 404(b) and 807 are both on track. The Standing Committee unanimously approved the proposed amendment to Federal Rule of Evidence 404(b) for publication and approved Rule 807 for transmission to the Judicial Conference.

### ***Roundtable Discussion***

The Chair expressed appreciation to the participants in the roundtable discussion that preceded the Committee meeting. The Committee invited a number of judges, practitioners, and professors to discuss the Committee's agenda items --- possible changes to Rule 702, 106, and 615. The Chair noted that the roundtable discussion raised a number of issues and considerations that would inform the Committee in dealing with these rules.

The roundtable discussion was transcribed and will appear in the Fordham Law Review.

## **II. Potential Amendments to Rule 702**

The Committee is considering two possible amendments to Rule 702. The first is to add language that would prohibit an expert from overstating conclusions. This proposal is primarily prompted by the Committee's consideration of forensic evidence and past instances in which forensic experts have, for example, testified to providing a "scientific" opinion or to an opinion

that is “error-free,” when the methodology employed does not justify that conclusion. The change would apply to all experts however, as the problem of overstatement could apply to any expert testimony. The second change being considered is to clarify, in the text of the rule, that questions of sufficiency of basis and application are questions of admissibility to be decided by the judge under Rule 104(a) --- meaning by a preponderance of the evidence.

The Chair opened the discussion of Rule 702 by commenting on the interesting and constructive discussion of issues surrounding Rule 702 during the roundtable discussion that preceded the meeting. She stated that she was interested in hearing the reactions of the Committee members to the discussion and suggested that the Committee identify any additional work that the Subcommittee on Rule 702 could perform in anticipation of the Committee’s spring meeting.

The Chair commented that there is strong interest in the possibility of amendments to Rule 702, noting that the Lawyers for Civil Justice had already submitted a letter in support of a textual addition of the Rule 104(a) standard, even though no amendments have yet been formally proposed.

Judge Campbell inquired about the concept of amending Rule 702 to clarify that the requirements of the Rule are admissibility requirements for the trial judge to find by a preponderance before admitting expert testimony. He asked whether a trial judge could utilize inadmissible evidence in determining the admissibility of expert testimony under that standard. The Reporter responded that a judge could indeed utilize inadmissible evidence in finding the Rule 702 requirements satisfied, because under Rule 104(a) the judge is not bound by rules of admissibility (other than privilege) in deciding whether challenged evidence is admissible. Judge Campbell asked whether it would make sense to include that point in an Advisory Committee note in the event that a Rule 702 amendment expressly requiring a finding by a preponderance were proposed. The Reporter agreed that it would be a good idea to include such a clarification in a Committee note.

Another Committee member commented on the roundtable discussion of Rule 702, remarking that he had previously been in favor of amending Rule 702 to correct the courts that are misapplying it by treating its requirements as ones of weight for the jury, and that hypotheticals posed by Judge Campbell during the roundtable discussion concerning the proper inquiry for a trial judge assessing the admissibility of expert testimony --- and the ensuing debate surrounding those hypotheticals --- had convinced him that the Committee might need to act to guide the courts in this area. The Committee member then inquired whether an amendment to Rule 702 directed at preventing experts from overstating their conclusions could also serve to cure the existing problems with the Rule 104(a) preponderance standard by way of an addition to the Committee Note. The Committee member suggested that the two issues were sufficiently related, because both dealt with concerns that expert testimony be valid, reliable, and sufficiently grounded in facts or data. The Reporter explained that Judge Schroeder, the Chair of the Rule 702 Subcommittee, had made the same suggestion before the meeting, and in response the Reporter had prepared a proposal that would amend the language of Rule 702 to prohibit overstatement, but that would offer additional guidance regarding application of the Rule 104(a) preponderance standard in the Committee Note. The Reporter handed out the proposal and stated that it would be further developed at the next meeting.

The Chair commented that both of the potential changes to Rule 702 – a change to clarify the application of the Rule 104(a) preponderance standard and one to prohibit overstatement of expert conclusions – would be designed to serve a signaling function for trial judges and lawyers. She remarked that either change could send a strong signal and that making both changes could have a significant impact. She cautioned that there would need to be a compelling case for making both changes at once. A Committee member commented that the trial judges participating in the roundtable discussion did not seem to favor amendments to Rule 702, while the practicing lawyers seemed more interested in amendments. Another Committee member agreed, noting that the trial judges seemed concerned that an amendment to Rule 702 might signal more change than is intended and that judges seemed more interested in education about admitting expert testimony than in a rule change.

Assuming that the two potential amendments to Rule 702 should be viewed as alternatives, the Chair then inquired which of the two appeared to the Committee to be most helpful. The Reporter suggested that adding the prohibition on overstatement to the language of Rule 702 would be the more meaningful of the two potential amendments given that the Rule 104(a) standard already applies to Rule 702. He noted that the Committee Note could be used to clarify and emphasize the intended operation of Rule 104(a), in addition to explaining the reasons for the overstatement amendment. The Chair agreed, noting that academics are at least in agreement that Rule 104(a) governs the *Daubert* inquiry, while the regulation of expert overstatement is less clear under the existing rule.

The Chair then explored the impact of an amendment that would prohibit expert overstatement on the testimony of forensic experts in criminal cases. She inquired whether such an amendment would prevent forensic experts in disciplines that are not supported by black box testing, whose testimony is routinely admitted under Rule 702 currently, from testifying at all. The Reporter responded that it would not be the intent of an overstatement amendment to exclude those forensic experts. Rather, an overstatement prohibition would be designed to prevent those forensic experts from overpromising and would require accurate testimony as to the limits of their opinions or conclusions. He noted that an overstatement amendment could be phrased in the negative to caution that experts “may not overstate” their conclusions or in the affirmative to require “accurate statements” concerning their results. The Chair then noted that the Department of Justice had already taken steps to correct the problem of overstatement through recent testimonial guidelines and queried what exactly these forensic experts would be permitted to testify to under an amended standard. The DOJ representative to the Committee stated that she was concerned about the vague meaning of “overstatement” in a potential amendment that could generate litigation. Again, the Reporter explained that an overstatement amendment would be designed to curb experts’ tendencies to overpromise. He cited examples of expert testimony regarding cell phone location data, explaining that such experts should be permitted to testify concerning the general location of a cell phone, but should not be allowed to opine as to an individual’s “precise location” based on cell phone location data because the underlying technology cannot at this time reveal precise locations. Basically, an expert should not be permitted to claim that their expertise shows more than it does. That said, the Reporter noted that it is a reality with any new rule that there will be some need for courts to interpret new language. With a well-drafted Committee Note, the Reporter explained that he did not anticipate rampant and costly litigation over an overstatement limitation.

Another Committee member remarked that limiting language in the proposed overstatement amendment would help to clarify the meaning of the amendment and would make it plain that the trial judge need not agree with an expert to admit her testimony, but must ensure that the expert's testimony is within the realm of reasonable inferences the expert can draw from her methodology. In particular, the potential amendment would prevent an expert from overstating "the conclusions that may reasonably be drawn from the principles and methods used." Judge Campbell asked whether there was terminology for an amendment that might capture the intent better than the word "overstatement." The Reporter noted that the concept of "overstatement" was derived from the PCAST report, but agreed that other language might be effective. Judge Campbell explored the possibility of prohibiting an expert from "exceeding the scope" of his basis. Alternatively, Judge Campbell suggested an amendment to Rule 702 that would provide that an expert may "not state conclusions that cannot reasonably be drawn from the principles and methods used" by the expert. Judge Campbell stated that a trial judge should be applying *Daubert* and evaluating an expert's basis rather than parsing the words chosen by each expert or regulating the vehemence with which an expert expresses conclusions.

Another Committee member noted that the concern over experts using the "reasonable degree of certainty" language could be addressed through Judge Campbell's efforts to avoid having trial judges parse the precise language expert witnesses may use in testifying. Judge Schroeder also noted that the amendment might want to reference the expert's "opinion" rather than the expert's "conclusions" because the existing language of Rule 702 deals with "opinions" rather than "conclusions." The Reporter noted that these suggestions were helpful and promised to incorporate the possible alternative language discussed into the agenda materials concerning Rule 702 for the Spring meeting.

The Committee agreed to continue, at the next meeting, its consideration of amendments to Rule 702 that would 1) prohibit experts from stating an opinion that goes beyond what is supported by the expert's data and methodology, and 2) clarify that the trial judge must find the Rule 702 requirements satisfied by a preponderance of the evidence.

### **III. Federal Rule of Evidence 106**

The Committee next turned its attention to potential amendments to Federal Rule of Evidence 106. In particular, the Committee has been considering the possibility of amending Rule 106 to provide 1) that statements necessary to correct a misleading partial presentation may be admitted even if they would otherwise be inadmissible hearsay and 2) that Rule 106 would cover oral as well as written or recorded statements.

The Federal Public Defender noted that the rule of completion comes up in many criminal cases, in large part as a result of the new technology that the FBI uses to capture conversations. The Chair inquired whether the completion of unrecorded oral statements was ever an issue. The Federal Public Defender noted that she could recall one instance in which her client had made several oral statements in the back of a police cruiser and that the government had tried to admit only part of the statements and she had successfully argued that the entirety of his statements be

admitted under Rule 106. She noted that there was no dispute in that case about the content of the defendant's oral statements, however. That last comment was in response to the extensive discussion among the roundtable participants about how the court should proceed if the proponent denies that the opponent ever made a completing statement.

The Reporter noted that most federal courts, and many state courts, currently permit the completion of partial oral statements under Rule 611(a) and that there does not appear to be a problem with proof of those oral statements or significant disputes regarding their content. Should a dispute about the content of an oral statement arise, the Reporter noted that a trial judge can use Rule 403 to reject completion with a disputed oral statement as too time consuming and not worth the delay and confusion. He stated that an amendment to extend Rule 106 to oral statements would not change the law in the six circuits that already permit it.

Another Committee member inquired whether Rule 403 was sufficient, without any amendment to Rule 106, to deal with potential unfairness caused by partial oral statements. The Reporter stated Rule 403 is a rule of exclusion, so it could not be used directly to require the admission of a remainder of a statement. The trial court could, perhaps, tell the proponent that the initial portion will be excluded under Rule 403 (as misleading) unless the proponent agrees to the admission of the remainder. But even in that case, the court would have to find that the probative value of the initial portion is *substantially* outweighed by its prejudicial effect. The Reporter concluded that the far more direct result was to allow the completing remainder to be admissible under Rule 106, even over a hearsay objection.

Returning to the questions regarding oral statements, the Chair noted that the legislative history of Rule 106 suggests that the original Advisory Committee decided to limit the Rule to written and recorded statements only due to "practical problems" inherent in including oral statements. The Chair expressed an interest in understanding more about the debate surrounding the original decision to limit Rule 106 to written and recorded statements before proceeding with a proposal to extend the Rule to oral statements. The Reporter stated that the Rules Clerk offered to research this question of legislative history and would present his findings in the agenda book for the next meeting.

The DOJ representative inquired whether the Federal Public Defender usually succeeded in admitting completing portions of a defendant's statements at trial. The Federal Public Defender responded that judges usually allow completing statements when fairness so requires, but noted that disputes about the timing of the originally admitted statement and the completing statement are common. She noted that prosecutors typically argue that completion should be limited to statements made within one or two sentences of the original statement, while defense counsel take a more expansive approach to completion with statements made at the same time (even if not within one or two sentences of the originally introduced statement).

The DOJ representative argued that the threshold requirement for completion should be that the introduction of the original partial statement is truly misleading. The Reporter stated that one possible amendment alternative, included in the agenda book, would be to add the term "misleading" to the language of Rule 106 to ensure that completion is only required where the original presentation is indeed distorting or misleading --- and that corresponding language could

be added to state that completion would be required if the statement corrected the initial misimpression. The Federal Public Defender asked why a new “misleading” limitation would need to be added to the Rule. The DOJ representative responded that the justification for amending Rule 106 to overcome a hearsay objection is that the circumstances in which completion is necessary are very narrow and truly rare. The DOJ experience is that courts are not limiting completion to truly misleading circumstances and that trial courts take a much more expansive view of when a defendant may admit completing statements. Adding a “misleading” limitation to an amended Rule 106 would thus restore equilibrium and ensure that the Committee’s narrow intent with respect to the amendment would be implemented. She noted that the DOJ will oppose any attempt to extend Rule 106 to allow completion of oral statements --- even though oral statements are currently allowed for completion in many federal courts.

The Reporter noted that because many circuits already allow completion of oral statements through Rule 611(a), it would be difficult for the Committee to resolve the conflict in the circuits concerning the admissibility of hearsay to complete without also resolving the circuit split regarding oral statements. This is especially so because a number of courts simply prohibit completion with oral statements, and an absolute distinction between oral and written or recorded statements for completion purposes makes no sense.

A trial judge remarked that completion questions often arise in the context of wiretaps or recorded jail telephone calls and that he has never encountered the issue of completion with respect to oral statements. Still, the Reporter noted that the Committee should resolve the issue of oral statements one way or the other in an amendment proposal. Another Committee member asked whether Rule 807 could be used to admit completing portions of statements that would otherwise be hearsay in place of amending Rule 106 to provide for a limited hearsay exception. The Reporter noted that completing statements are most often made by criminal defendants and that the completing portion omitted by the government’s original presentation is typically self-serving for the defendant. In that context, it is highly unlikely that the trustworthiness requirement of Rule 807 would be satisfied with respect to the completing portion of the statement.

The Chair noted that she had always understood that a statement need not be admitted for its truth in order to complete a partial statement or to correct a misimpression because the completing portion could be admitted for its nonhearsay purpose of providing needed context. The Reporter replied that even if “context” were a solution (and it is not in many courts) it would not be a fair outcome. If the completing portion were allowed only for context, the party benefitting from the completion could not argue the truth of the completing statement during closing arguments, meaning that the party that introduced the original misleading partial statement would retain an advantage in being able to argue the truth of the misleading portion of the statement. Because the party who offers a misleading statement is committing a wrong, the Reporter argued that it is unfair to allow that party to benefit from its own wrong. The Federal Public Defender commented that if the prosecution opened the door to the statement with a misleading presentation, the defense should be able to use the portion necessary to complete that statement for its truth as well. The Reporter queried why completion shouldn’t truly level the playing field between the parties with respect to the statements, by permitting arguments that both are true.

Another Committee member agreed with the Chair that a completing statement could be admitted for context only and need not be taken as true to perform its completing function of placing the original statement in context. That Committee member suggested that Rule 106 should not overrule a hearsay objection to a defendant's admission of a completing statement. Rule 106 could allow the completing portion of the statement to be admitted for its nonhearsay purpose of showing context only and a defendant could choose to testify if he or she wished to offer a self-serving statement for its truth. But others argued that a completing statement is useful for "context" only if it is true. Another Committee member observed that a criminal defendant cannot be required to testify and certainly wouldn't testify to a statement to show context only; nor should the criminal defendant have to risk impeachment by testifying to correct a misimpression that was created by the government. The Reporter questioned whether admitting a completing statement for its nonhearsay purpose in proving context only was adequate to level the playing field, raised concerns about the limiting instruction that would have to accompany a completing statement admissible only for its nonhearsay purpose, and posed other problems for a criminal defendant wanting to testify to his own self-serving statements (including that they would be excluded as prior consistent statements).

The Department of Justice representative queried whether it would be fair to admit a completing self-serving statement for its truth given that the prosecution would have no right to cross-examine the defendant declarant to determine whether the self-serving portion of the statement was a lie. The Reporter acknowledged the prosecution's inability to cross-examine the defendant, but suggested that the prosecution waives its right to object to the defendant's completing hearsay statement if it introduced a misleading portion of the defendant's statement.

The Chair noted that the truly problematic case would be one in which a court found a statement necessary to correct a misleading and incomplete partial presentation of the statement but then excluded it altogether. She suggested that it would seem unlikely that the court and litigants would spend time arguing about the admission of a completing statement for its truth or only for context once a decision was made to admit it. The Reporter noted that in one circuit, the completing portion is admissible for the limited nonhearsay purpose of providing context, but that others allow the completing portion to be admitted for its truth, while others hold that the Rule cannot overcome a hearsay objection. He concluded therefore that an amendment to allow a completing statement to be admitted for context only would change the law in every circuit but one.

Even if the Committee determined that Rule 106 should be amended to eliminate a hearsay objection to a completing statement, one Committee member noted that the scope of such an amendment would still need to be determined. The Committee could propose an amendment that would allow the statement to be admitted over a "hearsay objection" specifically or it could propose a more generic amendment that would allow completion with a statement even when it is "otherwise inadmissible." The Committee member noted that the latter amendment would be broader and might allow completion over objections other than hearsay. That Committee member expressed concern about the unintended consequences of the broader amendment that would defeat any and all objections to a completing statement offered under Rule 106, and expressed a preference for a narrower amendment tailored to a hearsay objection only. The Reporter noted that it is a hearsay objection that is currently used to defeat completion and that a narrower

amendment limited to hearsay objections would focus courts on the precise problem that created the need for a change.

Another Committee member reiterated that it would be important to limit Rule 106 to circumstances in which the original partial presentation of the statement was specifically “misleading” if Rule 106 were amended to create a hearsay exception. He suggested that the use of the word “fairness” in current Rule 106 might not be adequate to capture the intent of the Rule if it were amended to provide a hearsay exception. In particular, a party should not be able to argue that it is simply “unfair” that the hearsay rule prevents his presentation of some out of court statements to gain admission under Rule 106. Only if a party’s opponent has presented a partial statement in a misleading way that demands correction should the Rule 106 hearsay exception apply. The Reporter agreed that the term “misleading” better captures the concerns Rule 106 is designed to remedy. The Federal Public Defender suggested that if a defendant gave one version of events on one occasion and another version at some other time, she would still argue that it is “misleading” to introduce only of the two statements even though they were made at different times. The Chair noted that an amendment that would allow introduction of any other statements made at other times would expand Rule 106 and the current caselaw significantly. The Federal Public Defender responded that defense lawyers would interpret the term “misleading” more broadly than prosecutors would.

Another participant queried whether it would make sense to leave Rule 106 alone and to add a hearsay exception to Rule 803 to deal with completing statements. He noted the hearsay objection is the primary concern under the current Rules and that placing the remedy in a hearsay provision could make more sense and would focus judges more closely on the hearsay issue. The Reporter noted that Rule 802 precludes the admission of hearsay unless “these rules” (meaning the Evidence Rules as a whole) provide otherwise, such that an amendment to overcome a hearsay objection to completing statements does not have to appear in Article Eight of the Rules and could be placed in Rule 106. Still, he promised to discuss the possibility of incorporating an amendment into Rule 803 in the memorandum for the next meeting.

Another Committee member remarked that the issue of completion is most commonly litigated in the context of a criminal defendant’s recorded confession. He noted that a defendant may deny involvement in the alleged crime for the first couple hours of recorded conversations only to confess in the latter part of the recording. The Committee member opined that the prosecution will want to admit only the later inculpatory portion of the recorded statement while the defense will want to put in the whole thing. A hearsay objection would suffice to exclude the early self-serving portion of such a recorded confession under existing law and any amendment that would change that result and allow the entire recording to be admitted would have a significant impact on criminal cases every day. Judge Campbell suggested that perhaps an amendment could be drafted to guard against such expansive views of the Rule 106 completion right. In particular, he suggested language that would clarify that a party’s original presentation of a statement or a portion thereof must create a misleading or distorted view of that statement before completion will be permitted. For example, an amended Rule 106 might say: “If a party introduces all or part of a written or recorded statement so as to create a misleading impression about the statement, an adverse party may require the introduction, at that time, of any other part – or any other written or recorded statement by the same person – that corrects the misleading impression.”

The Committee determined that it would continue its consideration of potential amendments to Rule 106 at its Spring meeting. The Reporter promised to report back on potential Rule 106 amendments at the Committee's spring meeting in light of the discussion and proposals raised.

#### **IV. Federal Rule of Evidence 615 and Sequestration of Witnesses**

Judge John Woodcock, a former Committee member, requested that the Committee consider amendments to Rule 615, the rule on sequestering witnesses. He had three concerns, arising from a recent case over which he presided. They were: 1) The rule provides no discretion for a court to deny a motion to sequester; 2) There is no timing requirement in the rule, so it would be possible for a party to make a "midstream" request for exclusion, after some witnesses had already testified; and 3) There should be an explicit exemption from exclusion for expert witnesses, to substitute for the current vague exemption for witnesses who are "essential to presenting the party's claim or defense." These proposed changes were raised at the roundtable discussion, and the Committee obtained valuable information, especially from the participating judges.

At the meeting, the Chair acknowledged that Judge Woodcock had some very valid points about improving its operation. Still, she noted that the current Rule had been drafted to constrain a trial judge by making sequestration mandatory, while preserving some discretion in the exceptions. The mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware about the risk of tailoring trial testimony. The Chair noted how successful the Federal Rules of Evidence have been and cautioned that amendments that make them more complicated and cumbersome could erode their value. She stated that she would want to observe more of a problem in the daily operation of Rule 615 before recommending the proposed amendments to the Rule. Committee members agreed that Rule 615 would not be improved by allowing for court discretion; that the timing problem is not pervasive; and that courts have not had significant problems in applying the "essential" exception to those experts who should be allowed to be present during trial.

The Reporter noted that in researching Judge Woodcock's suggestion he came upon another issue about the application of Rule 615 that has resulted in a conflict among the courts. The issue involves the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or can it extend outside the confines of the courtroom to prevent prospective witnesses from learning about trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts read the rule as it is written. Where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself could be helpful. A Committee member noted that an amendment to address the problem of witnesses learning about testimony outside the courtroom should be drafted simply, to avoid excess verbiage that would complicate Rule 615 and make it difficult to memorize and apply. That Committee member suggested a straightforward amendment providing that a trial judge "must" order witnesses excluded from the courtroom upon request, but providing that a trial judge "may" also order measures to prevent witnesses from learning about trial testimony outside the courtroom, whether from talking with other witnesses or from reading the news. The Reporter noted that changing the

focus of Rule 615 to prevent witnesses from “learning” of the testimony of other witnesses rather than from simply “hearing” the testimony (as has been done in Pennsylvania) could help to extend the policy of sequestration beyond the courtroom.

Another Committee member agreed that a Rule 615 exclusion order should remain mandatory but thought that an order concerning out of court witness communication should be discretionary. As to language, the Committee member pointed out that merely adding the word “learn” to the language of existing Rule 615 (or replacing the word “hear” with the term “learn”) would not adequately cover out of court information because the current version of Rule 615 is tied to “exclusion” from the courtroom only. (So saying that “the court must order the witness excluded so that she cannot hear or learn of other witnesses’ testimony” doesn’t deal with out of court contacts because it only deals with “learning” due to courtroom presence). The Committee member suggested adding a new sentence to Rule 615 that would say something like: “At its discretion, the court may issue further orders to prevent witnesses from learning out of court about the testimony of other witnesses.” Other Committee members agreed that exclusion from the courtroom should remain mandatory, but that measures to prevent witnesses from learning of testimony beyond the courtroom should be discretionary with the trial judge.

The Chair pointed out that an amendment to extend Rule 615 protection outside the courtroom may be consistent with the Committee’s ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increasing witness access to information about testimony through news, social media, or daily transcripts. The Committee agreed to consider a potential amendment to Rule 615 to deal with the issue of witnesses learning about testimony outside the courtroom in light of these concerns, and the conflict in the courts, at the Spring meeting. The Committee agreed not to proceed with any other amendments to Rule 615.

The Federal Public Defender reported that trial judges sometimes refuse to issue orders preventing a witness from conferring with their own counsel during a recess when a break is taken in the middle of a cross-examination. She suggested that the principle of sequestration is the one invoked by the courts in the case law preventing consultation with counsel midstream during an examination, but that this protection is not express on the face of the Rule. Therefore, she suggested that the Committee consider also amending Rule 615 to make express a prohibition on a witness’s consultation with counsel during a recess taken in the midst of an examination. The Reporter questioned whether the issue of conferring with counsel is a Rule 615 issue directed at protecting witnesses from hearing the testimony of other witnesses. He suggested that this concern about witness coaching during an examination was not a Rule 615 concern and that an amendment directed to that issue would not belong in Rule 615. Another Committee member suggested that it would be a Rule 615 problem for a lawyer to convey the content of another witness’s testimony to a trial witness, but that general coaching did not seem to be within the Rule 615 protections.

## **V. A Roadmap Rule for Impeachment**

The Reporter next raised the possibility of adding a new Evidence Rule to Article Six to cover methods of impeachment, such as bias, sensory perception, and contradiction, that are not covered by the Federal Rules. He noted that Professor Lynn McLain of the University of Baltimore School

of Law had done a significant amount of work to add such a provision as Rule 616 of the Maryland Evidence Rules and that the Maryland Rule provided a roadmap on impeachment and rehabilitation of witnesses. The Reporter emphasized that the Committee would have to ensure that any such rule comported with all of the federal case law regarding impeachment and rehabilitation, and opined that if such a rule would be adopted it might be preferable to add it to Rule 607 of the Federal Rules as a roadmap at the beginning of the provisions regarding impeachment. All that said, he inquired whether the Committee had any interest in proceeding with a roadmap impeachment provision as essentially a good housekeeping matter.

One Committee member suggested that the Maryland provision was a bit cumbersome, reading more like a benchbook than a rule of evidence. Another participant agreed that the roadmap rule seemed like a table of contents and expressed concern about drafting a provision that would not conflict with any of the existing tenets of impeachment in these areas. After further discussion, the Committee determined that it would not proceed with an impeachment roadmap rule.

## **VI. Rule 404(b) Public Comment**

The Reporter reminded the Committee that the proposed amendment to Rule 404(b) had been published for public comment. He further noted that there are public hearings scheduled in January with respect to the proposal and that the public comment period would close in February, 2019. He informed the Committee that it had received two pertinent comments concerning the Rule 404(b) proposal to date: 1) a suggestion from a member of the public to include a reference to a continuance or other protective measures in the event of late notice for good cause (as was done in the recent proposal to amend Rule 807) and 2) a suggestion from a Standing Committee member to eliminate the term “propensity” in the proposed amendment in favor of the term “character” currently used in existing Rule 404(b)(1).

With respect to the first suggestion, the Reporter noted that there may be an argument for including a reference to a continuance or other protective measures in the text of the proposed amendment to Rule 404(b) to align the amendment with the recent proposal to amend Rule 807. On the other hand, he explained that Rule 404(b) already has a good cause exception to the existing notice requirement and that there is case law surrounding that good cause exemption and protective measures necessary in the event of late notice (making a rule change in the Rule 404(b) context unnecessary). Rule 807 had no good cause exception to its notice requirement and the proposed amendment is introducing one for the first time. In that different context, it may make sense to include more direction regarding protective measures, including continuances, than it does in the Rule 404(b) context. However, the Reporter suggested that the Committee might consider adding to the Note the same provision regarding continuances that was placed in the Note to Rule 807.

As to the suggestion to change the word “propensity” to the term “character,” the Reporter noted that the term “propensity” came from the Seventh Circuit’s decision in the *Gomez* case that led to the consideration of Rule 404(b), but that a change to the term “character” may make sense in order to keep the language consistent throughout the Rule.

The Committee will discuss the public comment received and any potential alterations to the proposed amendment to Rule 404(b) as a result of those comments at the spring meeting.

## **VII. Closing Matters**

The Chair thanked the Reporter for the excellent work in putting together the agenda materials, thanked Judge Schroeder and the Subcommittee on Rule 702 for their efforts, and the entire Committee for the very constructive exchange. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra  
Liesa L. Richter

# TAB 1D

**Effective (no earlier than) December 1, 2020**

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

REA History: approved by Standing Committee for publication (unless otherwise noted, 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. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts." |                                   |

Revised March 2019

# TAB 1E

**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

Meeting of January 3, 2019 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee” or “Committee”) held its winter meeting in Phoenix, Arizona, on January 3, 2019. The following members participated in the meeting:

Judge David G. Campbell, Chair  
Judge Jesse M. Furman  
Daniel C. Girard, Esq.  
Robert J. Giuffra, Jr., Esq.  
Judge Susan P. Graber  
Judge Frank Mays Hull  
Judge William Kayatta, Jr.

Peter D. Keisler, Esq.  
Professor William K. Kelley  
Judge Carolyn B. Kuhl  
Judge Amy St. Eve (by telephone)  
Elizabeth J. Shapiro, Esq.<sup>1</sup>  
Judge Srikanth Srinivasan

The following attended on behalf of the Advisory Committees:

*Advisory Committee on Appellate Rules*

Judge Michael A. Chagares, Chair  
Professor Edward Hartnett, Reporter

*Advisory Committee on Bankruptcy Rules*

Judge Dennis R. Dow, Chair  
Professor S. Elizabeth Gibson, Reporter  
Professor Laura Bartell, Associate 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 Civil Rules*

Judge John D. Bates, Chair  
Professor Edward H. Cooper, Reporter  
Professor Richard L. Marcus, Associate Reporter

*Advisory Committee on Evidence Rules*

Judge Debra Ann Livingston, Chair  
Professor Daniel J. Capra, Reporter

Providing support to the Committee were:

Professor Catherine T. Struve (by telephone)  
Reporter, Standing Committee  
Rebecca A. Womeldorf  
Secretary, Standing Committee  
Professor Daniel R. Coquillette  
Consultant, Standing Committee  
Professor Bryan A. Garner  
Style Consultant, Standing Committee  
Professor Joseph Kimble  
Style Consultant, Standing Committee  
Ahmad Al Dajani  
Law Clerk, Standing Committee

*Rules Committee Staff*

Bridget Healy (by telephone)  
Scott Myers  
Julie Wilson

*Federal Judicial Center*

John S. Cooke, Director  
Dr. Tim Reagan, Senior Research Associate

<sup>1</sup> 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.

## OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. He recognized the newest member of the Standing Committee, Judge William J. Kayatta, Jr., who sits on the U.S. Court of Appeals for the First Circuit. An attorney for many years in Maine, Judge Kayatta served in various capacities with the Maine Bar and the American Bar Association. Judge Campbell next welcomed Judge Kent A. Jordan, a new member of the Advisory Committee on Civil Rules who sits on the U.S. Court of Appeals for the Third Circuit.

Judge Campbell also recognized participants who are serving in new capacities including: Judge Dennis Dow – who began his tenure as Chair of the Advisory Committee on Bankruptcy Rules last October; Director John Cooke – who recently replaced Judge Fogel as Director of the Federal Judicial Center (FJC); and Professor Catherine Struve, who became the Standing Committee’s Reporter as of the first of the year. Judge Campbell thanked Professor Dan Coquillette for his service as Reporter and announced that Professor Coquillette would continue to serve the Standing Committee in a consulting capacity. He presented a framed certificate of appreciation to Professor Coquillette on behalf of the Judicial Conference of the United States and signed by the Chief Justice.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process. The chart includes three-and-a-half pages of rules that went into effect on December 1, 2018. Also included are changes (to the Appellate and Bankruptcy Rules) that continue the rules committees’ joint project of accommodating electronic filing and service. The Judicial Conference approved these rules in September 2018 and transmitted them to the Supreme Court the following month. The Court will consider the package and transmit any approved rules to Congress no later than May 1, 2019. Provided Congress takes no action, these rules will go into effect on December 1, 2019.

## APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 12, 2018 meeting.**

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 26, 2018, in Washington, DC. The Advisory Committee presented five information items.

### *Information Items*

*Rules 35 & 40 – Petitions for Panel and En Banc Rehearing, and Initial Hearing En Banc.* At the June 2019 Standing Committee meeting, the Advisory Committee plans to seek the Standing Committee’s final approval to amend Rules 35 and 40. These amendments, which concern length

limits applicable to responses to a petition for rehearing, are currently published for public comment.

The Advisory Committee is also considering additional changes to Rules 35 and 40 aimed at reconciling discrepancies between the two rules. These discrepancies trace back to a time when parties could petition for panel rehearing but only “suggest” rehearing en banc. The Advisory Committee has identified three possible approaches that further revisions might take. One approach would be to align Rules 35 and 40 more closely with each other. A second approach would use Rule 21 (extraordinary writs) as a model for revising both Rules 35 and 40. A third approach would be to consolidate the provisions governing both types of rehearing (panel and en banc) in a revised Rule 40, leaving revised Rule 35 to cover only initial hearing en banc.

*Rule 3 – Notices of Appeal and the Merger Rule.* At the next Standing Committee meeting, the Advisory Committee will seek approval to publish amendments to Rule 3 for public comment. These amendments would address the relationship between the contents of the notice of appeal and the scope of the appeal. The Advisory Committee’s research revealed that when a notice of appeal from a final judgment also designates a specific interlocutory order, some courts (invoking the “*expressio unius*” canon) take the view that the additional specification limits the scope of appellate review to the designated interlocutory order.

Judge Chagares explained how the proposed amendments would address this issue. First, because the merger rule provides that interlocutory orders become appealable once they merge into a final judgment, adding the term “appealable” to Rule 3(c)(1)(B) would indicate that a party need only specify the judgment or order that grants an appellate court jurisdiction over the matter. Second, the amendments would add two rules of construction for notices of appeal. The first rule of construction rejects the *expressio unius* approach that some courts use to limit the scope of appellate review. The second clarifies, for purposes of civil appeals, that courts should construe a notice designating an order resolving all remaining claims as designating the final judgment, whether or not the final judgment is set out in a separate document.

Judge Chagares asked members of the Standing Committee for their views on two issues: whether the text of Rule 3 should explicitly discuss the merger rule, and whether removing the phrase “part thereof” from Rule 3(c)(1)(B) would help to avoid encouraging undue specificity in notices of appeal.

A judge member asked whether framing the proposals as rules of construction undermines their binding effect. Why say that additional specificity in the notice “must not be construed to limit” the notice’s scope rather than simply saying that such specificity “does not limit” the notice’s scope? Another participant asked whether such phrasing would remove an appellant’s ability to intentionally limit the scope of the appeal. Professor Hartnett agreed that the goal is not to foreclose intentional limitations, but rather to protect an appellant from *unintentionally* limiting the appeal’s scope through the inclusion of superfluous detail in the notice.

A judge member stated that courts should interpret the notice of appeal so as to bring up for review as much as possible; the parties’ appellate briefing suffices to narrow the issues. A different member noted that allowing appellants to curtail their appeal in the notice can conserve

resources for the parties because it alerts the opposing party to the narrowed scope of the appeal. The member expressed support for a rule change to displace the *expressio unius* approach, and also suggested that framing the amendments as rules of construction would leave an appellant with the option to limit the notice's scope if the appellant desires.

The same member asked whether the Advisory Committee considered citing in the Committee Note the cases that the amendment would overrule. Professor Coquillette noted that citing cases in a Committee Note is a risky endeavor because case law continues to develop, and one cannot amend the Committee Note without a corresponding rule change. Sometimes, though, a Committee Note cites cases in order to illustrate the problems that a rule or amendment is addressing. Another judge member asked whether it might be worthwhile to incorporate the merger rule into the Rule 3 text. Judge Chagares explained that the Advisory Committee did not want to risk freezing the merger rule's development by explicitly defining it in rule text.

A style consultant suggested revising the second rule of construction to use "is" rather than "must be construed as." Judge Campbell asked whether the second rule of construction is inconsistent with Civil Rule 58 since it refers to "a designation of the final judgment" even in instances when Civil Rule 58 requires that the judgment be set out in a separate document and this requirement has been disregarded. Professor Cooper said that a court's failure to enter a Civil Rule 58 judgment in a separate document does not defeat finality, and therefore, the clause's directive to treat a reference to an order adjudicating all remaining claims as a reference to the final judgment is not a problem. He also remarked that the phrase "an appealable order" is fraught with the potential for confusion that could create a host of problems, and noted his support for referring to the merger rule without attempting to define it in the rule text. This approach, he suggested, would make clear that the merger rule applies without constraining its development.

Finally, Professor Coquillette reflected on a suggestion to reorder and renumber Rule 3's subparts. He noted that renumbering a rule can raise practical legal research problems which is why the traditional practice has been to maintain the same numbering. Even when abrogating a rule, he observed, the practice is to state that the rule is abrogated rather than remove it and renumber the set. Professor Cooper recalled that, in restyling the Civil Rules, the rule makers made sure to leave untouched the "iconic" subdivision numbers – for example, Civil Rule 12(b)(6) – but Appellate Rule 3's subdivisions, he suggested, were not in that "iconic" category.

*Rule 42(b) – Voluntary Dismissals and Judicial Discretion.* The Advisory Committee is considering whether granting voluntary dismissals should be mandatory under Rule 42(b). Rule 42(b) provides that the clerk "may" dismiss an appeal if the parties file a signed dismissal agreement. Under this formulation, attorneys have noted that they cannot guarantee their clients that the court will dismiss the appeal if the parties file a dismissal agreement. Judge Chagares noted that one argument in favor of mandating dismissals is that prior to restyling, Rule 42(b) stated that the clerk "shall" dismiss the appeal – a term that arguably did not leave the courts any discretion. On the other hand, some have argued that requiring a court to grant a stipulated dismissal when an opinion has already been prepared and is ready for filing would waste judicial resources.

A judge member expressed support for making the rule mandatory to provide clarity for the parties. Another judge member stated that it would be improper to allow a court to file an opinion once the dispute is no longer justiciable. But the member distinguished stipulated dismissals that do not require any further action by the court from those that do. Some types of cases – such as Fair Labor Standards Act cases – require court review of settlements. Where an action by the court is needed, such as a remand for the district court to review a proposed settlement, courts should have the discretion to decide whether to take the action proposed in the parties’ agreement. But when no further action (other than dismissing the appeal) is needed, mandatory dismissal is appropriate.

A style consultant noted that the choice between mandatory and permissive terms is a substance issue, not a style issue. Professor Gibson pointed out that in Part VIII of the Bankruptcy Rules – a subset of the Bankruptcy Rules modeled after the Appellate Rules – Bankruptcy Rule 8023 mandates dismissal of an appeal to a district court or bankruptcy appellate panel if the parties file a signed dismissal agreement, specify allocation of costs, and pay any fees.

*Potential Amendment to Rule 36 – Effect of Votes Cast by Former Judges.* Also under consideration is an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk’s office. Judge Chagares noted that a case pending before the Supreme Court raises the issue, and the Advisory Committee will refrain from further action pending resolution of that case.

*Other Matters Under Consideration.* Judge Chagares noted that the Supreme Court’s decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), distinguished time limits imposed by rule from those imposed by statute. The Court characterized time limits set only by court-made rules as non-jurisdictional procedural limits. The Advisory Committee is considering whether this decision raises practical issues for the rules but will refrain from acting on any issues until the Court decides *Nutraceutical Corp. v. Lambert*, No. 17-1094, which asks the Court to address whether Civil Rule 23(f)’s 14-day deadline for filing a petition for permission to appeal is subject to equitable exceptions.

Finally, Judge Chagares noted that the Advisory Committee received a letter from the Committee on Court Administration and Case Management (CACM Committee) requesting that all Rules Committees ensure that the rules provide privacy safeguards in social security and immigration matters. The Advisory Committee concluded that this request did not require action to amend the Appellate Rules.

## **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 13, 2018, in Washington, DC. The Advisory Committee sought approval of one action item and presented two information items.

### *Action Item*

*Restyling the Federal Rules of Bankruptcy Procedure.* Professor Bartell reported the results of a spring 2018 survey that was both posted on the internet and sent to judges, court clerks, and stakeholder organizations. The survey responses revealed widespread support for restyling the Federal Rules of Bankruptcy Procedure to make them clearer and easier to understand. The Advisory Committee accordingly sought the Standing Committee's approval to begin the restyling process.

She explained that the unique nature of bankruptcy procedure means that restyling poses a risk of unintended consequences resulting from inadvertent changes to the substance of the rules. As a result, the Advisory Committee recommended that the restyling process go forward on the condition that the Advisory Committee, not the Style Consultants, retains final authority to recommend any modifications to the Standing Committee for final approval.

Judge Dow noted that the Advisory Committee, in collaboration with the Style Consultants, drafted a restyling protocol. The protocol outlines the timing, grouping, and phasing of the restyling process, identifies methods for tracking comments and revisions to the rules, and establishes policies to ensure that the style consultants can meaningfully participate in the restyling process.

The protocol also addresses the style consultants' concerns regarding the use of statutory terms. Judge Dow explained that statutory terms are used throughout the rules because the rules are closely tied to the Bankruptcy Code. That said, the Advisory Committee pledged not to reject a proposed change solely because existing language tracked statutory language, unless the change would have an adverse effect on daily bankruptcy practice.

The Style Consultants expressed their satisfaction with the restyling protocol that the Advisory Committee continues to develop. Judge Dow further noted that the Advisory Committee is not seeking the Standing Committee's approval of the draft protocol because it is subject to ongoing revisions.

Judge Campbell expressed his view that the Advisory Committee should have final say on what to recommend to the Standing Committee. He explained that the Standing Committee generally would not overrule the Advisory Committee's recommendations on matters of substance within bankruptcy expertise. That said, Judge Campbell noted that the Standing Committee retains its authority to review, discuss, and modify any recommendations made by the Advisory Committee. Judge Dow agreed with Judge Campbell's views on this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the commencement of the effort to restyle the Federal Rules of Bankruptcy Procedure with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval.**

Judge Campbell mentioned how helpful it had been to obtain the guidance of a number of current and former rulemaking colleagues who had participated in the restyling of other sets of rules. That guidance had stressed, inter alia, the desirability of keeping members of Congress apprised of the restyling project, and had suggested that this would be particularly important with respect to the Bankruptcy Rules. It was noted that, in contrast to the other sets of rules, the Rules Enabling Act framework does not provide that Bankruptcy Rules amendments supersede contrary statutory provisions.

Judge Campbell also suggested that a primer on bankruptcy law for the stylists and members of the Standing Committee might be helpful to the restyling process. A judge member noted that it would be helpful to have the primer before the next meeting at which restyled bankruptcy rules will be considered.

### *Information Items*

*Expansion of Electronic Notice and Service.* Professor Gibson noted that the Advisory Committee has been considering ways to increase the use of electronic notice and service in bankruptcy courts. In addition to adversary proceedings, notice is often required in other aspects of a bankruptcy case, and notice by mail has proven costly for the judicial system as well as the parties. The Advisory Committee is considering ways to reduce costs (while still meeting the requirements of due process) by shifting to electronic noticing and service.

One suggestion from the CACM Committee is to mandate electronic notice for certain high-volume notice recipients. Professor Gibson explained that the Advisory Committee declined to act on an earlier version of this suggestion because the Bankruptcy Code provides some parties with the right to insist upon mail delivery at a particular mailing address. The current CACM Committee suggestion, however, explicitly recognizes that such parties retain the statutory right to opt for delivery at a stated physical address. Accordingly, the Advisory Committee is reexamining the idea and may have a proposal for publication this summer.

*Suggested Amendment to Bankruptcy Official Form 113 – Chapter 13 National Plan.* Another suggestion under consideration concerns instructions provided on the national form for chapter 13 plans. The form currently asks debtors to indicate whether the plan includes certain important provisions using two alternative checkbox answers to three questions on the front page. The instructions state that if the debtor marks the “Not Included” checkbox or marks both “Not Included” and “Included” checkboxes, then the relevant provision will not be effective.

The suggestion points out that the instructions do not address what happens if the debtor marks neither box. Professor Gibson explained that if one of the listed provisions is included in the plan, but the debtor fails to check the box stating that it is included in the plan, then the provision should be ineffective because the blank checkbox failed to alert creditors to the provision’s presence. She noted that while the Advisory Committee agrees with the suggestion, the form is relatively new. The Advisory Committee thus will defer proceeding with the proposed amendment in order to see whether experience under the new form and related rules suggests the need for additional adjustments.

## 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 last met on November 1, 2018, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Multidistrict Litigation (MDL) and Social Security Disability Review subcommittees.

### *Information Items*

*Rule 30(b)(6) – Deposition Notices or Subpoenas Directed to an Organization.* Judge Bates reported that the Advisory Committee received comments regarding its proposed changes to Rule 30(b)(6), and twenty-five witnesses will testify on the matter at a hearing scheduled for January 4, 2019. The subcommittee will hold the hearing at the Sandra Day O'Connor United States Courthouse in Phoenix, Arizona.

Judge Bates noted that most comments focus on proposed language requiring the party taking the deposition and the organization to confer about the identity of the witness(es) the organization will designate to testify on behalf of the corporation. Some submissions raised concerns that this will cause an unwarranted intrusion into the corporation's prerogative to designate who will testify. The Advisory Committee looks forward to hearing further input from stakeholders regarding the matter.

Judge Campbell invited those at the meeting to attend the hearing.

*Rule 73(b)(1) – Consent to Magistrate Judge.* The Advisory Committee's Report details three issues that have been raised about the procedure for consenting to referral for trial before a magistrate judge. One issue – concerning a question of consent by late-added parties – has been set aside. Another issue – relating to the means for obtaining consent after an initial random referral of a case to a magistrate judge – is still being considered. A third issue relates to the lack of anonymity, under the CM/ECF system, concerning consents to trial before a magistrate judge.

Judge Bates explained that the CM/ECF system currently notifies the judge assigned to the case whenever a party files its individual consent. This automatic notification defeats the anonymity provision of Rule 73(b)(1) that allows a district judge or magistrate judge to be informed of a party's consent only if all parties consent. During its April 2019 meeting, the Advisory Committee will review options for preserving anonymity in this process.

*Rule 7.1 –Disclosure Statements.* Also under consideration are changes to Rule 7.1 that would require a non-governmental corporation that seeks to intervene to file a corporate disclosure statement. These changes parallel pending proposals to amend the Appellate and Bankruptcy Rules.

The Advisory Committee is also considering a proposal relating to the disclosure of the names and citizenship of members in a limited liability company (LLC) or similar entity. Judge

Bates explained that the citizenship of LLCs, partnerships, and similar entities depends on the citizenship of their members. As a result, disclosing the citizenship of an entity's members is necessary for determining the existence of a federal court's subject matter jurisdiction in diversity cases. But, Judge Bates noted, in some cases a member of a partnership or LLC is itself a partnership or an LLC. The Advisory Committee is considering the extent to which citizenship disclosures should extend up the chain of ownership in such cases. Judge Bates noted that, in considering whether to propose requiring additional disclosures, the Advisory Committee is taking into consideration the underlying reason for the disclosure. It is important to know whether the goal is to demonstrate the court's subject matter jurisdiction or to provide judges with information necessary to make recusal decisions.

A judge member noted that a rule alerting judges and parties to the necessity of pleading citizenship in diversity cases would be helpful, so long as it accounts for the variation in entity types. Judge Campbell agreed. He noted that standing orders are often used to remind parties pleading diversity jurisdiction that they need to take into consideration the citizenship of members in an LLC or partnership. He also noted that lawyers representing such entities often miss this crucial step.

Judge Bates noted, as well, a third type of disclosure issue that has come to the Advisory Committee's attention. This third issue has to do with third-party litigation funding (TPLF). Here a concern might be that judges need information concerning TPLF in order to know whether they have a recusal issue. Though it is very unlikely that judges would invest in well-known third-party litigation funders, the dynamic nature of the field raises the possibility that a company not known for engaging in such funding might in fact turn out to do so. Judge Bates noted that the Advisory Committee could look into the TPLF disclosure issue or could wait for practice to evolve further.

Judge Campbell suggested that the Advisory Committee might initially train its focus on the question of disclosures relevant to diversity jurisdiction, while also continuing to study TPLF. An inter-committee project on recusal-related disclosures, though, might not be warranted at this time.

*Timing of Final Judgments in Cases Consolidated under Rule 42(a).* Judge Bates said that the Advisory Committee has taken up consideration of the effect of consolidation under Civil Rule 42(a) on final judgment appeal jurisdiction. In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Supreme Court held that an individual case consolidated under Rule 42(a) maintains its independent character, such that a judgment resolving all claims as to all parties in that case is an appealable final judgment, regardless of whether proceedings are ongoing in the other consolidated cases. Chief Justice Roberts, writing for the Court, noted that the appropriate Rules Committees could address any practical problems resulting from this holding.

Professor Cooper noted that the salient rules are Rule 42(a), which provides for consolidation, and Rule 54(b), which governs the entry of a partial final judgment. In considering whether and how to amend these rules in light of *Hall v. Hall*, the goal should be to minimize the risk that parties to a consolidated case might unwittingly forfeit their appeal rights out of confusion as to the effect of the consolidation.

Judge Bates noted that a subcommittee would be formed to consider these matters and that the subcommittee would benefit from the involvement of Judges Jordan and Chagares.

*MDL Subcommittee.* Judge Bates stated that the MDL Subcommittee, chaired by Judge Dow, has consulted various stakeholders and narrowed the subjects on which it will consider possible rulemaking. While some advocate rulemaking to govern MDL proceedings others stress the need to retain judicial flexibility and innovation in this area. The subcommittee has yet to reach any conclusions.

There are six topics under the subcommittee's consideration. These are:

- 1) Early procedures to winnow out unsupportable claims;
- 2) Interlocutory appeals;
- 3) Formation and funding of plaintiffs' steering committees (PSCs);
- 4) Trial issues;
- 5) Settlement promotion and review; and
- 6) TPLF.

1) *Winnowing Unsustainable Claims.* Judge Bates noted that certain laws require companies to report claims made against them, including unsupportable claims made in MDLs. Judge Bates explained that a number of MDL judges currently winnow unsupportable claims by requiring the submission of plaintiff fact sheets. These sheets are specific to the MDL under consideration and lack uniformity. He also noted that using these sheets to eliminate unsupportable claims early in the proceeding is difficult and requires that the court and parties expend substantial time and effort. Other suggestions under consideration include expanded initial disclosure requirements, Rule 11 sanctions, master complaints, requiring each plaintiff in an MDL to pay a filing fee, and/or requiring early consideration of screening tools.

2) *Interlocutory Appellate Review.* Some stakeholders have asked the subcommittee to consider expanding the opportunities for interlocutory appellate review of orders addressing potentially outcome-determinative issues including, but not limited to, preemption and the admissibility of expert testimony under *Daubert*. Judge Bates noted that the scope of this problem is not yet apparent and that the input received by the subcommittee imparts a healthy skepticism regarding this topic.

The subcommittee needs further information to resolve crucial questions including, but not limited to, whether appellate review should be mandatory or discretionary, what role trial courts should have in certifying issues for appellate review, and how to determine which orders will be subject to interlocutory appellate review. If the subcommittee decides to move forward, Judge Bates explained that it would do so in coordination with the Advisory Committee on Appellate Rules.

A judge member expressed support for an interlocutory appeal mechanism, to the extent that the avenue currently provided by 28 U.S.C. § 1292(b) is inadequate. That said, the member opposed expedited review because the timing of appellate decision making is affected by many variables that are difficult to control. One such variable is determining which cases to delay in

exchange for expediting review of an MDL ruling. Judge Bates noted that not expediting the appeal would cause further delay, and that delay impairs the MDL's efficiency and harms the parties. Judge Campbell agreed, stating that each interlocutory appeal in an MDL could take several years to resolve, and that if more than one such appeal occurs they could add up to many years of delay. Another member observed that key rulings may occur at different stages of the litigation; perhaps it would be possible to identify a single time when an interlocutory appeal might bring such rulings up for review. A different member suggested that the parties could brief questions of timing, so as to inform the courts' determinations about the proper balance between the need for appellate review and the risk of delay.

Another member expressed strong support for interlocutory appeals in MDLs, reasoning that, by definition, MDLs are important. Legal issues such as preemption or failure to state a claim can give rise to critical rulings with huge settlement values. The goal, this member suggested, is to reach the right result. And some courts of appeals, he reported, have been known to refuse to take up an issue that the district court has certified for interlocutory review under 28 U.S.C. § 1292(b).

A judge member, citing his experience presiding over an MDL, expressed skepticism that the challenges of MDL management are susceptible to rulemaking reforms. MDL judges, he stressed, need flexibility because every MDL is different. He suggested that sorting issues into dispositive and non-dispositive categories would help the subcommittee determine which issues are suitable for interlocutory appellate review, and he noted that more use could be made of the Section 1292(b) mechanism.

3) *Plaintiff Steering Committees.* A member suggested that the subcommittee should consider providing guidance for the appointment of lead counsel and PSCs. It might be helpful to examine the lead-plaintiff-appointment provisions in the Private Securities Litigation Reform Act (PSLRA). By analogy to the PSLRA's rebuttable presumption in favor of appointing the plaintiff with largest financial interest, he suggested, perhaps there should be a presumption in favor of appointing the lawyer with the largest number of cases in the MDL. The member stated that if the judge appoints too many law firms to the PSC, this may increase the complexity and expense of managing the MDL.

A judge member disagreed with the proposed presumption in favor of appointing to the PSC the lawyer with the largest number of cases; such a presumption, he argued, could exacerbate the problem of unsupported claims. This member said that he would not oppose possible amendments to Civil Rules 16 and/or 26 to require early discussion of screening tools such as plaintiff fact sheets (though he is not sure that such amendments are necessary).

Another judge member suggested that California state-court practice with PSC selection may be instructive. In California, she explained, the plaintiffs' lawyers organize themselves, subject to court approval; this approach relies on the plaintiffs' bar's knowledge concerning which lawyers conduct themselves fairly.

4) *Trial Issues.* Judge Bates noted several trial issues that are currently being considered by the subcommittee. One issue is whether MDL judges should have the authority to require party

witnesses to appear at trial to testify live. Another issue is whether a transferee court should only hold bellwether trials with the consent of all parties.

5) *Settlement Promotion, Review, and Approval.* The subcommittee is also evaluating whether it could provide a structure for courts to review settlements in MDL proceedings. Judge Bates distinguished MDL settlements from class action settlements (which are subject to court review and approval under Civil Rule 23(e)): whereas each plaintiff in an MDL is represented by his or her own counsel and can consult that counsel about a settlement's advisability, that is not the case in a class action. The subcommittee is considering whether any aspects of MDL settlement are suitable topics for rulemaking, or whether other measures, such as updates to the Manual on Complex Litigation, would be more appropriate.

A judge member suggested that an apparent lack of interest from stakeholders does not provide a reason to drop the topic of settlement from the subcommittee's agenda. This member observed that the ALI's Principles of the Law of Aggregate Litigation reflect concern for the lack of voice that individual plaintiffs may have in nonclass aggregate settlements.

6) *TPLF.* TPLF is a growing field with varied subparts. Funders might finance the prosecution of a case by a plaintiffs' firm, might finance individual plaintiffs' claims, or might finance the defense of a lawsuit. Some funding arrangements may raise concerns about who has control over the litigation.

Judge Bates noted that the Advisory Committee is looking at this issue through the MDL prism, though it is not a discrete MDL issue. One approach would be to focus on what disclosures may be necessary for purposes of judges' assessment of recusal issues. A question facing the subcommittee is whether the scope of the disclosure should be limited to the fact of funding and identity of the funder, or should include terms of the finance agreement as well. Another question is whether discovery in this area should be permissible.

Professor Coquillette cautioned that these issues are closely interwoven with the laws regulating lawyers. For example, this past fall the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 484, "A Lawyer's Obligations When Clients Use Companies or Brokers to Finance the Lawyer's Fee." This opinion addresses the financing of individual plaintiffs' claims and explains that when the plaintiff's counsel becomes involved in such financing, a great many of the ABA's Model Rules of Professional Conduct come into play. Professor Coquillette said that the Rules Committees' last foray into areas affecting the rules of professional conduct united every state bar association against them.

*Subcommittee on Social Security Disability Review.* A suggestion from the Administrative Conference of the United States asked the Advisory Committee to create rules governing cases in which an individual seeks district court review of a final decision of the Commissioner of Social Security. A subcommittee, chaired by Judge Lioi, created to address this suggestion has not yet concluded its work. Judge Bates noted that the most significant issues arising in these cases concern considerable administrative delay within the Social Security Administration as well as variation among districts in both local practices and rates of remand. The Social Security

Administration strongly supports the proposal for national rules, while the Department of Justice appears neutral on this topic. Claimants' attorneys generally oppose the idea of national rules, but if such rules are to be adopted they have views on what the rules' content should be. There is a real question whether any proposed rules would reduce the government's staffing burdens. And there is a question whether reducing the government's staffing burdens is an appropriate goal for the rulemakers. Judge Bates further noted that whatever rules the subcommittee might recommend, if any, still need to be considered by the Advisory Committee.

Professor Cooper reported that the subcommittee is approaching consensus on what the rules would look like if they were to be proposed. The subcommittee currently envisions (for discussion purposes) a narrow set of rules focused on pleading, briefing, and timing. There is a lingering tension between two possible models for the pleading rules. One, patterned after the appellate process, would cast the complaint as a limited document with the simplicity of a notice of appeal and would provide that the government's answer is to consist of the administrative record. In this model, further particulars would develop during briefing. The other model would provide for additional detail in both the complaint and the answer. As to briefing, one question is whether the plaintiff should be required to submit a motion for the relief requested in the complaint along with the brief.

A judge member reported that magistrate judges in his district were concerned about a uniform rule because approaches vary depending on the facts and circumstances of the individual case – such as whether the plaintiff has a lawyer or not. These circumstances may affect the judge's approach to (for example) the order and timing of briefing. In this member's view, flexibility is necessary to ensure adequate representation for parties proceeding pro se. Participants observed that there are variations both across and within districts concerning the extent to which these cases are referred to magistrate judges.

Judge Bates noted that the subcommittee is close to reaching a recommendation whether to abandon the effort or move forward. It will continue to include various stakeholders in the process and will ask for feedback and suggestions.

## **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 October 10, 2018, in Nashville, Tennessee. The Advisory Committee presented five information items.

### *Information Items*

*Rule 16 – Expert Disclosures.* The subcommittee, chaired by Judge Kethledge, is currently considering whether Rule 16 should be amended to expand pretrial discovery of expert testimony in criminal cases – a change that would bring Rule 16 closer to the more robust expert discovery requirements in Civil Rule 26. Judge Molloy announced plans for a mini-conference. This conference presents an opportunity for the Rule 16 Subcommittee to receive input from

prosecutors, private practitioners, and federal defenders around the country about whether an amendment is warranted and, if so, what its content should be.

*Task Force on Protecting Cooperators.* Judge Amy St. Eve provided an update on the progress of the task force. The task force's work is complete, and its reports and recommendations were finalized and delivered to Director Duff. These reports recommended practices to be implemented by the Bureau of Prisons (BOP) in ensuring the safety of cooperators. One recommendation asks the government to start tracking whether assaults on prisoners are related to the victim's status as a cooperator. The BOP wishes to avoid collecting this information within correctional institutions, so the information would instead be collected by the DOJ into an anonymized database that would be securely stored within the DOJ.

Another recommendation is that courts should store plea and sentencing documents in separate case subfolders with public access restricted to those physically present at the courthouse. Doing so allows the Clerk of Court to maintain an access log that would be useful in any investigations arising from retaliation against cooperators. Director Duff has referred this recommendation to the CACM Committee.

Judge Molloy noted that there continue to be concerns about the balance between protecting cooperators, on one hand, and government transparency and the public's right to information, on the other.

*Rule 43(a) – Defendant's Presence at Plea and Sentencing.* The Advisory Committee received a suggestion concerning the Rule 43(a) requirement that a defendant be physically present in court at plea and sentencing. In *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), the Seventh Circuit vacated a judgment of conviction due to the district court's decision to conduct the plea and sentencing proceeding with the defendant appearing by videoconference; the defendant's serious health issues made him susceptible to injury from even limited physical contact. The Seventh Circuit determined that Rule 43(a) by its terms permits no exceptions to the requirement of physical presence in the courtroom at sentencing and suggested that "it would be sensible" to amend Rule 43(a). In considering whether to propose an explicit exception in the rule, the Advisory Committee is investigating the frequency with which such extenuating circumstances occur.

*Time for Ruling on Habeas Motions (Suggestion 18-CR-D).* The Advisory Committee received a suggestion to require that judges decide habeas motions within 60-90 days. Judge Molloy explained the Advisory Committee's view that this is more of a systemic problem resulting from the fact that habeas petitions and Section 2255 motions are exempt from the reporting requirements of the Civil Justice Reform Act (CJRA). The Advisory Committee discussed the impact of these delays and decided to refer the suggestion to the CACM Committee to evaluate whether this exemption from the CJRA's reporting requirements should be reconsidered.

*Disclosure of Defendants' Full Name and Date of Birth.* The Advisory Committee received a suggestion to revise applicable rules and the PACER search structure so that users could search PACER using a defendant's full name and/or date of birth. The suggestion argues that providing this search capacity would enable background screening services to perform their

functions accurately and efficiently. A similar suggestion was rejected in 2006, and the Advisory Committee likewise decided not to pursue the current proposal.

## **REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which last met on October 19, 2018, in Denver, Colorado. The Advisory Committee presented four information items.

### *Information Items*

*Rule 702 – Admission of Expert Testimony.* A September 2016 report issued by the President’s Council of Advisors on Science and Technology contained a host of recommendations for federal agencies, DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee’s consideration of changes to Rule 702.

In fall 2017, the Advisory Committee held a conference on Rule 702 and forensic feature-comparison evidence. Subsequently a subcommittee was formed to study what the Advisory Committee might do to address concerns relating to forensic evidence; Judge Schroeder chairs the subcommittee. The subcommittee recommended against attempting to draft a freestanding rule governing forensic expert testimony, because such a rule would overlap problematically with Rule 702. The subcommittee also advised against trying to craft Rule or Note language setting out detailed requirements for forensic evidence, and it concluded that a “best practices manual” could not be issued as a formal product of the Advisory Committee. The Advisory Committee concurred in these assessments, but it will explore judicial education measures to undertake in collaboration with the FJC.

The subcommittee did suggest considering whether to amend Rule 702 to address the problem of expert witnesses overstating their conclusions, and the Advisory Committee is proceeding with that suggestion. A roundtable discussion held during the last Advisory Committee meeting asked for input from practitioners on an amendment that would target the overstatement problem. The debate produced a variety of diverging views among civil and criminal practitioners. As a result, the Advisory Committee is carefully weighing the effects such an amendment would have for expert evidence across the spectrum of legal practice.

Another amendment under consideration would emphasize that Rule 702’s admissibility requirements of sufficient basis and reliable application present Rule 104(a) questions that must be determined by the court using a preponderance standard.

One member raised a concern with the feasibility of creating a rule addressing the accuracy of expert opinion because it would be difficult to craft a rule that would tell experts how to present a test’s error rate. Judge Livingston explained that black-box studies provide an error rate associated with some types of expert evidence. She noted that studies had not considered every aspect of expert evidence, and it would be difficult to determine standards for evaluating expert opinions where the data are murky.

Judge Campbell noted that it is a real challenge to articulate in a rule what constitutes an overstated opinion, and the Advisory Committee is working on fleshing out its definition of the term “overstatement.” Another participant noted that the DOJ has been strongly opposed to such a rule and asked whether the DOJ changed its position. The DOJ’s representative noted that the word “overstatement” was fraught with confusion. She explained that the DOJ is working with the subcommittee to craft a rule addressing this issue. The DOJ is also implementing a set of internal directives, targeting overstatement, that regulate how Department scientists can phrase their opinions when testifying at trial.

Finally, Professor Capra noted that the Advisory Committee is considering several approaches, some of which were suggested by Judge Campbell. One suggestion is to state that experts may not overstate the conclusion that can be drawn from the methodology they employ. Another suggestion is to state that the expert’s conclusion should accurately relate the methods used. Articulating the standard in a rule remains a challenge that the Advisory Committee continues to study.

*Rule 106 – The Rule of Completeness.* Judge Livingston said that the Advisory Committee is considering a suggestion to amend Rule 106 to provide that oral statements, in addition to written or recorded statements, fall within the rule’s scope. Another change would provide that a completing statement is admissible under this Rule notwithstanding hearsay objections. Judge Livingston noted that this is not the first time the Advisory Committee has considered amending Rule 106, and it previously declined to act on a similar suggestion.

She also noted a few additional concerns including that a cure might have the unintended consequence of creating another hearsay exception permitting parties to introduce an out of court statement whenever a party can persuade the court that a statement should, in fairness, be considered given the admission of another statement. Another concern is that an amendment adding oral statements to Rule 106 risks disrupting the presentation of evidence with side litigation on whether a completing oral statement was actually made.

*Proposed Amendment to Rule 404(b) – Bad-Act Evidence.* Professor Capra stated that the Advisory Committee received two comments so far on the proposed amendment to Rule 404(b). The proposed amendment would require that prosecutors in a criminal case provide more notice of their intent to offer bad-act evidence and would require the notice to articulate support for the non-propensity purpose of the evidence. Professor Capra predicted that the Advisory Committee would replace the term ‘non-propensity’ with ‘non-character’ since ‘character’ is used throughout the rule.

*Proposed Amendment to Rule 615 – Excluding Witnesses from Court.* Professor Capra said that the Advisory Committee decided against acting on some suggestions, but other suggestions for amending Rule 615 remain pending. The Advisory Committee decided against acting on a suggestion proposing that the rule provide for judicial discretion in determining whether a witness should be excluded, reasoning that the purpose of exclusion is to prevent witnesses from tailoring their testimony according to what other witnesses testified. Accordingly, the parties are in the best position to determine whether a witness should be excluded. The

Advisory Committee also decided against acting on another suggestion concerning issues of timing and dealing with experts under this rule because case law research did not reveal any significant problems.

In studying these suggestions, however, the Advisory Committee came to consider a few other changes. The original purpose for excluding witnesses from trial was to prevent witnesses from tailoring their testimony according to the testimony of prior witnesses. However, technological developments have made mere exclusion from trial less than completely effective because the testimony of prior witnesses is now accessible beyond the courtroom. Professor Capra noted that most courts hold that a Rule 615 order extends to an excluded witness's access to trial testimony outside the courtroom. However, some courts have held that such orders do not extend beyond the courtroom unless the parties specifically ask the judge to extend the order. One change would clarify how courts should determine the extent of a Rule 615 order and provide judges with discretion to extend orders beyond the courtroom.

Judge Campbell asked whether a rule amendment would have the effect of overruling circuits who have held otherwise. Professor Capra said it would and, for this reason, the Advisory Committee is carefully considering this amendment.

Finally, Judge Campbell noted that the Advisory Committee at its October meeting considered but decided against recommending a rule that would provide a roadmap for impeachment and rehabilitation of witnesses, similar to a rule adopted by the State of Maryland.

### **OTHER COMMITTEE BUSINESS**

*Procedure for Handling Comments Made Outside the Ordinary Process.* Professor Struve noted a recurring issue regarding public submissions outside the formal public comment period, including submissions addressed directly to the Standing Committee.

There are instances when the Standing Committee receives submissions that discuss a proposal that an advisory committee will be presenting at an upcoming Standing Committee meeting. The context might be a proposal of an amendment for publication, or it might be a proposal of an amendment for final approval after the public comment period has expired. It would be desirable to publish a policy for handling such comments.

Professor Struve asked Standing Committee members and other participants for feedback on the memo and tentative draft included in the agenda materials. One judge member observed that it is useful to be transparent about the process, but that it would be better to require off-cycle submitters to show cause why their input is off-cycle. Judge Campbell responded by pointing out proposed language in the agenda book that listed examples of reasons that might suffice to show such cause. The participant responded that it would be preferable to make more explicit that a person wishing to make an off-cycle submission must make a showing of why their submission is off-cycle. When the discussion later returned to the language in that paragraph, one participant observed that if someone at the last minute spots a glitch in a proposal, the rulemakers would want to take account of that insight. Professor Struve observed that the language in the agenda book did not account for that scenario. Another participant questioned that paragraph's use of the term

“extraordinary circumstances,” and pointed out that it is not extraordinary for a proposal’s language to be amended after the publication of the advisory committee’s agenda book. A participant wondered if “good cause” would be a better term than “extraordinary circumstances.” One participant argued that it would be better if the paragraph did not provide examples of instances that could justify an off-cycle submission.

Another thread in the discussion related to the norms for Committee members in settings where discussion turns to a matter that is currently before the Committee. A judge member asked what level of formality Committee members should undertake; when does a communication with an outsider to the Committee process trigger the constraints outlined in the materials (e.g., forwarding comments to the Standing Committee’s Secretary)? Professor Struve suggested distinguishing between communications made to a Committee member qua Committee member and communications that are part of a more general discussion (e.g., on a listserv or at a conference). Professor Coquillette observed that there is a distinction between someone lobbying a Committee member and someone engaging in a general discussion. Subsequently, a participant proposed defining the term “submission” in the proposed website language; such a definition, this participant suggested, could help to address this issue. Professor King noted that her practice, after receiving a comment on a rule amendment, was to provide the sender with a link to the rules committee website and to explain the submission process. She suggested that members can use this technique to educate the public on how to participate in the process.

Judge Campbell thanked participants for their input, which will be incorporated into any proposal put forward at the June meeting.

*Legislative Report.* Julie Wilson delivered the legislative report. She noted that the 116<sup>th</sup> Congress convened on January 3, 2019. Any legislation introduced in the last Congress will have to be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

## **CONCLUDING REMARKS**

Before adjourning the meeting, Judge Campbell thanked the Committee’s members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 25, 2019, in Washington, DC. He reminded members that at this next meeting the Committee would resume its discussion (noted in the preceding section of these minutes) regarding submissions made outside the public comment period.

Respectfully submitted,

Rebecca A. Womeldorf  
Secretary, Standing Committee

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**SUMMARY OF THE**  
**REPORT OF THE JUDICIAL CONFERENCE**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

This report is submitted for the record and includes information on the following for the Judicial Conference:

- Federal Rules of Appellate Procedure ..... pp. 2-4
- Federal Rules of Bankruptcy Procedure ..... pp. 5-8
- Federal Rules of Civil Procedure ..... pp. 8-10
- Federal Rules of Criminal Procedure ..... pp. 11-12
- Federal Rules of Evidence ..... pp. 12-15
- Other Matters ..... pp. 15-16

**REPORT OF THE JUDICIAL CONFERENCE**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 3, 2019. All members were present.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve (by telephone), the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Joseph Kimble, and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC); and Judge Kent A. Jordan, member of the Advisory Committee on Civil

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

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process, the Committee received and responded to reports from the five rules advisory committees and engaged in discussion of three information items.

## **FEDERAL RULES OF APPELLATE PROCEDURE**

The Advisory Committee on Appellate Rules presented no action items.

### ***Information Items***

#### Possible Amendment to Rule 3 – the Content of Notices of Appeal

At its fall 2018 meeting, the Advisory Committee continued discussion of possible amendments to clarify the content of notices of appeal under Rule 3. Some cases apply an *expressio unius* rationale to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order. Other courts treat a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment, even if the notice of appeal also references a specific interlocutory order in addition to the judgment.

The Advisory Committee is considering whether Rule 3 should contain some statement of the merger rule – the rule that earlier interlocutory orders merge into the final judgment. The Advisory Committee is also considering whether the phrase “or part thereof” should be deleted from Rule 3(c)(1)(B)’s directive that an appellant “designate the judgment, order, or part thereof being appealed” because the phrase has been read to require the designation of each order sought to be reviewed. The Advisory Committee is mindful that any amendment to Rule 3 would

require an amendment to Form 1 (the form notice of appeal). Finally, as part of its consideration of Rule 3, the Advisory Committee is considering whether to address problems in appeals from orders denying reconsideration.

#### Proposal to Amend Rule 42(b) – Agreed Dismissals

The Advisory Committee is considering a proposal to amend Rule 42(b). The current rule provides that the circuit clerk “may” dismiss an appeal “if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due.” Some have suggested that a dismissal in these circumstances should be mandatory. Prior to the 1998 restyling of the rules that intended no substantive change, Rule 42(b) used the word “shall” instead of “may” dismiss. Rule 42(b) also provides that “no mandate or other process may issue without a court order.” The Advisory Committee believes that the key distinction is between situations in which the parties seek nothing but a dismissal of the appeal, and situations in which the parties seek some judicial action in addition to dismissal.

Where the parties seek additional judicial action, the parties cannot control that judicial action. However, where the parties seek nothing but a simple dismissal of the appeal, mandatory dismissal might be appropriate, if not constitutionally compelled.

The Advisory Committee will continue to discuss whether the rule should mandate dismissal upon presentation to the clerk of an agreed dismissal request. If it decides to recommend that dismissal be made mandatory in some or all such circumstances, one approach would be simply to change the existing word “may” in Rule 42(b) to “must” or “will.” Another option would be to revise the rule more thoroughly to mirror Supreme Court Rule 46, which provides more detailed guidance than current Rule 42(b) on the appropriate treatment of dismissal agreements or motions, including the circumstances under which dismissal is mandatory.

## Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

The proposed amendments to Rules 35 and 40 that were published for public comment in August 2018 would create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider the significant disparities between Rules 35 and 40. The disparities are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although parties could “suggest” rehearing en banc. The Advisory Committee continues to consider different approaches to harmonize the two rules.

Given that many local rules address the relationship between panel rehearing and rehearing en banc, the Advisory Committee will consider whether there are local practices that should be adopted in Rules 35 and 40.

## Counting of Votes by Departed Judges

Finally, the Advisory Committee has started considering how to handle the vote of a judge who leaves the bench, whether by death, resignation, impeachment, or expiration of a recess appointment. The question arises when an opinion has been drafted or a judge has voted in conference, and the judge leaves the bench before the opinion is filed by the court. This is a recurrent issue, and one treated differently across the circuits. One possibility is to amend Rule 36 to provide that an opinion may issue if it has been delivered to the clerk for filing before the judge leaves the bench. A subcommittee has been formed to consider this issue. The Committee recognizes that a case currently pending before the Supreme Court may affect this issue.

## **FEDERAL RULES OF BANKRUPTCY PROCEDURE**

The Advisory Committee on Bankruptcy Rules presented one action item for the Standing Committee regarding restyling of the Federal Rules of Bankruptcy Procedure, but no action is needed by the Judicial Conference at this time.

### ***Information Items***

#### **Restyling of the Federal Rules of Bankruptcy Procedure**

At its fall 2017 meeting, the Advisory Committee established a Restyling Subcommittee to consider restyling the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The proposed project follows similar restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. To inform its decision, the Restyling Subcommittee worked with the FJC and the Standing Committee's style consultants to solicit feedback from the bankruptcy community. A survey, along with a restyled version of Rule 4001(a) offered as an exemplar of the final product, was sent to all bankruptcy judges and clerks of court, as well as leaders of interested organizations. A link to the survey was also posted on the federal judiciary's website.

The FJC received and analyzed completed surveys from 307 respondents, including 142 bankruptcy judges, 40 bankruptcy clerks, 19 respondents from organizations, and 109 members of the public. Over two-thirds of all respondents in every category supported restyling of the Bankruptcy Rules. Some respondents expressed concern that restyling could introduce unintended consequences, and that project members should take great care to avoid changes in a rule's meaning. Given the positive response to the survey, the Restyling Subcommittee recommended going forward with the project, consistent with the unique features of the Bankruptcy Rules.

The Bankruptcy Rules have not previously been restyled because bankruptcy is particularly statute-driven, and many rules echo statutory language. Bankruptcy is a highly technical area of practice, and one particularly prone to terms of art as well as generally understood terms, concepts, and procedures. To ensure consistency and clarity in the revised rules, the Restyling Subcommittee recommended, and the Advisory Committee agreed, that the linkage between the Bankruptcy Code and the Bankruptcy Rules should presumptively be retained, even if application of restyling guidelines might arguably improve or simplify existing statutory language.

The Advisory Committee recommended that the Standing Committee authorize commencement of the restyling process with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval. The Standing Committee discussed the considerable deference due to the Advisory Committee in restyling and accepted the Advisory Committee's recommendation, noting that final approval of the Advisory Committee's recommendation rests, as always, with the Standing Committee.

The Advisory Committee provided a tentative timeline for restyling the rules, which anticipates publishing the restyled rules for public comment in three batches beginning in August 2020 as follows:

|                                       |                             |
|---------------------------------------|-----------------------------|
| Parts I and II of the Rules           | August 2020 – February 2021 |
| Parts III, IV, V, and VI of the Rules | August 2021 – February 2022 |
| Parts VII, VIII, and IX of the Rules  | August 2022 – February 2023 |

Although the Advisory Committee expects to restyle the rules in batches and obtain public comment on each group as it is restyled, none of the restyled rules would become effective until all groups have been approved. Absent delays and assuming approvals by the

Conference and the Supreme Court, and no contrary action by Congress, the full set of restyled rules would go into effect December 1, 2024. These dates are aspirational, however, and may change as the project develops.

#### Expansion of the Use of Electronic Noticing and Service

In August 2017, proposed amendments to two rules and one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts were published for public comment. Rule 2002(g) (Addressing Notices) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and Official Form 410 would be amended to add a checkbox for opting into email service and noticing. As published, the amendments to Rule 9036 (Notice or Service Generally) would allow clerks and parties to provide notices or serve most documents through the court's electronic-filing system on registered users of that system. It also would allow service or noticing on any person by any electronic means consented to in writing by that person.

In response to publication, several comments raised substantial issues about the proposed amendments. Those issues fall into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions. Based on consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Advisory Committee voted at its spring 2018 meeting to hold back the amendments to Rule 2002(g) and Official Form 410, but to move forward with the amendments to Rule 9036, with minor revisions. The Standing Committee recommended and the Judicial Conference approved the proposed amendments to Rule 9036 in September 2018, and that revised rule is on track to go into effect December 1, 2019.

After the spring 2018 Advisory Committee meeting, the Committee on Court Administration and Case Management (CACM Committee) submitted a suggestion for a further

amendment to Rule 9036 that would require mandatory electronic service on most “high volume notice recipients,” a category that would initially be composed of entities that receive more than 100 court-generated paper notices from one or more courts in a calendar month. The CACM Committee’s suggestion built upon a 2015 suggestion submitted by the Administrative Office’s (AO) Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The prior suggestion was rejected as being inconsistent with § 342(e) and (f) of the Bankruptcy Code, which allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. The CACM Committee’s version of the proposed mandatory electronic service requirement would be “subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code.”

The CACM Committee strongly urged the adoption of the high-volume-notice-recipient program in order to achieve substantial savings. The AO has estimated that the savings could reach \$3 million or more a year.

The Advisory Committee’s Subcommittee on Business Issues is evaluating the CACM Committee’s suggestion as well as revisions to proposed Rule 2002(g) and Official Form 410 that address the concerns raised in the comments. The subcommittee hopes to present drafts for Advisory Committee review at its spring 2019 meeting.

## **FEDERAL RULES OF CIVIL PROCEDURE**

The Advisory Committee on Civil Rules presented no action items.

### ***Information Items***

The Advisory Committee met on November 1, 2018. Discussion focused primarily on reports from two subcommittees tasked with long-term projects, as well as consideration of new suggestions related to expanding the scope of disclosure statements in Rule 7.1.

### Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over the past year, the subcommittee has engaged in a substantial amount of fact gathering, in part with valuable assistance from the Judicial Panel on Multidistrict Litigation (JPML). The outreach has included participating in several conferences hosted by different constituencies, including transferee judges. The purpose of the fact gathering is to identify issues on which rules changes might focus. While the subcommittee's work remains in an early stage, the information gathered thus far has allowed it to identify six issues for consideration: (1) early procedures to winnow out unsupportable claims; (2) interlocutory appellate review; (3) formation and funding of plaintiff steering committees; (4) trial issues (e.g., bellwether trials); (5) settlement promotion, review, and approval; and (6) third party litigation funding. Going forward, the subcommittee will continue to gather information with the assistance of the JPML and the FJC.

### Social Security Disability Review Subcommittee

As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules to assist in focusing the discussion. While the subcommittee has not determined whether to recommend new rules, there is a growing consensus that the scope of any such rules would be limited to cases seeking review of a single administrative record, and would focus on pleading, briefing, and timing.

## Disclosure Statements

Expanding the scope of the disclosure statements required by Civil Rule 7.1 and the analogous provisions in Appellate Rule 26.1, Bankruptcy Rule 8012, and Criminal Rule 12.4 has been the subject of several suggestions in recent years. The Advisory Committee has determined to move forward with a suggestion that it amend Rule 7.1 to include a nongovernmental corporation that seeks to intervene, a change that will parallel the proposed amendments to Appellate Rule 26.1 (approved by the Conference at its September 2018 session and forwarded to the Supreme Court on October 24, 2018) and Bankruptcy Rule 8012 (published for public comment on August 15, 2018). At its November 2018 meeting, the Advisory Committee also kept on its agenda a suggestion to address the problem of determining the citizenship of a limited liability company (or similar entity) in diversity cases by requiring that the names and citizenship of any member or owner of such an entity be disclosed.

## Proposed Amendment to Rule 30(b)(6) Published for Public Comment

On August 15, 2018, a proposed amendment to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, was published for public comment. The proposed amendment requires the parties to confer about the number and descriptions of the matters for examination, and the identity of each witness the organization will designate to testify. The comment period closes on February 15, 2019. A public hearing was held in Phoenix, Arizona on January 4, 2019. Twenty-five witnesses presented testimony. A second hearing is scheduled to be held in Washington, DC on February 8, 2019. Fifty-five witnesses have asked to testify.

## FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

### *Information Items*

The Advisory Committee met on October 24, 2018. A large portion of the meeting was devoted to discussion of the work of the Rule 16 Subcommittee. The Advisory Committee also determined to retain on its agenda a suggestion to amend Rule 43.

### Expert Disclosures

As previously reported, the Advisory Committee added to its agenda two suggestions from district judges that pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the more robust expert disclosure requirements in Civil Rule 26. The Advisory Committee devoted a portion of its October 2018 meeting to a presentation by the Department of Justice on its development and implementation of new policies governing disclosure of forensic and non-forensic evidence.

The Rule 16 Subcommittee will consider whether an amendment is warranted and, if so, what features any recommended amendment should contain. To assist in its work, the subcommittee is planning to hold a mini-conference this spring. Participants will include prosecutors, private practitioners, and federal defenders.

### Defendant's Presence at Plea and Sentencing

At its October 2018 meeting, the Advisory Committee created a subcommittee to consider the panel's suggestion in *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentencing.

Although the Advisory Committee has twice rejected suggestions that it expand the use of video conferencing for pleas or sentencing, members concluded the issue should be revisited

given the explicit invitation in *Bethea*. The subcommittee is tasked with assessing the need for a narrow exception to the requirement of physical presence, how such an exception could be defined, what safeguards would be necessary, including the procedures needed to ensure a knowing and intelligent waiver, and how to accommodate the right to counsel when the defendant and counsel are in different locations.

## **FEDERAL RULES OF EVIDENCE**

The Advisory Committee on Evidence Rules presented no action items.

### ***Information Items***

The Advisory Committee met on October 19, 2018. At that meeting, the Advisory Committee conducted a roundtable discussion with a panel of invited judges, practitioners, and academics regarding four agenda items, including two proposed amendments to Rule 702, proposed amendments to Rule 106, and proposed amendments to Rule 615. Each is discussed below. The roundtable discussion provided the Advisory Committee with helpful insight, background, and suggestions.

### **Possible Amendments to Rule 702**

*Addressing Forensics.* The Advisory Committee has been exploring the appropriate response to the recent scientific studies regarding the potential unreliability of certain forensic evidence. A subcommittee was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. After extensive discussion, the subcommittee concluded that it would be difficult to draft a new freestanding rule on forensic expert testimony because any such rule would have an inevitable and problematic overlap with Rule 702. Further, the subcommittee concluded it would not be advisable to set forth detailed requirements

regarding forensic evidence in rule text because substantial debate exists in the scientific community as to appropriate requirements.

The Advisory Committee agreed with the subcommittee's recommendations and is considering ways other than rule changes to assist courts and litigants in meeting the challenges of forensic evidence. These include assisting the FJC with judicial education. The Advisory Committee continues to consider a proposal to amend Rule 702 to focus on one important aspect of expert testimony: the problem of overstating results (for example, by stating an opinion as having a "zero error rate" when that conclusion is not supportable by the methodology).

*Admissibility/Weight.* The Advisory Committee is also considering an amendment to Rule 702 that would address some courts' apparent treatment of the Rule 702 requirements of sufficient basis and reliable application as questions of weight rather than admissibility, without finding that the proponent has met these admissibility factors by a preponderance of the evidence. Extensive case law research suggests confusion on whether courts should apply the admissibility requirements of a preponderance of evidence under Rule 104(a), or the lower standard of prima facie proof under Rule 104(b). Based on the roundtable discussion and other information, the Advisory Committee will continue to consider whether an amendment to Rule 702 is necessary to clarify that the court must find these admissibility requirements met by a preponderance of the evidence.

#### Possible Amendment to Rule 106

Over its last three meetings, the Advisory Committee has been considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement to correct the misimpression. The Advisory Committee has focused on whether Rule 106 should be amended to provide: (1) that a

completing statement is admissible over a hearsay objection; (2) that the rule covers oral as well as written or recorded statements; and (3) more specific language about when the rule is triggered (i.e., by a “misleading” statement) and when a completing portion must be admitted (i.e., when it corrects the misleading impression). The roundtable discussion provided important input on these questions.

### Possible Amendments to Rule 615

The Advisory Committee considered a suggestion to amend Rule 615, the rule on sequestering witnesses. The suggestion noted three concerns: (1) the rule provides no discretion for a court to deny a motion to sequester; (2) there is no timing requirement for when a party must invoke the rule, so it would be possible for a party to make a mid-trial request for exclusion of witnesses from the courtroom after some witnesses had already testified; and (3) there should be an explicit exemption from exclusion for expert witnesses to substitute for the current vague exemption for witnesses who are “essential to presenting the party’s claim or defense.” These proposed changes were raised at the roundtable discussion, and the Advisory Committee obtained valuable information, especially from the participating judges.

The Advisory Committee rejected the proposal to make sequestration discretionary. The mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware of the risks of tailoring trial testimony. Also, discretion still exists in the rule given the exceptions to exclusion provided. Similarly, the Advisory Committee determined that the concerns regarding timing and an explicit exemption from exclusion for expert witnesses were not pervasive or significant issues.

In researching the operation of Rule 615, the Advisory Committee found another issue that has produced a conflict among the courts. The issue involves the scope of a Rule 615 order

and whether it applies only to exclude witnesses from the courtroom, as stated in the text of the rule, or extends outside the confines of the courtroom to prevent prospective witnesses from being advised of trial testimony. The Advisory Committee has agreed to further consider an amendment that would clarify the extent of an order under Rule 615.

#### Proposed Amendment to Rule 404(b) Published for Public Comment

On August 15, 2018, the Advisory Committee published for public comment a proposed amendment to Rule 404(b), the rule that addresses character evidence of other crimes, wrongs, or acts. The proposal would expand the prosecutor's notice obligations by requiring that the prosecutor "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Three comments have been submitted thus far.

### **OTHER ITEMS**

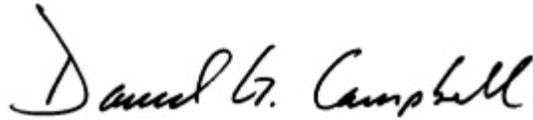
The Standing Committee's agenda also included three information items. First, the Committee was briefed on the status of legislation introduced in the 115<sup>th</sup> Congress that would directly or effectively amend a federal rule of procedure.

Second, the Committee engaged in a discussion of whether to develop procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. Based on that discussion, the Reporter to the Committee will draft proposed procedures to be discussed at the June 2019 meeting.

Third, Committee members were provided with materials summarizing the September 12, 2018 long-range planning meeting of Conference committee chairs and members of the Executive Committee, as well as the status of the strategic initiatives meant to support

implementation of the *Strategic Plan for the Federal Judiciary* that have been identified by each Judicial Conference committee.

Respectfully submitted,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive, flowing style.

David G. Campbell, Chair

|                        |                     |
|------------------------|---------------------|
| Jesse M. Furman        | Peter D. Keisler    |
| Daniel C. Girard       | William K. Kelley   |
| Robert J. Giuffra Jr.  | Carolyn B. Kuhl     |
| Susan P. Graber        | Rod J. Rosenstein   |
| Frank M. Hull          | Srikanth Srinivasan |
| William J. Kayatta Jr. | Amy J. St. Eve      |

# TAB 1G

**Pending Legislation that Would Directly or Effectively Amend the Federal Rules  
116th Congress**

| Name  | Sponsor(s)/<br>Co-Sponsor(s)   | Affected<br>Rule | Text, Summary, and Committee Report  | Actions  |
|---|--|------------------|--|--|
| <b>Protect the Gig Economy Act of 2019</b>            | <b>H.R. 76</b><br><i>Sponsor:</i><br>Biggs (R-AZ)  | CV 23            | <p><b>Bill Text:</b> <a href="https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf">https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf</a></p> <p><b>Summary (authored by CRS):</b><br/>This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors.</p> <p><b>Report:</b> None.</p> | <ul style="list-style-type: none"> <li>1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice</li> </ul> |
| <b>Injunctive Authority Clarification Act of 2019</b> | <b>H.R. 77</b><br><i>Sponsor:</i><br>Biggs (R-AZ)  | CV               | <p><b>Bill Text:</b> <a href="https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf">https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf</a></p> <p><b>Summary (authored by CRS):</b><br/>This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.</p> <p><b>Report:</b> None.</p>   | <ul style="list-style-type: none"> <li>1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security</li> </ul>           |
| <b>Litigation Funding Transparency Act of 2019</b>    | <b>S. 471</b><br><i>Sponsor:</i><br>Grassley (R-IA)<br><br><i>Co-Sponsors:</i><br>Cornyn (R-TX)<br>Sasse (R-NE)<br>Tillis (R-NC) | CV 23            | <p><b>Bill Text:</b> <a href="https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf">https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf</a></p> <p><b>Summary:</b><br/>Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."</p> <p><b>Report:</b> None.</p>   | <ul style="list-style-type: none"> <li>2/13/19: Introduced in the Senate; referred to Judiciary Committee</li> </ul>   |

# TAB 2

# TAB 2A

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## **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  
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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Proposed Amendment to Rule 404(b)  
Date: April 1, 2019

At its Spring, 2018 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, 2018. The public comment period ran until February 15, 2019.

This memorandum is in three parts. Part One sets forth the proposed amendment and Committee Note. Part Two sets forth and analyzes the comment received on the proposal. Part Three sets forth the proposal with three slight changes in response to those comments.

At this meeting, a vote will be taken to submit an amended Rule 404(b) to the Standing Committee with the recommendation that it be referred to the Judicial Conference (and then to the Supreme Court and to Congress). If all goes well, the amendments will take effect on December 1, 2020.

## I. The Proposal to Amend Rule 404(b)

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.

## II. Comments Received on the Rule

Only four public comments were posted on the proposed amendment. In addition, a comment for possible change was made by a Standing Committee member at the Standing Committee’s June 2018 meeting.

### *A. Summary of Public Comments*

Here is the summary of public comments, and responsive comments and suggestions by the Reporter:

**1. 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 raises 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. Consequently, nothing in this comment warrants a change to the proposal.

**2. 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.”

**Reporter’s Comment:** The rule could possibly be read in a way that the “fair opportunity” requirement does not apply if good cause is found. But that would be a strange way to read the rule, given the fact that the fair opportunity requirement clearly applies to pretrial notice and it would be odd to conclude that no fair opportunity would be required during trial.

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 explicitly 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 explicitly applies to all notices, pre- and post-trial --- as is the case with Rule 807.

There is a fair argument against a change to the text, however. The Rule 807 amendment *added* a good cause exception not previously in the rule. The good cause exception has been in Rule 404(b) since 1991. Nothing in the amendment is intended to change the operation of the good cause exception. The only intended effect is to extend the good cause exception to cover the new articulation requirements. The courts have construed the existing good cause exception in a way that answers the concern of the public comment: specifically, if the prosecution is allowed to give notice at trial, protective measures are to be provided to the defendant, so that he has a fair opportunity to meet the evidence. See, e.g., *United States v. Lopez-Gutierrez*, 83 F.3d 1235 (10<sup>th</sup> Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta*, 36 F.3d 1552 (11<sup>th</sup> Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire). There is no reason to think that this case law is changed by the amendment.

Whether or not the text is changed to specifically provide a fair opportunity after notice is given at trial, the Committee should consider importing a passage from the Committee Note to the new Rule 807, which contains this proviso regarding notice during trial pursuant to good cause -- - along with a reference to the existing protective case law under Rule 404(b):

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. See, e.g., *United States v. Lopez-Gutierrez*, 83 F.3d 1235 (10<sup>th</sup> Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta*, 36 F.3d 1552 (11<sup>th</sup> Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

Given the pre-existing Rule 404(b) case law, and the fact that there is really little chance that the existing draft will be construed to deny the defendant a fair opportunity to meet the Rule 404(b) evidence when pretrial notice is excused for good cause, it would appear more than sufficient to leave the matter to a Committee Note. This passage could go at the end of the Committee Note discussion on notice --- after the bullet points. This will be shown at the end of the memo.

But if the Committee believes a textual change is required, then the change as suggested above could be implemented. In that case, it would still make sense to add the paragraph regarding protective measures to the Committee Note.

**3. The Federal Magistrate Judge’s Association, (EV-2018-0004-0006),** generally supports the proposed amendment. It has some concern about the lack of “specificity” in the requirement that disclosure be made sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence. It notes that some courts have standing orders that notice must be provided 7 to 14 days before trial and states that “such orders are helpful.” The Association suggests that “after the rule as proposed has been in effect for a period of time, the committee might consider whether a further amendment, setting a presumptive specific amount of time in advance of trial by which the required disclosures must be made, is warranted.”

**Reporter’s comment:** The Magistrate Judges’ comment does not propose a change to the existing amendment. Whether to monitor the rule to determine the usefulness of concrete notice periods is a question for the Committee.

It should be noted, though, that all of the other notice provisions in the Evidence Rules that have been approved through the rulemaking process use the “fair opportunity” language and do not proscribe a concrete time period. See Rules 609(b), 807, and 902(11).<sup>1</sup> Moreover, a few years ago, when the Committee considered whether to amend the notice requirements in the Evidence Rules to provide more uniformity, it considered the possibility of uniform concrete time periods. But the DOJ opposed such a move, pointing out that many local rules already have time periods for the Evidence Rules notice provisions, specifically Rule 404(b). The danger is therefore that imposing a national time

<sup>1</sup> Rules 412-415 contain specific time periods, but they were directly enacted by Congress.

period will create a conflict with these local rules --- which is not a dealbreaker if the local rules are wrong or problematic, but there is no showing that this is the case. For example, a national rule requiring notice 14 days before trial would create a conflict with local rules that require 7 (or 13 for that matter) --- and unless it can be said that the number of days in the local rule is simply insufficient in all or most cases, that is a conflict that does not seem worth making.

More fundamentally, there is something to be said about a flexible rule grounded in “fair opportunity.” Not all cases are alike, not all Rule 404(b) evidence is the same, and the number and breadth of bad acts will vary. The trick would be to pick a number of days that would “presumptively” be fair, but how is that to be figured out?

Finally, it should be noted that a 14 day rule for the Rule 404(b) notice provision was specifically considered by the Committee when it evaluated drafting alternatives for the proposed amendment that was eventually submitted for public comment. While the Committee did not spend a great deal of time on the day-based time limit, it ultimately opted for the “fair opportunity” language. This was in part because a seven-day based time period could run into problems in counting holidays, and the time-counting rules designed to solve such problems have not been added to the Evidence Rules. And it was in part because the Committee apparently wanted to maintain flexibility.

Accordingly, nothing in the Magistrate Judges’ Association comment warrants a change to the existing proposal. And going forward, a change to add a specific time period would be a matter of significant debate.

**4. The Federal Courts Committee of the Association of the Bar of the City of New York, (EV-2018-0004-0007),** states that the “Advisory Committee’s attention to Rule 404(b) is welcome” and supports the proposed changes. The Committee believes that the articulation requirement in the notice provision will result in “more thoughtful and better reasoned evidentiary arguments” and that by requiring the government to articulate a valid, non-character purpose, “improper admission of Rule 404(b) evidence should become less frequent.” The Committee suggests, however, two further changes to Rule 404(b): 1) an amendment to “clarify that if a defendant agrees to concede a particular issue or element within the rubric of the rule, then the district court should give weight to this concession when deciding whether to prohibit the admission of Rule 404(b) evidence on that issue or element” --- this could be done by providing

that “the court must consider, as part of its discretionary review under Rule 403, whether the purpose for which the evidence is submitted is conceded at trial”; and 2) an amendment that would expressly state that Rule 404(b) applies in civil cases, and that would extend the existing notice requirement to civil cases.

**Reporter’s Comment:** The suggestions made for additions to the existing amendment can be addressed at two levels---whether such extensions could be added to the existing proposal, and whether they might be addressed at a later point, independent of the current proposal.

**1. Amending the current proposal:** It seems clear that regardless of their merit, adding either of the proposed changes to the current proposal would require resubmitting the proposed amendment to Rule 404(b) for another round of public comment. That is because the two suggestions would extend the proposed amendment to subject matters not at all covered by the proposal that was issued for public comment. While changes can of course be made after public comment, and those changes can sometimes be significant, the addition of coverage not at all related to the matter issued for public comment counsels caution. Another round of public comment means a delay of at least a year for the important changes to the notice provision that everyone agrees will be useful. The questions, then, are whether either or both of these proposals 1) are sound and important enough to be added now and justify a year’s delay, or 2) support further study for an independent amendment to Rule 404(b) at a later point.

**2. The merits of the City Bar proposals:**

**a. Adding language related to a defendant’s concession.** The Committee considered, in detail and over three meetings, the case law from the Seventh and Third Circuit holding that bad act evidence is not admissible for a proper purpose (such as intent) unless the defendant actively disputes that purpose. (The classic example being that in a prosecution for selling drugs, evidence of prior drug distribution is not admissible to prove intent if the defendant’s claim is that he was misidentified and so did not commit the crime charged.) The Committee considered the merits of adding an “active dispute” requirement to the rule, and determined that any attempt to codify such a limitation “raises questions about how ‘active’ a dispute would have to be, and is a matter better addressed by balancing probative value and prejudicial effect.” That is, the Committee opted for the flexibility of the Rule 403 balancing test (under which the degree of dispute affects the probative value of the bad act evidence) over a rigid “active dispute” limitation. It seems very unlikely that

the Committee has changed or will change its view on the “active dispute” proposal any time soon.

The City Bar says that the Committee’s rejection of the “active dispute” limitation does not foreclose consideration of whether the defendant’s actual *concession* of an element --- such as by a proffered stipulation --- should be given weight. The City Bar proposes language providing that “the court must consider, as part of its discretionary review pursuant to Rule 403, whether the purpose for which the evidence is submitted is conceded at trial.” But there are several concerns about this approach (other than, as stated above, that it seems well beyond the subject matter of the proposed amendment as issued for public comment.).

First, there may well be a dispute about whether the defendant has “conceded” the element. “Conceded” is not necessarily any more clear than “actively disputed.” For example, what would “conceded” mean in the drug sale case? Is it a concession if the defendant says “if the government proves I made the sale, then I concede that I intended to make the sale?”

Second, there may be problems in determining the timing of the concession --- similar to some of the procedural problems raised by an “active dispute” limitation. For example, what if the “concession” is not made until the defendant’s closing argument?

Third, the language offered by the City Bar is problematic, as it states that the court must consider “whether the purpose for which the evidence is submitted is conceded at trial.” But it is not the “purpose” for which the evidence is submitted that must be conceded. The defendant may well “concede” that the government is offering bad evidence to prove intent. What would make the evidence arguably inadmissible is not that the defendant concedes the “purpose” but rather that he is not contesting the non-character fact that the government seeks to prove. That is a concept that is difficult to draft in a rule.

Fourth, the proposed language states that the court must consider whether there has been a concession “as part of its discretionary review under Rule 403.” It can be argued that referring to the Rule 403 test specifically in Rule 404(b) is problematic. A stipulation should affect the Rule 403 balance in *any* case, not simply with Rule 404(b) evidence. Indeed that was the holding in *Old Chief v. United States*, 519 U.S. 172 (1997). By referring to concessions being relevant to the Rule 403 analysis in Rule 404(b), a negative inference is raised that concessions might not be relevant in all other Rule 403 situations.

Fundamentally, the City Bar's proposal is not much different from the "active dispute" proposal that the Committee rejected fairly early on in its consideration of a possible amendment to Rule 404(b). This is not at all to say it is without merit. It is to say, however: 1) that it is not now the time to seek to add it to the proposed amendment as issued for public comment; and 2) that it is a proposal that the Committee has already essentially considered.

***b. An amendment to cover civil cases:*** The City Bar asserts that "there is a frequent misunderstanding that Rule 404(b) is not available in the civil context" and that even if it is thought to be available, there is confusion about whether the standard for admitting Rule 404(b) evidence is different in civil or criminal cases. The citation to support these premises is an article in *Litigation Journal* that is basically anecdotal.

Anyone who thinks that Rule 404(b) is *inapplicable* in civil cases is not just reading the rules. Rule 404(a) prohibits the circumstantial use of character evidence in civil cases. The only way that bad acts of an adversary (other than those charged in the case) can be admissible is through Rule 404(b)/403. (Unless it's habitual or routine conduct covered by Rule 406). Rule 404(b) itself is plainly not limited to criminal cases --- the exception being the notice requirement, where the explicit reference to criminal cases signals that the rest of the rule *is* fully applicable to civil cases. *See* Committee Note to the 2006 Amendment to Rule 404 ("The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases."). Moreover, there is copious case law on Rule 404(b) in civil cases --- most prominently in employment discrimination cases and civil rights cases. The Federal Rules of Evidence Manual has digested over 200 circuit court decisions applying Rule 404(b) in civil cases. A quick review of those cases does not indicate any substantial difference in approach from civil cases.

This is not to say that Rule 404(b) is working perfectly in civil cases. The Committee may or may not be interested in embarking on a project to review all that case law to determine whether changes are necessary. It is to say, though, that the case for an amendment to Rule 404(b) that would specifically cover criminal cases has not been made, and at this point nothing could responsibly be added to the existing proposal. Any change, assuming it is necessary, is years down the line.

Finally, what about extending the notice provision to civil cases? That *is* a question that has been raised in memos to the Committee over the last few years --- first in the context of uniform notice rules, and then specifically in the context of a Rule 404(b) amendment. The bottom line is that the DOJ opposed extending the Rule 404(b) notice

requirement to civil cases throughout that process of consideration, and while the Committee did not vote specifically to reject a notice requirement for civil cases, the proposal was dropped for lack of affirmative support. Beyond that bottom line, there is a rational distinction between civil and criminal cases when it comes to notice of Rule 404(b) evidence --- that distinction lies in the difference in discovery in civil and criminal cases. In civil cases, a party is very likely to know, after discovery, about 404(b) evidence to be offered by the adversary. But that is not so in criminal cases. That difference in discovery systems was the basis for the proposal to amend Rule 404(b) in 1991 to require notice in criminal cases only.

It may be that adding a notice requirement in civil cases makes sense if the requirement is not just to notify about the evidence but also to articulate how the bad act evidence is probative for a non-character purpose. The argument would be that you might find out, in civil discovery, that your adversary is going to offer bad act evidence under Rule 404(b), but an articulation-based notice requirement does more: it requires the adversary to explain in advance how the bad act evidence actually complies with Rule 404(b), and it gives the party the opportunity to address the Rule 404(b) argument specifically. That was an argument made in the Reporter's memorandum on Rule 404(b) a year ago. The Committee might be interested in a project investigating whether an articulation-based notice requirement would have a salutary effect on civil cases. But again, the case has not yet been made for such a requirement in order for it to be added to the existing proposal, even with a year for a new round of public comment.

### ***B. 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 (7<sup>th</sup> Cir. 2014) (stating that Rule 404(b) is concerned with “the chain of reasoning that supports the non-propensity purpose for admitting the evidence”). But the

word “propensity” is not used anywhere else in Rules 404 or 405. “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 is and is not permitted. It arguably seems more iffy and less directive.

Because “character” rather than “propensity” is used throughout Rule 404, and because the suggestion was made at the Standing Committee level, the proposed amendment to be sent to the Standing Committee, immediately below, uses the word “character” --- as does the Committee Note. Of course, the change, if any, will have to be implemented by Committee vote.

### ***C. Suggestion by Professor Richter for a clarification to the Note***

Professor Richter suggests a tweak to the paragraph in the Note that discusses the good cause exception as applied to the prosecutor’s duty to articulate a proper purpose. Currently that provision states as follows:

- 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.

The intent of the paragraph is to emphasize that good cause can excuse both the failure to notify at all and the failure to articulate, before trial a purpose for which the evidence is offered at trial. An example of a good cause exception as applied to articulation might be where the prosecution provides pretrial notice that it will offer a bad act to prove motive, and then the defendant makes an argument at trial that the crime was an accident --- now the bad act might also be admissible to show absence of accident.

Professor Richter suggests that the first sentence of the bullet point might be taken to mean that a prosecutor might argue that there is good cause by which a prosecutor can avoid *ever* having to articulate the purpose for admitting the evidence, even at trial. A response to that concern is that at trial, the prosecutor will have to articulate a purpose or the evidence cannot be admitted over a Rule 404(b) objection. But Professor Richter notes that much of the Rule 404(b) case law

is permissive, and, given the tendencies of courts to pay lip service to the Rule 404(b)(2) permitted purposes without exploring reasoning or putting the prosecution to its burden of demonstrating admissibility, there is some concern about a Committee Note that says a prosecutor's "obligations" to articulate non-character purpose and reasoning can be excused. In other words, she suggests that the paragraph be amended to clarify that the good cause exception is about *timing* and not the obligation to articulate a proper purpose.

**Reporter's Comment:** It would probably be a helpful clarification to emphasize that the good cause exception is about timing only, and doesn't excuse the obligation to articulate a proper purpose and explain how the evidence is probative of that purpose. It is true that the prosecutor has such an obligation at trial under Rule 404(b) right now, but it would be a sad outcome if something in this amendment (or Committee Note) could be read to limit that obligation, when the whole point of the amendment is to promote that obligation.

As Professor Richter suggests, the fix is a pretty straightforward one. Here is the suggestion:

- 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 **prior to trial**. A good cause exception for the **timing of 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.

This clarification is added to the proposed Committee Note as it would be submitted to the Standing Committee.

### **III. Proposed Amendment to Rule 404(b) to be sent to the Standing Committee for Final Approval**

The proposed amendment to Rule 404(b) and the Committee Note are set forth in a document included immediately after this memo. (Formatting problems required the Rule to be placed in a separate document.). The proposal makes three changes from the proposal as issued for public comment:

1. It substitutes “character” for “propensity” in the text and Committee Note;
2. It clarifies that the good cause exception affects the timing of the prosecutor’s duty to articulate a non-character purpose, but does not excuse the obligation itself; and
3. It adds a paragraph to the Committee Note, lifted from the recent amendment to Rule 807, specifying that the court should consider protective measures when pre-trial notice is excused for good cause.

# TAB 2B

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE<sup>1</sup>**

**Rule 404. Character Evidence; Other Crimes, Wrongs  
or ~~Other Acts~~**

\* \* \*

- 1   **(b) Other Crimes, Wrongs, or ~~Other Acts~~.**
- 2
- 3   **(1) *Prohibited Uses.*** Evidence of a any other crime,  
4       wrong, or ~~other~~ act is not admissible to prove a person’s  
5       character in order to show that on a particular occasion  
6       the person acted in accordance with the character.
- 7
- 8   **(2) *Permitted Uses; ~~Notice in a Criminal Case.~~*** This  
9       evidence may be admissible for another purpose, such  
10      as proving motive, opportunity, intent, preparation,  
11      plan, knowledge, identity, absence of mistake, or lack

<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

12 of accident. ~~On request by a defendant in a criminal~~  
13 ~~ease, the prosecutor must:~~

14 **(3) Notice in a Criminal Case.** In a criminal case, the  
15 prosecutor must:

16 **(A)** provide reasonable notice ~~of the general nature~~ of any  
17 such evidence that the prosecutor intends to offer at  
18 trial; ~~and~~

19 **(B)** articulate in the notice the non-character purpose for  
20 which the prosecutor intends to offer the evidence and  
21 the reasoning that supports the purpose; and

22 **(C)** do so in writing ~~before trial~~ sufficiently ahead of trial  
23 to give the defendant a fair opportunity to meet the  
24 evidence — or in any form during trial if the court, for  
25 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-character 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-character 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 prior to trial. A good cause exception for timing of 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.

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. See, e.g., *United States v. Lopez-Gutierrez*, 83 F.3d 1235 (10<sup>th</sup> Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available

to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta*, 36 F.3d 1552 (11<sup>th</sup> Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

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.

### **Changes Made After Publication and Comment**

The Committee changed “non-propensity” purpose to “non-character” purpose in the text and the Committee Note. And two clarifications to the operation of the good cause exception were added to the Committee Note.

### **Summary of Public Comment**

**Donald Wilkerson, NA (EV-2018-0004-0003)**, 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.”

**Ann Paiewonsky, Paiewonsky Law Firm, PLLC (EV-2018-0004-0004)**, 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.”

**The Federal Magistrate Judge’s Association, (EV-2018-0004-0006)**, generally supports the proposed amendment. It has some concern about the lack of “specificity” in the requirement that disclosure be made sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence. It notes that some courts have standing orders that notice must be provided 7 to 14 days before trial and that the “such orders are helpful.” The Association suggests that “after the rule as proposed has been in effect for a period of time, the committee might consider whether a further amendment, setting a presumptive specific amount of time in advance of trial by which the required disclosures must be made, is warranted.”

**The Federal Courts Committee of the Association of the Bar of the City of New York, (EV-2018-0004-0007)**, states that the Advisory Committee’s attention to Rule 404(b) is “welcome” and supports the proposed changes. The Committee believes that the articulation requirement in the notice provision will result in “more thoughtful and better reasoned evidentiary arguments” and that by requiring the government to articulate a valid, non-character purpose,

“improper admission of Rule 404(b) evidence should become less frequent.” The Committee suggests, however, two further changes to Rule 404(b): 1) an amendment to “clarify that if a defendant agrees to concede a particular issue or element within the rubric of the rule, then the district court should give weight to this concession when deciding whether to prohibit the admission of Rule 404(b) on that issue or element”; and 2) an amendment that would expressly state that Rule 404(b) applies in civil cases, and that would extend the existing notice requirement to civil cases.

# TAB 3

# TAB 3A

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## FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Possible Amendments to Rule 702  
Date: April 1, 2019

The Advisory Committee has been considering possible amendments to Rule 702 for the last two years. By the time of the last meeting, the Committee's focus had narrowed to two possible changes:

1. An amendment that would prevent an expert from overstating the results that could be reliably obtained from the method used by the expert.
2. An amendment clarifying that the questions of sufficiency of facts of data and reliable application of method are questions for the court, and must be proved to the court by a preponderance of the evidence under Rule 104(a).

At the last meeting – after a miniconference that was devoted mostly to these two possible amendments --- the Committee requested that drafting alternatives be prepared to capture the concept of overstatement. As to the weight/admissibility issue, the Committee made no final determination, but interest was expressed in addressing the problem in a Committee Note should the amendment regarding overstatement be approved.

This memorandum further develops the matters that the Committee wished to further consider, based on discussion at the last meeting. It 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 short discussion of the admissibility/weight problem. Part Three sets forth two drafting alternatives, and accompanying draft Committee Notes.

**In addition, an extensive digest on recent case law on forensic evidence is set forth in the agenda book immediately after this memo. (It was previously part of the memo but it got so lengthy that I thought it would be better accessed as a freestanding document).**

## I. The Problem of Overstatement

### A. *Overstatement of Results in Forensics*

Many speakers at the Boston College Symposium in 2018 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; or that the witness is a “scientist” when the forensic method is not scientific. Expert overstatement was a significant focus of the PCAST report. And a report from the National Commission on Forensic Sciences addresses overstatement with its proposal 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 testimony regarding rates of error (as discussed below).

Both the National Academy of Science 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 Boston Symposium, suggested that a provision prohibiting an expert from overstating results should be added to Rule 702 --- and that this would be a meaningful change because the courts have not relied on any language in the existing rule to control the problem of overstatement. And Judge Browning, at the Denver Symposium, suggested that while he does prevent overstatement by pruning an expert’s conclusions, textual language on overstatement might be useful to provide a specific source of authority.<sup>1</sup>

It goes without saying that most of the problems of forensic overstatement occur at the state level --- and especially this may be so going forward, given the DOJ’s attempts at quality control at the federal level. But the case law digest on federal cases, set forth in the agenda book after this memo, supports the notion that overstatement of forensic results is a problem. There are many reported cases in which experts’ conclusions went well beyond what their basis and methodology could support --- claims such as zero rate of error, or opinions to a reasonable degree of scientific certainty. And, as discusses below, there is an argument that problems remain with forensic “identification” testimony even under the DOJ protocols. 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.

<sup>1</sup> Though to be fair, Judge Browning also, in the context of an opinion about something else, appended long footnotes that generally came out against: 1) Amendments to Rule 702 of any kind, and 2) the Reporter, who was accused of pushing Federal judges around in order to justify his existence.

## ***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 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 any time soon.

**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 ago<sup>2</sup> 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 may well 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 is at least an important means of effectuating change in accompaniment with judicial education.

**3. DOJ:** The Department is making extensive efforts in trying to control some of the prior problems that were evident in the testimony of forensic experts. 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 disclose 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:

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

- 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.
- 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 despite these efforts there remains an argument that an amendment limiting overstatement will be useful and even necessary.* This is so for a number of reasons:

- There are questions of implementation of the DOJ protocols, 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. Also there are questions about the impact of the DOJ standards 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.

- There is no guarantee that the Department’s protocols will remain in place --- administrations change, objectives change, and nobody has a right to enforce an existing DOJ protection. With an amendment to Rule 702, there is a pretty strong guarantee that limitations on overstatement will remain in place.

- 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 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.***<sup>3</sup> \* \* \* [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*, and has no statistical foundation \* \* \*. 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:

<sup>3</sup> Reporter’s Note: This fine line (or fuzzy line) was evident in the explanations provided by the DOJ at the Denver Miniconference: See 87 Fordham L.Rev. at 1370-71 (explaining that a statement of identification is permissible because “it is not an empirical claim on the external world. . . “The claim is simply based on identification, and identification is different than individualization and uniqueness.”).

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? Isn’t 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 reliable principles and methods (which it termed “foundational validity”). PCAST summarized its conclusion regarding pattern matching testimony as follows:

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, \* \* \* 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.

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The 2018 Report of the American Statistical Association on Statistical Statements for Forensic Evidence supports Joe Cecil’s conclusion that the DOJ-sanctioned statement of “identification” raises the possibility of a problematic overstatement of an expert’s conclusions. The Association states as follows:

The ASA strongly discourages statements to the effect that a specific individual or object is the source of the forensic science evidence. Instead, the ASA recommends that reports and testimony make clear that, even in circumstances involving extremely strong statistical evidence, it is possible that other individuals or objects may possess or have left a similar set of observed features. We also strongly advise forensic science practitioners to confine their evaluative statements to expressions of support for stated hypotheses: e.g., the support for the hypothesis that the samples originate from a common source and support for the hypothesis that they originate from different sources.

The ASA report is addressing, in the above passage, the very concerns that support an amendment prohibiting overstatement. The ASA further states that “a comprehensive report by the forensic scientist should report the limitations and uncertainty associated with measurements, and the inferences that could be drawn from them” --- again, directed straight to the concerns that animate an amendment prohibiting overstatement.

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. Support for a Proposal to Regulate Overstatement***

At the Chair’s suggestion, the Reporter contacted some individuals involved with the PCAST report to determine whether the working draft addressed to overstatement --- developed over the last few meetings --- was on the right track. They were asked their thoughts whether the proposed amendment will effectively address at least some of the concerns expressed about forensic expert testimony. (There was no attempt to be comprehensive, because broader input is part of the public comment process).

**Professor Brandon Garrett**, an expert on forensic evidence at Duke Law School, reviewed the proposed amendment on overstatement and submitted this opinion:

I write to strongly endorse the revision presently under consideration to Rule 702, regarding the testimony of expert witnesses. My research includes work in law and in psychology, as well as collaborations with statisticians, and with forensic crime laboratories, regarding scientific evidence. I should note that the views expressed in this letter do not reflect those of Duke University or Duke School of Law, where I work, or that of the Center for Statistics and Applications to Forensic Evidence (CSAFE), a research center that I participate in.

The proposed revision would add a new subsection (e), providing that an expert may not overstate the conclusions that may reasonably be drawn from the principles and methods used. I strongly favor this proposal. The central problem that this proposal addresses is that experts may reach conclusions that are not supported by the facts or by the method employed and that there has been a tendency in many disciplines to overstate conclusions.

Testimonial overstatement has contributed to large numbers of wrongful convictions. Experts have made such claims of infallibility, together with other unscientific and invalid claims, in a disturbing number of cases in which persons were later exonerated by post-conviction DNA testing. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 1 (2009) (exploring “the forensic science testimony by prosecution experts in the trials of innocent persons, all convicted of serious crimes, who were later exonerated by post-conviction DNA testing”).

Nor is it an isolated problem. Entire disciplines have been plagued by testimonial overstatement. A massive FBI review of almost 3,000 cases involving microscopic hair comparison found that over 96% involved testimony flawed by overstatement of several different types. FBI/DOJ Microscopic Hair Comparison Analysis Review, at <https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj-microscopic-hair-comparison-analysis-review>. Indeed, 33 of those cases involving testimonial overstatement had been death penalty cases; in nine of those cases, the defendants had already been executed and five died of natural causes, as of March 2015.

Moreover, when such testimonial overstatement has occurred and has been brought to the attention of judges, in response, judges have often viewed their responsibility to regulate expert testimony as limited to the methods used and the admissibility of the type of expertise. Judges have sometimes viewed (incorrectly, in my view) the conclusions reached and how those conclusions are expressed as a matter for the jury to assess, rather than an integral feature of the expert’s work. In my view, the ultimate conclusion reached is an integral feature of the expert’s work and it must be reviewed as part of the judge’s

gatekeeping responsibilities. This proposal valuably addresses what has become, in practice, a very important and troubling gap in the coverage of Rule 702.

Obviously more could be done to address the problem that experts may draw conclusions that are overstated and do not follow from the facts or their methods. However, I also want to highlight the importance of the notes accompanying this proposal, which help to explain the concept of non-overstatement of conclusions. Perhaps most important is what the Committee Note says regarding failure to mention error rates. No conclusion can be reached about a method without qualification or discussion of error rates, because there is no type of expertise that does not have some error rate. No technique that involves human interpretation or judgment is error free. And if a type of analysis was so reliable that no human judgment was involved, one would likely not need an expert to explain it and reach conclusions about it. The entire purpose of an expert is to contribute judgment, experience, and use of sound scientific methods to analysis of facts relevant in a case. In research conducted in collaboration with Greg Mitchell, we have found that error-rate information is highly salient to lay jurors. See, e.g. Brandon L. Garrett and Gregory Mitchell, *How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information and Error Acknowledgement*, 10 J. Empirical Legal Stud. 484 (2013).

In the past, unfortunately, experts have made false and startling statements, like that there was a “zero error” rate in their type of expert work. See, e.g. Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. Crim. L. & Criminology 985, 1043, 1048 (2005). For example, the American Association for the Advance of Science (AAAS) report described “decades of overstatement by latent print examiners.” Am. Ass’n for the Advancement of Sci., *Latent Fingerprint Examination: A Quality and Gap Analysis* 11 (2017). Zero error rates do not exist but asserting infallibility would predictably impact the jury powerfully.

Not only should experts be barred from claiming infallibility, but they must disclose the actual error rates, if they have been adequately measured. If error rates for a method have not been adequately measured using sound “black box” studies under realistic conditions, then experts must disclose that their technique is of unknown validity and reliability (and in such situations, other prongs of Rule 703 and Rule 403 may each bar admissibility of the expert testimony).

Expert evidence should never be presented in court without evidence of its error rates and of the proficiency or reliability of not just the method, but the particular examiner using the method. See President’s Council of Advisors on Sci. & Tech., Exec. Office of the President, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 9–11 (2016). Such proficiency testing should involve tests of realistic difficulty and such testing should be done blind, so that the participant does not know that it is a test. Jonathan J. Koehler, *Proficiency Tests to Estimate Error Rates in the Forensic Sciences*, 12 Law, Prob. & Risk 89, 94 (2013) (“Blind proficiency testing has been used in some forensic science areas, including the Department of Defence’s forensic

urine drug testing programme and the HIV testing programme.”); Joseph L. Peterson et al., *The Feasibility Of External Blind DNA Proficiency Testing. II. Experience With Actual Blind Tests*, 48 J. Forensic Sci. 1, 8 (2003).

Jurors should hear about the proficiency of the particular expert, and of that person’s reliability in reaching conclusions using a method. Brandon L. Garrett and Gregory Mitchell, *The Proficiency of Experts*, 166 U. Penn. L. Rev. 901 (2018); see also Gary Edmond, *Forensic Science Evidence and the Conditions for Rational (Jury) Evaluation*, 39 Melb. U. L. Rev. 77, 85-86 (2015) (“[R]egardless of qualifications and experience, rigorous proficiency testing tells us whether the forensic analyst performs a task or set of tasks better than non-experts or chance. A significantly enhanced level of performance is precisely what it means to be an expert.”).

\* \* \*

In the past, scientific experts have also used vague terminology like “identification” or “match” – and the Committee Note could valuably note that there are additional types of problematic conclusion testimony apart from the use of terms like “reasonable scientific certainty.” The AAAS report, for example, noted that terms like “match,” “identification,” “individualization,” and other synonyms should not be used by examiners, nor should they make any conclusions that “claim or imply” that only a “single person” could be the source of a print. AAAS Report at 11.

The Committee Note could also address claims of experience – which can be used to bolster statements that something the expert observes is rare or common based on one’s experience, without citing to any empirically valid support. The Department of Justice’s Model Uniform Language on Latent Fingerprint Evidence, for example, explicitly cautions against the use of such experience-based claims to suggest probabilities connected with a conclusion, as does the protocol for the FBI’s review of microscopic hair evidence. FBI/DOJ Microscopic Hair Comparison Analysis Review, at <https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj-microscopic-hair-comparison-analysis-review>.

I also note that some experts testify about general research, and are therefore cautious about connecting general research to the facts in a case, and therefore may be much less likely to risk overstatement. For example, experts may also testify about more general scientific research to provide a “framework” to educate factfinders, and they may explain industry or professional norms as well. See Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987).

I hope that these views are of use as you consider this important proposal. Please feel free to contact me at your convenience if I can be of further assistance.

In addition, a number of experts involved in the PCAST report have reported that the amendment, and especially the Committee Note, would be useful in regulating what that PCAST found to be a significant problem of overstatement. Among those who have reviewed the draft amendment are Dr. Eric Lander (who provided some suggestions on the Committee Note), Judge Patti Saris, and Dr. Karen Kafadar. All thought that the amendment and the Note would be an important tool in addressing a real problem.

#### ***D. Trial Court Evaluations of an Expert’s “Credibility”***

At the last meeting, during the discussion of the proposed amendment on overstatement, the thought was expressed that the amendment might lead to the court assessing the “credibility” of an expert, and that this was inappropriate. The example discussed was an expert testifying that he was “certain” of his opinion; under the amendment, the trial judge might have to exclude the testimony if she found that the testimony of “certainty” was an overstatement given the underlying data and method that the expert used. The thought was expressed that such an exclusion would amount to a credibility determination, and the credibility of the expert is to be left to the jury.

But the process that the judge used in this hypothetical would be no different than that used to judge any of the other admissibility requirements currently in Rule 702. For example, if an expert states that he relied on sufficient data, and the judge finds that the data is not sufficient to support the opinion, the judge must exclude the evidence. Is the judge in that case wrong because she does not believe the expert’s assertion? If “credibility” assessments are prohibited in that circumstance, then logically the judge cannot disagree with any of the expert’s assertions, because to do so would challenge the expert’s credibility.

In fact a *Daubert* hearing today is rife with “credibility” determinations. If an expert states that he relied on a report, but the adversary shows to the judge’s satisfaction that the expert could not have so relied and come to the opinion he did, then the judge should disregard the expert’s assertion and review the expert’s basis accordingly. Similarly, under the proposed amendment, if the expert states that there is a zero rate of error when a forensic methodology applies, that assertion is demonstrably untrue --- incredible --- and the expert should be prohibited from testifying to that overstatement.

The role of “credibility” determinations at a *Daubert* hearing is complicated, but credibility determinations are clearly not always barred. If the expert says that he employed a reliable method, or that his conclusion is not an overstatement, it may be that the expert did not in fact employ reliable methods, or did in fact overstate the conclusion. If the trial judge does not intervene, this would mean that the jury would hear unreliable expert testimony, contrary to the principle of *Daubert*.

Judge Becker considered the complex relationship between expert credibility and reliability in *Elcock v. Kmart Corp.*, 233 F.3d 734, 750–751 (3d Cir. 2000). The trial judge in

*Elcock* held a *Daubert* hearing and determined that one of the plaintiff's experts did not pass the reliability threshold. The judge relied in part on the fact that the expert had engaged in criminal acts involving fraud, and so was not a credible witness; the fraudulent activity was not in any way related to the expert's professional life, however. Judge Becker found the trial court's reliance on these bad acts to be error, and stated that on remand "the district court should not consider Copemann's likely credibility as a witness when assessing the reliability of his methods." Judge Becker added, however, the following important elaboration:

We do not hold ... that a district court can never consider an expert witness's credibility in assessing the reliability of that expert's methodology under Rule 702. ***Such a general prohibition would be foreclosed by the language of Rule 104(a), which delineates the district court's fact-finding responsibilities in the context of an in limine hearing on the Daubert reliability issue. Indeed, consider a case in which an expert witness, during a Daubert hearing, claims to have looked at the key data that informed his proffered methodology, while the opponent offers testimony suggesting that the expert had not in fact conducted such an examination. Under such a scenario, a district court would necessarily have to address and resolve the credibility issue raised by the conflicting testimony in order to arrive at a conclusion regarding the reliability of the methodology at issue.*** We therefore recognize that, under certain circumstances, a district court, in order to discharge its fact-finding responsibility under Rule 104(a), may need to evaluate an expert's general credibility as part of the Rule 702 reliability inquiry.

While Judge Becker properly concluded that credibility determinations would have to be made at a *Daubert* hearing, he emphasized that those determinations are limited to testimony about how the expert reached her opinion, as opposed to witness-credibility more generally:

Although *Daubert* assigns to the district court a preliminary gatekeeping function—requiring the court to act as a specialized fact-finder in determining whether the methodology relied upon by an expert witness is reliable—it does not necessarily follow that the court should be given free rein to employ its assessment of an expert witness's *general credibility* in making the Rule 702 reliability determination. To conclude otherwise would be to permit the district court, acting in its capacity as a *Daubert* gatekeeper, to improperly impinge on the province of the ultimate fact-finder, to whom issues concerning the general credibility of witnesses are ordinarily reserved.

Thus the distinction as articulated by Judge Becker is between credibility determinations bearing *directly* on the expert's methods and application, and general credibility issues that apply to all witnesses. Judge Becker posited the following example:

For instance, in situations involving an attempt to attack an expert witness's credibility on the basis of prior bad acts or convictions, at least one prominent evidence commentator has noted that an expert's prior dishonesty or misconduct should not qualify as an appropriate factor in assessing methodological reliability *when the acts are wholly unrelated to the expert's use of a particular methodology*, but that a court should take such

dishonesty or misconduct into account when the nexus between the acts and the expert's methodology is more direct, e.g., when the prior dishonest acts involve fraud committed in connection with the earlier phases of a research project that serves as the foundation for the expert's proffered opinion. See Edward J. Imwinkelreid, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony*, 84 Marq. L. Rev. 1, 39 (2000). Under this approach, for instance, the fact that an expert witness falsely reported his salary on an income tax return has little if any bearing on the reliability of a diagnostic test he frequently employs, but the fact that the expert lied about whether his methodology had been subjected to peer review, or ***intentionally understated the test's known rates of error, is a different matter entirely.***

It would seem that the Becker quote above is spot-on for answering concerns about “credibility” determinations made by a judge ruling on possible overstatement of an expert's conclusions. If the expert overstates the certainty of a conclusion (understates the rate of error) then *Daubert* obligates the judge to prohibit such an unreliable assertion from being made at trial.

Thus, if the attack on credibility has nothing to do with the expert's methods, but only with a general character for truthfulness, the issue of credibility should be left to the jury—the opponent can bring impeachment evidence before the jury by way of cross-examination as with any witness. As applied to the facts of *Elcock*, the credibility evidence should not have been used by the trial court, because it related to acts of dishonesty and fraud completely outside the expert's work in the particular case.<sup>4</sup> On the other hand, if the expert in *Elcock* were found to have misstated or even lied about doing a test in this particular case, the trial court must disregard the expert's conclusion that is purportedly based on the test. If that is a “credibility” determination, then so be it.

It should be noted that while a trial court is considering credibility when evaluating an admissibility requirement under Rule 702 (such as sufficiency of basis), the addition of an overstatement requirement would not, and should not, be a vehicle allowing the trial judge to nitpick an expert into oblivion. Nothing in an amendment limiting overstatement requires the judge to get into the difference between “highly likely” and “very likely” for example. The preponderance standard of Rule 702 does not require that the expert be absolutely correct or completely precise. The draft Committee Notes, *infra*, emphasize this point.

In sum, the proposed amendment limiting overstatement is no different from any of the existing admissibility requirements of 702 insofar as there is concern that trial judges will improperly make “credibility” determinations. If the judge finds that the expert overstated the opinion, then the trial judge should prohibit the opinion.

<sup>4</sup> See also *Cruz-Vazquez v. Mennonite Gen. Hosp. Inc.*, 613 F.3d 54 (1st Cir. 2010) (error to exclude expert because he was biased in favor of plaintiffs in medical cases and was generally affiliated with plaintiffs' lawyers; those considerations are for the jury in assessing the weight of the expert's testimony).

### ***E. Should a Rule on Overstatement Apply Beyond Forensics?***

While overstatement by experts in areas other than forensics is less publicized, there are 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. And while it is not as evident as in the forensic area, overstatement does exist. What follows is a case digest:***

#### ***Case Digest on Overstatement by Non-Forensic Experts<sup>5</sup>***

##### **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. Machado-Erazo***, 901 F.3d 326 (D.C. 2018): The government offered an expert on cellphone location. The disclosure under Rule 16 was deficient, because the “report” was nothing but pictures of cellphone towers. (!) At a hearing the government assured the trial judge that the expert would offer testimony about only the “general location” of cell phones, rather than precise locations. At trial, before a different judge, the

<sup>5</sup> This digest is not intended to be comprehensive. It collects a representative example of cases decided within the last five years. The digest was prepared with the substantial help of Professor Liesa Richter.

expert testified to precise locations. The court of appeals found that it was error to admit this testimony --- and that there was a violation of Rule 16 --- but found the error to be harmless.

- ***United States v. Chikvashvili***, 859 F.3d 285, 292-93 (4<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (11<sup>th</sup> 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 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 (10<sup>th</sup> 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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 (4<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 2016) (affirming admission of 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 (7<sup>th</sup> 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 (9<sup>th</sup> 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 an 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); *Miranda v. Count of Lake*, 900 F.3d 335 (7<sup>th</sup> Cir. 2018) (“In Illinois, proximate cause must be established by expert testimony to a reasonable degree of medical certainty.”); *Day v. United States*, 865 F.3d 1082 (8<sup>th</sup> 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.

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 --- the draft Committee Note at the end of this memo does exactly that.<sup>6</sup>

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. A sampling of recent cases is immediately below.

***Here are some recent cases on “reasonable degree of certainty” and Daubert:***

<sup>6</sup> 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.

- ***Johnson v. Memphis Light, Gas & Water Div.***, 695 Fed. App'x 131 (6<sup>th</sup> 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 (9<sup>th</sup> Cir. 2017) (exclusion of medical experts' opinions was error 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 (9<sup>th</sup> 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").
- ***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 a 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" was 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 the 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 a reason 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. A Short Discussion of the Admissibility/Weight Problem

As stated above, the Committee has been considering 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. That report was submitted to the Committee at the last meeting.

The Committee's inquiry was in response to a law review article highlighting a number of cases that appear not to have 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). But the cases cited in the law review article appeared to be treating these admissibility requirements as questions of weight.

The last memo to the Committee on this subject took a deep dive into the cases that have been cited as the leading examples of courts ignoring the Rule 104(a) standard for questions of sufficiency of basis and reliability of application. The takeaway points from the case law survey were as follows:

- A court's declaration that sufficiency of basis and reliability of application 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. When the proponent has met the preponderance standard and the opponent responds with some deficiency that does not drive the proponent's showing of a preponderance, then that deficiency is a question of weight and not admissibility --- under the preponderance standard.
- 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" (a misstatement made by circuit courts in a disturbing number of cases). But 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 in the specific case. 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.

- 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. But in many of the reviewed 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.<sup>7</sup>

### ***Discussion at the last Committee Meeting:***

At the last meeting a number of Committee members observed that it would be useful to educate the courts that it is incorrect to make broad statements that sufficiency of basis and reliable application are questions of weight and not admissibility. Members also stated that it would be useful if courts articulated the standard of proof that they were actually applying. But Committee members did not conclude that the proper remedy was to amend the text of the Rule to emphasize that the Rule 104(a) standard applies to all admissibility requirements of Rule 702. The confounding problem of amending the text is that the Rule 104(a) standard *already* applies to these admissibility requirements --- as the court itself makes clear in *Daubert* and *Bourjaily*. Adding the preponderance standard to the text of the rule may raise questions about its applicability to all the other rules --- the Rule 104(a) standard applies to almost all the admissibility requirements in the Federal Rules, but it is not specifically stated in the text of any of them.

The Committee's reaction at the last meeting to a proposed amendment to the text of Rule 702 that would add a Rule 104(a) standard was, it was fair to say, not wildly enthusiastic. But no vote was taken to drop the proposal. Therefore, one of the drafting alternatives below sets forth such an amendment.

The Committee seemed more receptive to an alternative: if a proposal to amend Rule 702 to prevent overstatement were approved by the Committee, the Committee Note to that amendment could provide instruction on the Rule 104(a) question --- including encouraging courts to specify that they are applying that standard. Accordingly, one of the drafting alternatives below adds Rule

<sup>7</sup> A rough count of the cases highlighted in the law review article as being problematic (along with a number of recent cases decided after its publication) found the following: 1. Five circuit court opinions in which the court appeared to apply a Rule 104(b) standard to the questions of sufficiency of basis and reliable application; 2. Six circuit opinions in which the court used inappropriate Rule 104(b) language, but actually appeared to apply the Rule 104(a) standard to those questions; 3. Three district court opinions that wrongly applied the Rule 104(b) standard; 4. Four district court opinions that used Rule 104(b) language but actually appeared to review under Rule 104(a); and 5. Three district court opinions in which Rule 104(b) language was used and there is not enough to determine from the opinion which standard was actually applied.

104(a)-related instructions to the Committee Note that would accompany an amendment regarding overstatement.

### III. Drafting Alternatives

This section presents two drafting alternatives. Alternative 1 adds an admissibility requirement to address overstatement of conclusions, and includes comment on the Rule 104(a)/104(b) question. Alternative 2 combines the first alternative with the addition of the Rule 104(a) standard to the text.

**Note:** The “overstatement” language has been tweaked in response to comments and suggestions made at the last meeting. The changes were worked on by Judge Schroeder (Chair of the Rule 702 Subcommittee), Dan Collins, and the Reporter.

#### 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 testimony is limited to the opinions that may reasonably be drawn from the reliable application of the principles and methods.]

Or: “(e) the expert does not overstate the opinions that result from the expert’s reliable application of the principles and methods.”

## Draft Committee Note

Rule 702 has been amended to provide that an expert may testify only to opinions 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 or exaggerate 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 inaccurately states 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 of an expert concerning the strength of the evidence produced by a method.

The amendment applies to all experts but it has special relevance to testimony of forensic experts. Forensic experts often (explicitly or implicitly) express opinions about probabilities – for example, when comparing features to assess the possible origin of an evidence sample. It is important that the expert accurately inform the factfinder of the meanings of the results that are reached. A forensic expert who states or implies that a method or conclusion is “infallible,” “certain,” or “error-free” will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is “scientific” is not supported --- and is prohibited under this amendment. The amendment requires the expert to accurately inform the factfinder of the meaning of the results found by the expert. Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, based where appropriate on empirical studies of how often the method produces correct results, as well as other relevant limits inherent in the methodology. Claims of identification or probabilities based only on the expert's experience, without empirically valid support, would not be admissible because they are not reasonably drawn from the method used.

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.

Nothing in the amendment requires the court to nitpick an expert's opinion so that it is perfect expression of what the basis and methodology can support. The Rule 104(a) standard does

not require perfection. On the other hand, it does not permit the expert to express a conclusion that is clearly unsupported by the expert's basis and methodology.

A requirement of an accurate conclusion derived from the methodology is integrally related to the admissibility requirements of Rule 702(b)-(d), all of which are intended to assure that an expert's opinion is helpful. Those admissibility requirements, like the requirement of an accurately stated conclusion, are evaluated by the court under Rule 104(a), under which the proponent must establish that the admissibility standards are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987). Unfortunately many courts have held or declared 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).

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. In order to avoid confusion on this subject, it is useful for the trial court to specify that it is applying the Rule 104(a) preponderance standard to all the admissibility requirements of Rule 702.

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

### **Rule 702. Testimony by Expert Witnesses.**

For a witness to testify as an expert in the form of 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 of 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 testimony is limited to the opinions that may reasonably be drawn from the reliable application of the principles and methods.

Or: "(f) the expert does not overstate the opinions that result from the expert's reliable application of the principles and methods."

### **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 --- which may include evidence (other than privileged information) that would not be

admissible at trial. *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. In order to avoid confusion on this subject, it is useful for the trial court to specify that it is applying the Rule 104(a) preponderance standard to all the admissibility requirements of Rule 702.

Second, Rule 702 has been amended to provide that an expert may testify only to opinions 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 or exaggerate 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 inaccurately states 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 of an expert concerning the strength of the evidence produced by a method.

The amendment applies to all experts but it has special relevance to testimony of forensic experts. Forensic experts often (explicitly or implicitly) express opinions about probabilities – for example, when comparing features to assess the possible origin of an evidence sample. It is important that the expert accurately inform the factfinder of the meanings of the results that are reached. A forensic expert who states or implies that a method or conclusion is “infallible,” “certain,” or “error-free” will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is “scientific” is not supported --- and is prohibited under this amendment. The amendment requires the expert to accurately inform the factfinder of the meaning of the results found by the expert. Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, based where

appropriate on empirical studies of how often the method produces correct results, as well as other relevant limits inherent in the methodology. Claims of identification or probabilities based on the only on the expert's experience, without empirically valid support, would not be admissible because they are not reasonably drawn from the method used.

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.

Nothing in the amendment requires the court to nitpick an expert's opinion so that it is perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to express a conclusion that is clearly unsupported by the expert's basis and methodology.

# TAB 3B

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## FORENSIC CASE DIGEST

2008-Present

Prepared by Daniel J. Capra

Several Committee members have 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 in a couple of older cases that I wrote up for other projects).

The case digest has gotten so large that I decided to put it in its own file.

**Note: 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 witness was more certain, or more error-free, than the methodology could support.**

### *A. Federal Appellate Cases on Forensic Evidence*

**Acid-phosphate testing: *United States v. Rodriguez*, 581 F.3d 775 (8<sup>th</sup> 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:** *United States v. Williams*, 506 F.3d 151 (2<sup>nd</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 mixed source sample: *United States v. Barton***, 909 F.3d 1323 (11<sup>th</sup> Cir. 2018): The defendant was convicted of felon-firearm possession, in part on the basis of testimony by a DNA expert who extracted a sample from a gun. The defendant did not challenge the process of DNA identification itself, but argued that the identification was from a sample that was a mixture from a number of individuals, and that the expert used a flawed process in extracting the DNA that she tested. The court held that the trial court "rightly reached its decision based on an evaluation of the foundations of Zuleger's testimony and the failure of the defense to rebut it with anything but the testimony of a competing expert, who employed the same general methodology." The court concluded that "[t]he issues raised by Johnson's competing testimony went to the weight owed Zuleger's expert opinion, and were properly left to the jury."

The defendant pointed up that between the time of his conviction and the appeal, a scientific body published new guidelines concluding that the prosecution expert's methods of extraction from the mixed source were not reliable. (The prosecution expert was relying on guidelines that were primarily designed to cover single-source samples and two-person mixtures, while the sample in the case was a mixture of DNA from at least three persons.). According to the court, "the updated SWGDAM guidelines support Barton's claim that analysis of a low-quantity three-person mixture should be based on interpretation guidelines drawn from validation studies performed on low-quantity three-person mixtures. Validation studies go to the heart of reliability." The court found that the new guidelines are "potentially important evidence cutting against reliability." But because they were not presented to the trial court, the court held that they could not be considered on appeal. The remedy, if any, would lie in a motion for a new trial under Fed.R.Crim.P. 33.

**DNA single source samples:** *United States v. Silva*, 889 F.3d 704 (10<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (1<sup>st</sup> 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 a latent print examiner to testify 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) used 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, “[a]s far as I know, in the United States the[re] are not more than maybe 50 erroneous identification[s], which comparing with identification[s] that are made daily, thousands of identification[s], 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, and so the DOJ standards are not directly applicable.

**Fingerprint identification: Overstatement --- testimony of a match --- *United States v. Pena***, 586 F.3d 105 (1<sup>st</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 highlight 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 (9<sup>th</sup> 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.”

**Fingerprinting --- Bench Trial: *United States v. Flores***, 901 F.3d 1150 (9<sup>th</sup> Cir. 2018): The court affirmed the defendant’s conviction for attempting to reenter the United States after being deported. It held that the trial judge did not abuse discretion in admitting the testimony of a government fingerprint expert. The defendant presented evidence that the expert failed to consult with other professionals, had taken no certification test in forty years, had no verification of his work done in this case, and had no regular continuing education in the field. But the court found this not troubling at all. It first noted that this was a bench trial, and that the trial court’s gatekeeping function is less stringent when it also acts as the trial of fact. It further noted that the witness had over 25 years’ experience in fingerprint comparison, had worked as a Federal Bureau of Investigation fingerprint technician, and had been qualified as an expert in federal and state court more than thirty times. It finally declared that “fingerprinting is far from junk science—it can be tested and peer reviewed and is generally accepted by the relevant scientific community.” In making that assessment it relied on precedent, specifically *United States v. Calderon-Segura*, 512

F.3d 1104, 1109 (9th Cir. 2008) (“[F]ingerprint identification methods have been tested in the adversarial system for roughly a hundred years.”).

**Fingerprint identification --- Overstatement, testimony of a match: *United States v. Baines*, 573 F.3d 979 (10<sup>th</sup> 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: *United States v. Watkins*, 880 F.3d 1221 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (1<sup>st</sup> 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*, 902 F.3d 584 (6th Cir. 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, the defendants 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 the gateway to disaster. 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 --- error to admit in the absence of verification: *Crew Tile Distribution, Inc. v. Porcelanosa L.A., Inc.***, 2019 U.S. App. LEXIS 4988 (10th Cir. Feb. 21, 2019): In an appeal of a judgment in a contract dispute, the appellant argued that the trial court erred in admitting the testimony of a handwriting expert, Carlson, because she did not complete the verification step of the ACE-V methodology before submitting her expert report. The court agreed and found error. It explained as follows:

[T]he district court assessed the reliability of Carlson's testimony without the aid of a *Daubert* hearing. Moreover, [the appellee] did not offer any evidence to support its contention that Carlson's ACE methodology satisfied Rule 702. As a result, the district court based its finding on one Fourth Circuit case and two district court cases in which expert testimony was admitted despite a failure to complete the verification step of the ACE-V methodology. But none of these cases explain why the ACE methodology is reliable, and certainly none discuss the lack of verification with respect to Carlson's analysis in this case.

It may be that verification adds so little to the reliability of an expert's opinion that there is no real difference between the ACE and ACE-V methodologies. But it might also be true that verification adds just enough to the reliability of the ACE-V methodology to push handwriting analysis over the line from worthless pseudoscience to valuable expert testimony. [The appellee's] attempt to resolve this uncertainty was lacking. Accordingly, the district court did not have sufficient evidence to perform its gatekeeping function and its decision to admit Carlson's testimony was error. *Dodge*, 328 F.3d at 1228-29.

**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 and use of a firearm in relation to a crime of violence resulting in death, 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 run over 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. The court stated as follows:

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 inculpatory toolmark evidence. 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 – generally accepted, testimony to a reasonable degree of certainty:** *United States v. Hylton*, 2018 WL 5795799 (D. Nev. Nov. 5, 2018): In an armed bank robbery prosecution, the defendant moved to strike the Government’s firearm expert’s proposed testimony, or in the alternative, to conduct a *Daubert* hearing on the method that the expert used to identify the firearm at issue. The court denied the defendant’s motion, finding that the Association of Firearm and Toolmark Examiners (“AFTE”) ballistics methodology is generally accepted:

The AFTE methodology is generally accepted by federal courts, and has repeatedly been found admissible under *Daubert* and Rule 702. *See United States v. Johnson*, 875 F.3d 1265 (9th Cir. 2017). *See also United States v. Johnson*, 2015 WL 5012949 (N.D.Cal. 2015); *United States v. Diaz*, 2007 WL 485967 (N.D.Cal. Feb. 12, 2007); *United States v. Arnett*, 2006 WL 2053880 (E.D.Cal. 2006). Defendant fails to identify a single case in which AFTE ballistics testimony was excluded under *Daubert*. *See Johnson*, 875 F.3d at 1282.

The Court finds that Defendant has not shown that striking the United States’ expert notice as unreliable is proper. Further, the Court finds that a *Daubert* hearing is neither required nor necessary in the instant matter. Further, to the extent Defendant wishes to criticize the AFTE methodology, or ballistics evidence generally, he may do so through the presentation of his own expert and cross-examination of FS Wilcox.

**Note: The court stated that the government “notes that some courts have required experts to testify that casings can be matched *only* to a reasonable degree of ballistics certainty, and that FS Wilcox’s testimony will comply with this directive.” But under the DOJ’s own guidelines, a ballistics expert is not permitted to testify to a reasonable degree of certainty, unless the court requires it, and the court did not require it in this case. The DOJ has stated that many of the cases involving overstatement in this case digest preceded the guidelines and so are to be discounted. Maybe so --- but not this one. The opinion is dated November 5, 2018. And what is especially troublesome is that the court considers the “reasonable degree of certainty” testimony to be a *tempered* form of conclusion, when in fact it is a classic form of overstatement.**

**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: Limiting overstatement:** *United States v. White*, 2018 WL 4565140 (S.D.N.Y. Sept. 24, 2018): In a gang prosecution, the defendant moved to exclude the testimony of the government's proposed ballistics expert. Citing the NAS Report and other federal cases restricting ballistics experts' testimony, the court concluded that the proposed testimony was admissible, *subject to the limitation* that the expert could not testify to any specific degree of certainty that there was a ballistics match between the firearms seized from the defendant and those used in the various shooting incidents:

The general admissibility of expert testimony regarding ballistics analysis has been repeatedly recognized by federal courts. *See, e.g., United States v. Glynn*, 578 F. Supp. 2d 567, 569 (S.D.N.Y. 2008); *Ashburn*, 88 F. Supp. 3d at 247. Moreover, the Second Circuit has recently affirmed the admission of this kind of expert ballistics testimony. *See Gil*, 680

F. App'x at 14. As such, White's motion to exclude Detective Fox's testimony in its entirety is denied.

Still, certain restrictions to Detective Fox's testimony are warranted. Recent reports have challenged ballistics analysis as a science. For example, the National Research Council has noted the subjectivity of the analysis and the lack of any definitive error rate. *See, e.g.*, Nat'l Res. Council, *Strengthening Forensic Science in the United States: A Path Forward* 154-55 (2009); Nat'l Res. Council, *Ballistic Imaging: Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database 3* (2008). The Government's detailed description of Detective Fox's anticipated testimony is insufficient to persuade the Court that the concerns raised by such reports are unjustified. Specifically, the evidence fails to establish that the theory of uniqueness on which Detective Fox relies has been proven as a matter of empirical science, that there is any objective standard for declaring a "match," or that there is any reliable basis on which Detective Fox could state the degree to which he is certain of his conclusions.

For these reasons, consistent with other federal opinions, the Court finds that Detective Fox's testimony must be limited in certain respects. *See, e.g.*, *Glynn*, F. Supp. 2d at 575 (restricting ballistics expert's opinion to statement that match was "more likely than not"); *Order, United States v. Barrett*, No. 12-cr-45, at 1 (S.D.N.Y. Mar. 11, 2013); *Ashburn*, 88 F. Supp. 3d at 249 (precluding expert from testifying that he is "certain" or "100%" sure of his matches); *United States v. Willock*, 696 F. Supp. 2d 536, 574 (D. Md. 2010) (prohibiting expert from stating that it was a "practical impossibility" that any other firearm fired the cartridges in question); *United States v. Green*, 405 F. Supp. 2d 104, 124 (D. Mass. 2005) (precluding expert from testifying that his methodology permits "the exclusion of all other guns" as source of certain shell casings). In particular, Detective Fox may not testify to any specific degree of certainty as to his conclusion that there is a ballistics match between the firearms seized from White and those used in the various shooting incidents. However, if pressed to define his degree of certainty during cross-examination, Detective Fox may state his personal belief on that issue.

**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: *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, 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 classically 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, combined with the 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 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 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 flatly 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. July 28, 2014): 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. Jan. 29, 2018): 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: *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 PCR/STR DNA testing 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 exercised its discretion to forego a *Daubert* hearing. The court stated that the defendant’s objections went to the weight of the evidence, not the “well-established reliability of the DNA testing methodology and process.” The court elaborated 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 so sound that no *Daubert* hearing need be held. 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 --- STR Mix Program: *United States v. Christensen***, 2019 WL 651500 (C.D. Ill. Feb. 15, 2019): In a kidnapping prosecution, the defendant moved to exclude DNA test results and requested a *Daubert* hearing on the reliability of the methods used. With regard to the DNA tests, law enforcement used the STRmix program to compare DNA samples taken from the defendant to samples from the alleged victim. The defendant challenged the reliability of the STRmix program, arguing that its use of allele length rather than more detailed sequencing analysis makes it unreliable. The court denied the defendant’s motion, finding STRmix test to be a reliable methodology:

Defendant moved to exclude the DNA test results on the grounds that STRmix is unreliable. At the evidentiary hearing, the United States called Ms. Jerrilyn Conway, a

forensic examiner for the FBI, who testified that STRmix has been validated internally by the FBI and also by numerous studies conducted by employees of the company that produced it. She noted that STRmix is used by at least 43 laboratories in the United States, including the U.S. Army. Defendant argues that the STRmix program, which utilizes a probabilistic genotyping algorithm based on allele length, is not as reliable as next-generation sequencing analyses. Ms. Conway agreed at the hearing that next-generation sequencing could be more precise. However, she testified that STRmix is nonetheless reliable, partly because it compares allele length at not just one locus (where sequencing would prevent false matches among alleles with identical lengths but different contents), but at 21 regions of the sample. She testified that the probability of two different individuals having matching allele lengths at one locus would be approximately 1 in 50, but that the probabilities STRmix generates are in the quintillions to octillions, due to the numerous loci compared. The evidence shows that STRmix has been repeatedly tested and widely accepted by the scientific community. Although there may be more precise tests available, such tests do not affect STRmix's reliability. Accordingly, Defendant's Motion to exclude the DNA evidence based on the alleged unreliability of STRmix is denied.

**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 --- statistical evidence: *United States v. Tucker*, 2019 WL 861215 (E.D. Mich. Feb. 22, 2019):** Following his conviction for armed bank robbery, the defendant moved to vacate his sentence, arguing that his trial counsel erred in failing to object to the DNA evidence that was offered against him. The court denied the defendant's motion, finding that the Sixth Circuit has repeatedly upheld the reliability of statistical evidence related to DNA testing:

Defendant's objection regarding the DNA evidence fails because the Sixth Circuit has consistently held that statistical evidence related to DNA testing is admissible. *See United States v. Beverly*, 369 F.3d 516, 528 (6th Cir. 2004) ("The 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. Bonds*, 12 F.3d 540, 568 (6th Cir. 1993) ("Thus, because the theory, methodology, and reasoning used by the FBI lab to declare matches of DNA samples and to estimate statistical probabilities are scientifically valid and helpful to the trier of fact, we affirm the district court's conclusion that they are admissible under Rule 702."). Accordingly, counsel was not deficient for failing to raise a meritless objection to the statistical DNA evidence presented.

**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 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 that?

**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]lthough 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 (“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. It described FST 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 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 per se, but rather whether the number 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 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: *United States v. Mercado-Gracia*, 2018 WL 5924390 (D.N.M. Nov. 13, 2018):** In an armed drug trafficking prosecution, the defendant sought to exclude the testimony of the government’s latent fingerprint expert, Lloyd. The court held a *Daubert* hearing on the reliability of the ACE-V method and denied the defendant’s request, applying the *Daubert* factors as follows:

1. Whether the Theory Can be Tested

Research on the persistence and uniqueness of fingerprints has occurred over hundreds of years. \* \* \* Continued studies are ongoing in the fingerprint community. Numerous courts, including this one, have held that the ACE-V method can

be tested. Given the record and authority, the first *Daubert* factor weighs in support of admissibility. \* \* \*

## 2. Peer Review and Publication of the ACE-V Method

The record contains information on studies concerning the reliability of latent fingerprint analysis but contains less on the extent of peer review of the studies or the ACE-V method. This factor is thus neutral.

## 3. Known or Potential Error Rate

Defendant argues that fingerprint analysis is completely subjective and bias affects fingerprint analysis results, citing publications in support. Additionally, defense counsel highlighted at the hearing that Lloyd was unaware of population statistics regarding the uniqueness of fingerprints. Lloyd acknowledged that latent print examinations involve subjectivity, and human error can occur, notably in the comparison step of the ACE-V method.

Nevertheless, the training and experience of latent print analysts is important in the field of fingerprint analysis. \* \* \* In the Ulery study, 169 latent print examiners were given 100 prints, and the analysts made correct identifications 99.8% of the time. The Ulery study found a false negative rate of 7.5%. Numerous courts to have examined this issue have found that the error rate evidence in fingerprint identification weighs in favor of admissibility. \* \* \* The recent bias studies cited by Defendant indicate that the error rate could be higher in real world settings where bias may be introduced; however, the very low error rate in the controlled Ulery study favors admissibility.

## 4. Existence and Maintenance of Standards

The Customs and Border Patrol (“CBP”) laboratory is certified by an outside agency, the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (“ASCLD”). ASCLD promulgates its own standards that the ASCLD-certified laboratories must follow. Independent examiners from ASCLD analyze cases from the laboratory to make sure all laboratory analysts are following the same guidelines and the laboratory internal procedures and that the analysts all have the same training. ASCLD and the fingerprint analysis community use the ACE-V process for latent print comparison.

CBP latent print examiners throughout the world, including Douglas Lloyd, are certified by the International Association for Identification (“IAI”). Latent print examiners must pass a test issued by the IAI. The IAI requires re-testing every five years and training within the five years to stay continually certified. Failure to pass the IAI’s proficiency test will result in a six to twelve-month suspension, mandatory retraining, and re-testing.

Although the ACE-V system is a procedural standard relying on the subjective judgment of the examiner, there are accepted standards for following the ACE-V method, training on the system, and certification processes within the fingerprint examiner community to help ensure quality. This factor therefore weighs in favor of admissibility.

## 5. General Acceptance of Theory

The IAI, a worldwide standard, follows the ACE-V methodology. Despite the subjectivity inherent in the ACE-V method and some studies suggesting bias can affect results, federal courts of appeals have consistently concluded that ACE-V is an acceptable and reliable methodology. [citing a number of cases]. The general-acceptance-in-the-community factor favors admissibility.

The court concluded as follows:

Although not entirely scientific in nature, fingerprint analysis requires significant training and experience using a standard methodology. As *Kumho Tire* instructs, expert testimony on matters of a technical nature or related to specialized knowledge, albeit not scientific, can be admissible under Rule 702, so long as the testimony satisfies the Court's test of reliability and relevance. Fingerprint identification testimony is sufficiently reliable to be admitted into evidence at trial and Lloyd is qualified by his education, training, and experience to testify to matters in the field of fingerprint analysis and identification. The Court will therefore deny Defendant's motion to exclude Lloyd from testifying at trial.

**Note: The government in this case provided notice that "Lloyd is expected to testify that he viewed the digital images photographed by Handley, compared them to Defendant's fingerprint images, and identified fingerprints of value 4A and 5A as the right thumb and right index finger of Defendant." So this is testimony of a match --- an overstatement, given that no testimony of a possible rate of error is contemplated. The testimony, however, is permitted under the DOJ protocol, where the word "identification" is interpreted as something other than a statement that there is a match.**

**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 --- or that the defendant’s fingerprint has been “identified” --- 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 so 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 (Palprints): 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.

**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: *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 it 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, testifying to a match. The court rejected the plaintiff’s motion to exclude the expert.

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.”

**Serology tests: *United States v. Christensen*, 2019 WL 651500 (C.D. Ill. Feb. 15, 2019):** In a kidnapping prosecution, the defendant moved to exclude serology test results and requested a *Daubert* hearing on the reliability of the methods used. The defendant challenged the reliability of

the Takayama hemochromogen test used to confirm the presence of blood. The court denied the defendant's motion, finding the Takayama test to be reliable:

Defendant moves for a *Daubert* hearing on the reliability of the Takayama hemochromogen test and the methods of the law enforcement official who performed that test. The United States responds that such a hearing is unnecessary because the test has been the standard confirmatory test for blood for over 100 years, and the law enforcement official's application of this reliable method is a subject appropriate for cross-examination at trial, not a pre-trial hearing. The Court held an evidentiary hearing on this matter on February 11, 2019, effectively granting this aspect of Defendant's Motion.

At that hearing, Ms. Conway testified that the Takayama hemochromogen test is the prevailing confirmatory blood test in the field. She stated that multiple studies have confirmed that the Takayama test does not react to substances other than blood, and that the FBI has control testing protocols to avoid errors. Ms. Conway further testified that standard procedure in conducting the Takayama hemochromogen test does not involve photographic or descriptive records other than documenting whether the analyst determined that it was positive or negative. According to Ms. Conway, a second examiner always checks positive results to ensure accuracy. The Court finds that the Takayama test is well-known, widely used, not prone to errors, subject to peer review, and applied reliably in this case. Thus, Defendant's Motion to exclude the test results on reliability grounds is denied.

**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.

# TAB 4

# TAB 4A

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## FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Proposed Amendment to Rule 106  
Date: April 1, 2019

For the last two years, the Committee has been studying and discussing a request from Judge Paul Grimm to consider possible amendments to Rule 106. 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 whenever 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.<sup>1</sup>

<sup>1</sup> One of my students had another example. The defendant, let’s call him Eric, is on trial for shooting the deputy. He stated to the police: “I shot the sheriff, but I did not shoot the deputy.” The government introduces the first part of

Rule 106 was 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.<sup>2</sup> 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 substantial 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.<sup>3</sup> These courts hold that Rule 106 is only about the order of proof and is not a rule that trumps other rules of exclusion.

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 three 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. A working draft, with several drafting alternatives, was considered at the miniconference that was held on the day of the Fall, 2018 meeting, and there was significant discussion about the pros and cons of the proposals.

The Minutes of the Fall 2019 Meeting indicate that “the Committee determined that it would continue its consideration of potential amendments to Rule 106 at its Spring meeting. The Reporter promised to report back on potential Rule 106 amendments at the Committee’s spring meeting in light of the discussion and proposals raised.”

the statement (probably admissible in most courts under Rule 404(b) to show intent, or background, or inextricably intertwined, or some such, and offered to create an inference that the defendant shot the deputy as well). The defendant seeks to complete with the remainder of the statement.

<sup>2</sup> Rule 106 Advisory Committee Note.

<sup>3</sup> *See, e.g., United States v. Sanjar*, 853 F.3d 190, 204 (5<sup>th</sup> 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.”

This memo is in five parts.<sup>4</sup> Part One discusses how and when Rule 106 applies, focusing on the facts that the requirements of the rule (which would not be changed by any proposed amendment) are stringent and that completion is rarely permitted. 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 unrecorded statements or, if not, whether such statements are covered under a completeness principle found in Rule 611(a) or the common law. 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 the merits of various amendment alternatives that were presented at previous meetings. Part Five provides three drafting alternatives.

**Behind this memo in the agenda book is a memo from Professor Richter, on case law in those states with versions of Rule 106 that allow completion with oral, unrecorded statements. That memo addresses concerns that including unrecorded statements in the rule will raise special difficulties.**

## **I. How and When the Rule Applies.**

### ***A. Rule 106 Applies in Narrow Circumstances***

Because Committee members at previous meetings expressed concern about whether an amendment will allow rampant completion and constant disruption of the order of proof, this memo seeks to provide more perspective on the *very limited scope of the existing rule*. The possibility of completion arises only in very narrow circumstances --- circumstances that would not be expanded by any of the proposals the Committee is considering. The rule contains important threshold requirements that provide 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 statement offered by the proponent has been presented in such a way as to create an inference that is inaccurate --- i.e., it is misleading.

AND

2. The completing statement that the adversary seeks to introduce is necessary to eliminate the unfair inference and to make the statement accurate as a whole.

<sup>4</sup> Substantial passages from this memo are unchanged from the memo submitted for the Fall, 2018 meeting. But changes and additions have been made to include new case law, and to provide responses to some of the arguments and suggestions made at the miniconference and at the last meeting. New drafting alternatives are presented in response to these arguments and suggestions.

These triggering requirements are *not* diminished in any of the proposals for change that the Committee has been considering. To the extent the language regarding these requirements might be clarified (given the ambiguous “fairness” language in the current rule), the proposed clarifying language (discussed later in this memo) will not make the rule apply more broadly.

The Grimm example of the gun possession is one in which both of the above requirements are met, and would be met by the proposals discussed later in this memo. The portion chosen by the government creates an inaccurate inference. “I bought the gun” creates an inference that you still have it (exactly the inference the government is seeking) --- so it is misleading. 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 on me” creates no unfair inference in a prosecution for possessing the gun; it’s simply a confession of the crime. 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 on me” 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 --- and would not be expanded by any proposal the Committee is considering --- it seems very unlikely that amending it to trump the hearsay rule and to cover oral unrecorded statements will 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 Rule 106 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 successfully invoked.**

*Here are some (the relatively few) examples of completion required:*

- *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 offered only the

part of the statement conceding awareness of the 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 --- so the portion offered by the government was misleading. 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 (7<sup>th</sup> 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 same 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 misleading inference from the second recording that he had independent knowledge.

- *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.

***Here are some of the (many more) examples of completion not required:***

- *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 his car, but objected to redaction of his statement 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 . . . [not] necessary to explain or place in context the admitted portion.” Put another way, the defendant’s statement about who was in the car was not misleading.

- *United States v. Hird*, 901 F.3d 196 (3<sup>rd</sup> Cir. 2018): The defendant was a ticket-fixing judge charged with perjuring himself in a grand jury proceeding. He argued that the trial court should have admitted the portion of his grand jury testimony in which he stated that he never provided favors. The court found that the statement was not necessary for completing the portions of his testimony in which he (falsely) denied receiving consideration for fixing tickets. The court stated that the excerpt that the defendant sought to admit “occurs many pages before the testimony regarded as perjurious,” was “separated by the passage of time during questioning” and was “unrelated in the overall sequence of questions and to the answers grounding his conviction.” The court held that the rule of completeness does not apply to statements that are remote in time and circumstances from the statement offered by the proponent.

- *United States v. Shuck*, 1987 U.S. App. Lexis 1519471, at \*6 (4<sup>th</sup> 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. Branch*, 91 F.3d 699, 728 (5<sup>th</sup> 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 government offered the former statement and not the latter. 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 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. Dotson*, 715 F.3d 576, 581 (6<sup>th</sup> 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 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. The court held that the portions admitted were not misleading and the portions omitted were not necessary to correct any misleading impression. The omitted 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. Doxy*, 225 Fed. Appx. 400 (7<sup>th</sup> 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 misleading 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. Lewis*, 641 F.3d 773 (7<sup>th</sup> 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 (7<sup>th</sup> 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. 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. Dorrell*, 758 F.2d 427 (9<sup>th</sup> 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. Brown*, 720 F.2d 1059 (9<sup>th</sup> 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."
- *Briggs v. Temple University*, 2018 WL 5013597 (E.D. Pa. Oct. 16, 2018): In a case involving damages from the alleged breach of an employment contract, the jury asked for a readback of testimony about the plaintiff's wages. The defendant argued, under Rule 106, that if the judge provided a readback on wages, the judge was then required to readback the testimony about the plaintiff's failure to mitigate damages. The court found that Rule 106 did not impose a requirement of completion, because the amount of the plaintiff's wages was a completely separate question from what the plaintiff did or did not do to mitigate damages. (The parties and the court seemed all to agree that Rule 106 applied to

readbacks, but this is probably not so, because the rule applies when a “party” seeks to introduce all or part of a statement. That is not occurring in a readback.)

- *Rodriguez v. Miami-Dade County*, 2018 WL 3458324 (M.D. Fla. July 18, 2018): In a Title VII action, the plaintiff admitted some call logs and the defendant argued that the rule of completeness required admission of all call logs to the same people. The court found that the defendant made no argument that the remainder of the logs was necessary to rectify any misleading impression created by the plaintiff.

- *United States v. Gilbert*, 2018 WL 5253517 (N.D. Ala. Oct. 22, 2018): A defendant was convicted of bribing a legislator. The government offered the defendant’s statement to police officers that he thought he was not violating the law because the subject of the payment was beyond the legislator’s jurisdiction. The defendant sought to complete with a statement made later in the interview, to the effect that he had sought advice of counsel. The court found that this statement was not necessary to complete: “the fact that Roberson inquired about the legality of his actions is not directly related to his determination that the area targeted by the lobbying campaign was outside of Robinson’s district. Thus, excluding the latter part of the interview did not distort the meaning of the admitted portion.”

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**Of all the reported Rule 106 cases in federal district courts, the ratio of “completion required” to “completion not required” is about 1/15.<sup>5</sup> That is unsurprising because 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 in favor of a criminal defendant. 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,

<sup>5</sup> Of course reported cases, while relevant, do not tell the whole story of how Rule 106 is used.

in *United States v. Mosquera*, 866 F.3d 1032, 1049 (11<sup>th</sup> 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.”

For other examples of the prosecution benefiting from Rule 106, *see United States v. Rubin*, 609 F.2d 51 (2<sup>nd</sup> 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 (4<sup>th</sup> Cir. 1988) (government allowed to complete with portions of the grand jury testimony of a witness, even though the statements were hearsay); *In re Ohio Execution Protocol Litigation*, 2018 WL 6520758 (S.D. Ohio Dec. 11, 2018) (redacted portions of prior witness testimony were admitted because necessary to complete the defendant’s selective presentation).

### ***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 (2<sup>nd</sup> 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 were misleading); *Brewer v. Jeep Corp.*, 724 F.2d 653, 656 (8<sup>th</sup> 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 --- regarding Rule 106 is whether the Rule requires the court to admit a completing statement over the government's hearsay objection. At the outset, it must be remembered that there are *substantial conditions* that must be met before you even get to the hearsay question: the portion offered by the proponent must be misleading, and the hearsay portion must be necessary to correct the misleading impression. 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, misleading presentation, the question then is whether the government can turn around and object on hearsay grounds to the defendant's statement that he sold the gun.

As discussed in prior memos, 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 it is not styled as a hearsay exception and is not in Article VIII. But as also noted previously, 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 --- correct a misleading impression --- 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 when necessary to rectify a misleading statement.

- *United States v. Bucci*, 525 F.2d 116 (1<sup>st</sup> 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 to 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 (10<sup>th</sup> 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 (2<sup>nd</sup> Cir. 2012); *United States v. Nixon*, 779 F.2d 126 (2<sup>nd</sup> Cir. 1985); *United States Football League v. National Football League*, 842 F.2d 1335 (2<sup>nd</sup> 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 (4<sup>th</sup> Cir. 2014) (defendant’s web postings were not admissible under Rule 106 because they were hearsay); *United States v. Lentz*, 524 F.3d 501 (4<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 2013) (discussed *infra*, holding 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> Cir. 2013) (“Rule 106 does not compel admission of otherwise inadmissible hearsay evidence.”); *see also United States v. Cisneros*, 2018 WL 3702497 (C.D. Ca. July 30, 2018) (exculpatory statements in a post-arrest interview could not be admitted under Rule 106 because they were hearsay, even assuming that they were necessary to clarify the defendant’s inculpatory statements).

In sum there is a clear conflict in the courts about whether Rule 106 can operate to overcome a hearsay objection.

### ***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 --- which is a departure from the common law. According to the Rule 106 Advisory Committee Note, the Advisory Committee apparently abandoned the common law approach 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 unrecorded oral statement.<sup>6</sup> 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 statements from Rule 106 has led some courts to find an alternative way to admit such statements when necessary for completion. The Supreme Court has intimated that the common-law rule of completeness---which does cover unrecorded statements -- retains vitality. *See United States v. Sanjar*, 853 F.3d 190, 204 (5<sup>th</sup> 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 already admitted. The common law rule of completeness is described as follows by the court in *United States v. Littwin*, 338 F.2d 141 (6<sup>th</sup> 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

<sup>6</sup> 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.

Note, though, that the Florida explanation assumes that the remainder will be *admissible* at a later point. If it is inadmissible hearsay, that is not the case. In essence, Rule 106's coverage of oral unrecorded statements is not very important (just a question of timing), unless Rule 106 can be used to overcome a hearsay exception. If it can, then excluding unrecorded oral statements from its coverage results in a major difference between recorded and unrecorded statements that is difficult to justify as a bright line rule.

Moreover, the Florida rule as to conversations is grounded in part in the disruption that would occur by contemporaneous completion. That justification is weakened if completion can occur at a later time within the discretion of the court. That discretion is provided in the proposed draft, *infra*.

explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary.<sup>7</sup>

A number of courts admit unrecorded statements for completion 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 unrecorded statements and completeness under Rule 611(a) 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 unrecorded 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 unrecorded statements:***

- *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (unrecorded statements of a government witness properly admitted to complete).
- *United States v. Maccini*, 721 F.2d 840 (1<sup>st</sup> Cir. 1983) (relying on Rule 106 --- which is not applicable --- to uphold admission of unrecorded statements offered by the government for completion).
- *United States v. Holden*, 557 F.3d 698, 704 (6<sup>th</sup> 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).”
- *United States v. Haddad*, 10 F.3d 1252 (7<sup>th</sup> Cir. 1993) (exculpatory portion of an oral confession should have been admitted to complete; declaring that Rule 611(a) gives the judge

<sup>7</sup> Note that the common law rule, as described in *Littwin*, also operates to admit completing evidence over a hearsay objection.

the same authority regarding unrecorded statements as Rule 106 grants regarding written and recorded statements).

- *United States v. Woolbright*, 831 F.2d 1390 (8<sup>th</sup> Cir. 1987) (stating that Rule 611(a) supports a rule of completeness for unrecorded 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 unrecorded 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 sufficient cause in itself for amending Rule 106 to cover unrecorded statements. But there are at least two reasons to consider amending Rule 106 to cover such statements:

1. If the Committee does decide to propose an amendment to allow completing statements over a hearsay objection, then an amendment to cover unrecorded oral statements would be a useful complement to that amendment. This is the principle, often used by the Committee, that a proposed amendment not sufficient in itself to justify an amendment may be usefully proposed as part of a rule that is already going to be amended.

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 unrecorded oral statements, **simply says that Rule 106 does not apply, and so that is that --- these courts 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 unrecorded statements.

For example, in *United States v. Gibson*, 875 F.3d 179 (5<sup>th</sup> Cir. 2017), the defendant complained that the trial court erred in preventing defense counsel from cross-examining a former employee about an unrecorded 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 Rule 611(a) or the common law rule of completeness. But that in itself might indicate a reason to treat both recorded and

unrecorded 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 has rejected *any* application of the rule of completeness to unrecorded statements. ***The following courts also to reject the rule of completeness as to unrecorded statements:***

- *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (finding no relief from a misleading presentation because the completing statement was unrecorded and so Rule 106 does not apply).
- *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007) (refusing to consider completion with 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."

**Note: The result in *Ramirez-Perez* has to be wrong even in a circuit holding that Rule 106 does not apply to unrecorded statements. 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 record. The case provides a pretty good example of the need to treat recorded and unrecorded statements the same under the rule of completeness. The "oral statement" exception to Rule 106 is subject to abuse.**

- *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 recorded or not. Such an absolute rule makes no sense. The fact that some oral unrecorded statements might be hard to prove does not mean that all are --- especially when the initial portion offered by the misleading proponent is usually part of *the same oral statement*, and thus subject to exactly the same “practical considerations” --- and yet by definition it has already been admitted.

In sum, there is a good case for amending Rule 106 to cover oral unrecorded statements – or at least to say *something* about such statements if an amendment is being proposed on other grounds. The question of such statements can’t just be ignored if some kind of amendment to Rule 106 is to be proposed.

### **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 was whether a party who had the *right* to complete contemporaneously could do so at a later point in the trial. This section discusses the law on the question of timing of admitting a completing statement. (Again with the proviso that completion is rarely allowed under the terms of the Rule).

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 is a conflict in the courts. Some courts have required the completing evidence to be admitted when the initial portion is admitted. For example, in *United States v. Larranaga*, 787 F.2d 489 (10<sup>th</sup> 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.<sup>8</sup>

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 (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 (6<sup>th</sup> Cir. 2009), the defendant sought to admit redacted portions of his confession. The court held that, assuming completion is allowed, “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 (8<sup>th</sup> 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*, 93<sup>rd</sup> Cong., 1<sup>st</sup> Sess. Ser. 2, 55-56 (1973) (indicating legislative intent that the trial court should have discretion as to the timing of completion).

The court in *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2<sup>nd</sup> 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.

<sup>8</sup> A weird case on timing is *United States v. Maccini*, 721 F.2d 840, 844 (1<sup>st</sup> 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, misleading 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 says completion must occur “at that time.”

In sum there are questions about the timing of completion that might well 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. This conflict 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.

#### **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 prior meetings --- 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.<sup>9</sup>

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 past meetings. (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. A supplement to that proposal, intended to limit any possible overbreadth, is to specify that the rule is not triggered unless the proponent’s proffer creates a misleading impression *about the statement*.

<sup>9</sup> 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 testify that he saw the defendant entering the bank that was robbed, does the defendant, at that point, get to introduce another witness to testify 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.

All these options are discussed below.

### **A. Providing that a Statement That Is Necessary to Complete Is Admissible Over a Hearsay Objection**

As stated above, 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. The contrary view, of a number of courts, is best set forth in *United States v. Sutton*, 801 F.2d 1346 (D.C.Cir. 1986), where the court held that Rule 106 is by its terms not limited by other rules of admissibility, and concluded 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. It is a conflict that has existed for more than thirty years. 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 Supreme Court has only reviewed Rule 106 once – in *Beech Aircraft v. Rainey*, 488 U.S. 153 (1988). The *Beech Aircraft* 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 seems apparent that it must be resolved in favor of admissibility (in some form) of the completing evidence – again assuming that the strict requirements for completion under Rule 106 are established. 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 misleading impression. 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.

**What follows is a discussion of some of the arguments that have been made regarding an amendment that would allow completing evidence to be admissible over a hearsay exception.**

### ***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."<sup>10</sup>

***But there are a number of reasons why the defendant's testimony option is not a good solution to the unfairness problem:***

1. 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.

2. The testimony remedy ignores the advantage that Rule 106 presents as to the *timing* of completion. The 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). Defendant's testifying in the defense case-in-chief is in no sense contemporaneous with the government's admission of the misleading portion.

3. Leaving completion to defendant's testimony raises a tension with the defendant's constitutional right *not* to testify. The Seventh Circuit recognized the unfairness of the testimony alternative in *United States v. Walker*, 652 F.2d 708, 713 (7<sup>th</sup> 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

<sup>10</sup> 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.").

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].

*See also United States v. Sutton*, 801 F.2d 1346, 1370 (D.C.Cir. 1986) (“Since this was a criminal case Sucher had a constitutional right not to testify, and it was thus necessary for Sucher to rebut the government’s inference with the excluded portions of these recordings.”); *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”).

4. 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 third party’s statement. (Such as a statement made by a witness in a deposition). In those cases, it is hard to see how the defendant can testify his way out of a statement of a third party statement that is redacted to be misleading.

5. Probably most importantly, even if the defendant testifies, he will most likely *not even 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 (9<sup>th</sup> 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.” Therefore, completion is necessary to correct the misleading portions of the defendant’s statements *even if the defendant does testify*. See, e.g., *United States v. Vargas*, 2018 WL 6061207, at \*2 (S.D.N.Y. Nov. 20, 2018) (completion with exculpatory statements was necessary because even though the defendant was going to testify, the admission of the prior inculpatory portions of the statements could lead the jury to conclude that he made no exculpatory statements; and without completion, the defendant’s exculpatory testimony at trial could be thought by the jury to be “a recent fabrication, inaccurately undercutting defendant’s credibility.”).

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. And of course, 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 making the initial offer 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 (6<sup>th</sup> 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.<sup>11</sup>

It should be noted that *Adams* was written six 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 was unavailable for trial, 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

<sup>11</sup> 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.”).

defendant should have gone unrectified in the absence of a hearsay exception, according to the court.<sup>12</sup>

For these reasons, the possibility that parties will be deterred from misleading presentations by the risk of rebuttal is not a ground for rejecting an amendment to Rule 106 that would allow the opponent to admit completing hearsay to remedy a misleading presentation.

### ***3. Argument: What About the Constitution as a Remedy?***

It might be argued that any unfairness resulting from the fact that a criminal defendant cannot rebut a misleading presentation with completing hearsay could be rectified by the Constitution. Couldn't the defendant in *Adams* argue that his constitutional right to an effective defense was violated by the exclusion of his completing hearsay? For example, in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court found that the defendant's constitutional right to an effective defense was violated when a confluence of state evidence rules barred the admissibility of hearsay evidence strongly indicating that a third party committed the crime. A response to this argument, however, is that the *Chambers* Court, and subsequent decisions, emphasize that the constitutional right to overcome evidentiary rules of exclusion is extremely narrow. The accused must show that the evidence rule infringes upon a "weighty interest" and that the exclusion is "arbitrary or disproportionate to the purposes[] [it is] designed to serve." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (finding that exclusion of exculpatory polygraph evidence does not violate the right to an effective defense). So whether an accused will be protected by the Constitution in *Adams*-like situations is a matter of debate.

But even if the Constitution could be a solution for completing hearsay, there are at least two reasons to change the rule itself to cover such situations:

1. It is never a good idea to have evidence rules that are susceptible to unconstitutional application. That is not only a bad outcome in terms of the integrity of rulemaking. It is also a trap for the unwary. Lawyers that assume evidence rules are controlling may not be aware of the line of cases establishing a constitutional right to an effective defense that overcomes certain evidentiary exclusions. And even lawyers that know about these cases may rightly think that they are too narrow to cover every instance of unfairness when the government introduces a misleading portion of a statement. It is notable that the *Adams* court itself, in holding that Adams had "no redress" to the unfairness, did not reference the constitutional right to an effective defense --- meaning at a minimum that Adams's counsel probably did not raise the point.

2. The constitutional right to an effective defense has no applicability where the unfair portion is offered *by the criminal defendant*, or by a party in a civil case. In those situations, the remedy against unfairness must come from the Evidence Rules, or not at all.

<sup>12</sup> 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.

For these reasons, the unfairness resulting from an un rebutted misleading presentation should be a matter for Rule 106, not the constitutional right to an effective defense.

#### ***4. Argument Against an Amendment: Completion Would Allow Unreliable Hearsay to be Admitted.***

At the last meeting, a Committee member argued against an amendment to Rule 106 that would overcome a hearsay objection, on the ground that such an amendment would result in “unreliable” hearsay being admitted. The specific argument was that the defendant’s statement in the Grimm hypothetical that he gave the gun away should not be admissible for its truth because it is unreliable.

But there is a strong argument that a concern about unreliability of a completing statement misses the point. To start with, *the initial portion of the statement, offered by the government, is not admitted because it is reliable.* The rationale for admitting a party-opponent statement is described in the Advisory Committee Note to Rule 801:

Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility as evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. *No guarantee of trustworthiness is required in the case of an admission.*

Thus, a party-opponent statement is not admitted because it is reliable, but because it is consistent with the adversary system rationale that you can use an opponent’s own statements against them.

Following along with the adversarial premise, it is *not* consistent with the adversary system to allow an adversary to present the opponent’s statement in such a way as to mislead the factfinder. Rule 801(d)(2) allows for *fair* adversarial use --- but there must be some protection against foul use. That is where Rule 106 comes in. So to argue that allowing Rule 106 to admit hearsay would result in unreliable evidence being introduced misses the point of the completion --- the completion is necessary to provide an *accurate* indication of what the defendant actually said, regardless of whether the statement is in whole or in part reliable. Under these circumstances, if the first statement need not be reliable, why should the second statement have to be, its admission is necessary to protect against unfairness and to provide the jury more accurate information of what was actually said?

It should be noted, as to reliability, that proponents retain complete control over the admissibility of “unreliable” remainders --- by foregoing the misleading statement instead of seeking to admit it. What they should not be able to do is introduce misleading statements and then object that a statement correcting the misrepresentation is “unreliable.”

## 5. 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 of “any other part or any other writing or recorded statement *which is otherwise admissible.*” But Congress did not add that language.<sup>13</sup>

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 hearsay<sup>14</sup>, 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 outside of Article 8 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, 1013 (8<sup>th</sup> Cir. 2018) (Rule 32 authorizes admissibility of deposition hearsay even though it is not admissible under the Article 8 exceptions, relying on Rule

<sup>13</sup> Letter from Rakestraw to Senate Jud. Comm., 93<sup>rd</sup> Congress, 121-23.

<sup>14</sup> Rule 801 provides the definition of hearsay; Rule 802 is the source of exclusion of hearsay.

802 and noting that “[d]ecisions from around the country have concluded that Rule 32(a)(4)(B) operates as an independent exception to the hearsay rule.”) 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.<sup>15</sup>

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 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, it would appear that legislative history, a fair reading of the Evidence Rules, and the placement and language of Rule 106 support the conclusion that Rule 106 can operate as a hearsay exception for completing evidence.<sup>16</sup>

<sup>15</sup> Also, recently enacted Rules 902(13) and (14) effectively provide hearsay exceptions for testimony that authenticates electronic information --- a certificate is allowed as a substitute for trial testimony. And these exceptions are, of course, outside Article 8.

<sup>16</sup> At the Denver miniconference, Judge Browning suggested that if Rule 106 were amended to allow completion over a hearsay objection, it should be moved to Rule 803. But this suggestion is unworkable for a number of reasons:

1) Relocation would create unnecessary disruption (to electronic searches, settled expectations, etc.) from moving the rule --- relocation of rules was specifically prohibited in the restyling in order to avoid such disruption.

2) Placement in Rule 803 is inapt because those exceptions are based on the premise that the hearsay statement was trustworthy when made. (That is why party-opponent statements were not included in Rule 803 --- their admission is not dependent on having been trustworthy when made). In contrast, a completing statement would be admissible to prevent adversarial unfairness. So Rule 106 simply does not fit within the rationale of the Rule 803 exceptions.

3) There are many situations where a party might offer completing evidence *that is not inadmissible hearsay* --- such as an offer of one part of an admissible business record contemporaneously with the opponent’s misleading portion. If Rule 106 is moved to Rule 803, questions will arise as to whether Rule 106 even applies, thus depriving the party of the right to complete *contemporaneously*.

## ***6. 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.

Notably, the California Supreme Court has applied the *rule of completeness* to operate as a forfeiture provision where the defendant offers a misleading portion of a statement and objects, on confrontation grounds, to the admissibility of the testimonial remainder. In *People v. Vines*, 251 P.3d 943, 968–69 (Cal. 2011), the court stated that “like forfeiture by wrongdoing, [the rule of completeness] is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on confrontation clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood.”

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.<sup>17</sup> 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 a prior 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 an 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.<sup>18</sup>

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

<sup>17</sup> 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.

<sup>18</sup> The minutes of a 1968 Advisory Committee meeting indicate that the Committee reviewed a draft providing that "the adverse party may require him" to complete. Judge Weinstein argued that this should be changed to "the court may require" because the court should have control over the order of proof. A motion was made to change "an adverse party may require him" to "he may be required" --- implying, though in passive voice, that the court would do the requiring. That tentative final draft was, for reasons I cannot find, changed back to "the adverse party may require him" in a revised draft that was then enacted.

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 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; it appears that it is the adverse party who is to offer it. 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 when a portion of the defendant’s statement is offered by the government and is misleading.

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 (7<sup>th</sup> 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 (3<sup>rd</sup> 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 over a hearsay objection.

Would an amendment to Rule 106 that would restore the requirement language (while of course maintaining gender neutrality) solve the problem raised by a party offering a misleading portion of a statement and then arguing that the remainder is inadmissible hearsay? 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 --- assuming that the drafters actually considered the language to be a solution to the hearsay problem.<sup>19</sup>

An amendment restoring the requirement language is surely better than the existing state of affairs. It might 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 will 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:**

<sup>19</sup> That assumption may be dubious. The drafters were focused on leaving the court in control of the order of proof. There was no discussion of the effect of that delegation on a hearsay exception. See the history discussed in Note 18.

**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 a 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 will probably 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 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. It might be statements made at the grand jury by a government informant. 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 forfeiture --- 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 to 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. The foundation of the argument is that 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.

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 could be proposed to make that explicit.

**There are some pretty serious problems with a “context” solution, however:**

1. The completing statement could be used by the jury 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 one that is unfair to the defendant. 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 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. The completing statement doesn’t change the meaning of the original portion 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.<sup>20</sup> It is much more direct to just say that the statement is admitted for its truth.

<sup>20</sup> *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

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 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 specifically on the non-hearsay basis of context.<sup>21</sup> 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.

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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. The Alternative of Including Unrecorded Oral Statements**

### ***1. Legislative History***

The Advisory Committee Note to Rule 106 states that unrecorded oral statements are not covered due to “practical considerations.” Per the Chair’s request, researchers at the AO checked to see what the Advisory Committee might have thought it meant by “practical considerations.” The AO could not find any history on why the phrase was used in the Advisory Committee Note. But there is some history on the Advisory Committee’s decision to exclude unrecorded statements from the coverage of Rule 106. A brief discussion of that history follows:

The Reporter’s First Draft of Rule 106 allowed completion with another part of a “writing, statement, or conversation.” Thus, unrecorded oral statements would be allowed under that draft. The tentative final draft changed the language to “writing or recorded statement.” The minutes of a 1968 Advisory Committee meeting indicate that a member moved to strike the term “conversation” with the intent to “limit the scope of the rule to

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.

<sup>21</sup> See, e.g., *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10<sup>th</sup> 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.”).

concrete factors.” Then there was “a lengthy and indecisive discussion on whether the word ‘conversations’ belonged in the rule.” The deletion of the term “conversation” was eventually voted on and approved by a vote of 10 to 3.

It would be tough, at least from the record, to determine what “practical considerations” moved the Advisory Committee to delete the coverage of oral unrecorded statements. A possible conclusion --- given the reference to “concrete factors” --- is that if the completing statement is unrecorded, disputes might arise about the content of the statement --- disputes that are less likely to arise if the statement was written or recorded.<sup>22</sup> Another possibility is that the drafters had it most prominently in mind to draft a rule requiring contemporaneous completion, and might have thought that contemporaneous completion for every conversation would be unduly disruptive. And if that is the case, the drafters’ concerns are ameliorated if the timing of completion is left to the discretion of the court.

## ***2. Difficulties in Proof as a Bar on Oral Unrecorded Statements?***

Even if there is concern about disputes over unrecorded oral statements, it can be argued that complete exclusion of such statements is overkill. While there might be a dispute about the content or existence of some unrecorded statements in some cases, surely the difficulty of proof is a matter that could be handled on a case-by-case basis under Rule 403. The argument would be that the fairness rationale of Rule 106 should apply to completing unrecorded 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 unrecorded statements offered to complete --- were they ever made, or are they being misreported --- is the problem raised by *every single unrecorded statement reported in a court*. So why should completing unrecorded statements be treated differently from any other unrecorded statement? Moreover, when an unrecorded statement is being offered for completion, the statement that it is completing is very likely a part of a broader unrecorded statement, a portion of which is offered initially by the adversary. So in the Grimm hypothetical, 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 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 under Rule 106 gives rise to the possibility of sharp practices and abuse. An example is *United States v. Ramirez-Perez*, 166 F.3d 1106 (11th

<sup>22</sup> It is not clear that difficulties of proof were at the heart of the Advisory Committee’s decision. That same Committee proposed a rule on prior inconsistent statements that allowed oral unrecorded statements to be admissible for their truth. There was no concern expressed about difficulty in proving up such statements; and it could be expected that the witness being impeached with a prior oral statement might deny having made it.

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 unrecorded statements.

So it would seem that there is a good reason to amend Rule 106 to cover unrecorded oral statements, as is the practice in a number of states.<sup>23</sup> A complicating factor is that many courts have found a way to apply the rule of completeness to unrecorded oral statements by relying either on Rule 611(a) or the common-law rule of completeness. In these courts, adding unrecorded statements to Rule 106 would not change any result. So it could be argued that as to these courts, the cost of an amendment is unjustified.

Yet as discussed above, there are a fair number of opinions where courts simply hold that Rule 106 does not cover unrecorded 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.

In the end, there is an argument that including unrecorded oral statements in Rule 611(a) will serve two separate purposes:

1) In those circuits that cover unrecorded statements under Rule 611(a) or 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 unrecorded 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 unrecorded 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.

<sup>23</sup> 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.

### ***3. Problems in Practice in Courts Allowing Completion with Unrecorded Oral Statements.***

As discussed above, several circuits and several states allow completion of misleading statements with unrecorded statements. Given the concern about disputes over the content of an unrecorded statement, one might wonder whether these courts have had difficulties, e.g., extensive hearings to determine what was said.

At the federal level, I have not found a reported case on Rule 106 in which a court expressed a concern about an unrecorded statement offered for completion, in terms of difficulty of determining what, if anything, was said. I have not found any case even discussing a dispute between the parties about an unrecorded statement. This is of course not dispositive, as I don't claim perfection, and anyway such disputes may not be reported. But it is some indication that there is not a state of discontent over admission of oral unrecorded statements to complete in those federal jurisdictions that allow it. Part of the reason may well be that the grounds for being able to offer completing evidence --- whether recorded or not --- are so narrow that it rarely if ever comes down to the form of the statement. That is, given the fact that the first portion must be misleading, and the completing portion must actually correct the misleading impression, by the time those requirements are met, the court would be reluctant to exclude the completing statement merely because it is unrecorded.

At the state level, Professor Richter has conducted significant research into how unrecorded statements have worked under state rules of completeness that permit such statements to be admitted. Professor Richter's memo is included in the agenda book immediately after this one. In quick summary, she did not find a single state case where the court wrestled with a dispute about the content of a completing oral statement. Thus, it would appear that the "practical" concerns about completing with oral statements are substantially overblown.

### ***4. A Possible Compromise***

A possible compromise, allowing oral unrecorded statements for completion but retaining awareness over possible difficulties of proof, was proposed by Paul Shechtman at the Denver miniconference. His proposal was to allow completion with unrecorded statements "the contents of which are not substantially in dispute." Such language would have the advantage of giving judges the discretion to avoid disputes about the content of an unrecorded completing statement, while still allowing completion where there is no meaningful dispute (as is likely to be the case in most situations). One could argue that the court already has such discretion under Rule 403, but including something more specific in the rule might be helpful. This compromise language is set forth in the drafting options below.

## E. The Alternative of Addressing 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 a *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 (8<sup>th</sup> Cir. 2001) (trial court has substantial 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 is injured by a misleading presentation 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, like those discussed above. 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, allowing court discretion as to the timing of completion might be a useful amendment.

If the rule is amended to allow discretion as to timing, it would be sensible to add language to the Committee Note indicating while discretion is allowed, there should be a presumption that completion is to be contemporaneous. After all, a major foundation of Rule 106 is that contemporaneous completion is necessary because of “the inadequacy of repair work when delayed to a point later in the trial.”

## **F. The Alternative of Precluding Admissibility of Third Party Statements**

Judge Schroeder, in a previous meeting, noted 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” could allow completion with statements by other speakers, including e.g., news reports. Judge Schroeder suggests that any amendment should clarify that the initial portion and the completing statement are made *by the same person*.

My research of the federal 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 (11<sup>th</sup> 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.”

The Committee has, at the Spring 2018 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.

It should be noted, however, that at the Denver miniconference, Judge O’Malley made remarks in opposition to a “same speaker” limitation in Rule 106. Here are her remarks:

I think the same person limitation—that the completing statement must be made by the same person who made the original statement—is a real problem because if the statement is in response to a question, and the way the question was phrased makes the statement mean something totally different or at least arguably means something different, then the question should be admitted for completion. Or what if you’re in a meeting, and something’s said, and the very next comment makes it clear that everyone understood it to be a joke? Shouldn’t that comment be admissible to correct a misimpression, even if it is made by a different person?

An example of a completion issue that Judge O'Malley might be thinking of arose at the state level. *State v. Swenson*, 2013 WL 2106773, at \*7 (Neb. Ct. App.), was a Nebraska prosecution for sexual assault on a minor. At trial, the defense impeached a prosecution witness with inconsistent statements she made during a deposition. After the prosecution suggested that the witness was scared during her deposition and that her fear explained the inconsistencies, the defense asked the witness what she had said at the deposition when defense counsel asked her if she was scared and she responded that she had said “no, because you [the defense lawyer] seem like a nice guy.” Thereafter, the prosecution asked the witness how defense counsel had responded when she said he seemed nice. Over a defense objection, the witness was allowed to relate *defense counsel's response* that he “was not such a nice guy.” The appellate court found that the rule of completeness permitted the prosecution to ask about the lawyer's statement to the witness during the deposition to give the full tenor of the exchange between the witness and the lawyer.

The question for the Committee is whether the possible overuse, and disruption of trial, by proffers of third party statements for completion is so great that examples such as those proposed by Judge O'Malley, and as illustrated by *Swenson*, should be left without coverage. That might be a question that may be more easily answered after public comment.

## **G. The Alternative of 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 seems 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. “Fairness” is fuzzy. 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. Given the benefits that completing parties would be receiving from other parts of a proposed amendment --- overcoming a hearsay objection and covering oral statements --- sharpening the term for triggering the rule might be seen as a fair and balanced amendment.

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 (2<sup>nd</sup> 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 an example of a statement triggering Rule 106 coverage under current law that is not “misleading.” But perhaps any possible underinclusiveness can be tolerated by the benefit of using a concrete word, “misleading,” that sharpens the concept in a way that avoids potential overbreadth.

A more substantial issue is that adding “misleading” raises some question about how to interpret the rest of the rule, and probably requires 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 as a condition for the initial proffer, then it would probably be beneficial to take the next step and clarify when completion is *actually allowed*, as opposed to relying on the fuzzy standard of fairness. The net gain of specificity will thus apply both to the trigger for the rule and the completion allowed. 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.

## H. The Alternative that the Statement Itself Must Be Misleading for Completion to be Allowed

At the last meeting and at the miniconference, there was concern about an amendment that would cause overuse of Rule 106. The concern was that the rule might be read to allow disruption of the order of proof whenever a proponent offered evidence that could be rebutted by the opponent. Judge Campbell suggested that an amendment might be drafted to guard against expansive views of the Rule 106 completion right. In particular, he suggested language that would clarify that a party's original presentation of a statement must create a misleading or distorted view of *that statement* before completion will be permitted. Judge Campbell explained as follows at the miniconference:

But the concern I have is that anytime the government wants to introduce a statement to prove its point, the defense can say that that's misleading if there is any other evidence in the case that contradicts it. An argument "the statement is misleading unless we get in the rest of the story" is overbroad, and it's not the intent of the rule of completeness, to be that broad.

The example discussed at the miniconference was a statement from one coconspirator to another: "The defendant is going to drive the getaway car for the robbery next week." The defendant wants to admit a later statement from the same speaker, made the next day: "The defendant can't do it. We will have to find someone else." If the defendant is allowed to contemporaneously complete with that statement, there is a potentiality of upsetting the order of proof in every case in which the defendant has evidence that contradicts government-proffered evidence. (And that problem would of course be extended to civil cases).

The suggested solution to this possible problem of overbreadth would look something like this:

If a party introduces all or part of a written or recorded statement so as to create a misleading impression **about the statement**, an adverse party may require the introduction \* \* \* that corrects the misleading impression.

It is not absolutely clear that this refinement is necessary. To take the example given above, under the existing Rule 106 there is no case law providing that evidence is admissible to contemporaneously complete simply because it contradicts the proponent's evidence. The case law set forth above on when the rule applies is unambiguously narrow. The *statement itself* as introduced by the proponent must be misleading under current law. Put another way, with the hypothetical above, a court under current law would undoubtedly reject completion, because the first coconspirator statement is not misleading. Rather it is probative that the defendant was involved in the crime. Thus there would be no misleading impression to rectify.

That said, the addition of “about the statement” would emphasize that the rule is narrow – which might be useful if the operative language is changed from generalized notions of “fairness.” And if the term “misleading” is used, that is a new term, and so it might well be helpful to clarify just what needs to be misleading. And “about the statement” might counteract any impression that allowing admission of hearsay and unrecorded statements (if the committee decides as such) was intended to expand the kinds of cases in which completion would be allowed. Also, the proposal *would* cover the Grimm hypothetical, because the government, by cutting the statement in half, has created a misleading impression “about the statement.” The statement is actually exculpatory and the government has made it inculpatory. In contrast, the first coconspirator’s statement, about the defendant agreeing to drive the getaway car, is inculpatory and so properly offered as such.

## V. Drafting Alternatives

From the discussion above, there are a number of alternatives that are workable, and a few that are probably non-starters.

The workable possibilities appear to be:

- Admissibility over a hearsay objection.
- Admissibility for “context” only.<sup>24</sup>
- Coverage of oral unrecorded statements.
- Discretion as to timeliness.
- Limiting completion to statements made by the declarant who made the initially proffered statement.
- Sharpening the “fairness” requirements by referring to a “misleading” initial statement and “correcting the misleading impression” with the completing statement.
- Clarifying that completion is possible only when the initially offered statement is itself misleading and the completing statement clarifies the misleading impression created about the statement.

What follows are three drafting alternatives: 1. Admissibility over a hearsay objection, and covering oral unrecorded statements; 2. Context and covering oral unrecorded statements; and 3. Admissibility over a hearsay objection but not covering oral unrecorded statements. All of the other credible alternatives are included in each of these three models. This is done because mixing and matching all the possibilities would result in about 30 drafting alternatives; moreover it would be simple enough to drop language about timeliness, etc. from any of the alternatives.

There is a separate model for not including oral unrecorded statements, because if the Committee makes the choice not to cover such statements, it would not be enough to simply drop it out of the language of the proposal --- a passage in the Committee Note would be required to explain why oral unrecorded statements remain uncovered.

<sup>24</sup> “Workability” as to the context alternative translates to mean “better than nothing” but rife with problems.

***A. Draft One --- Admissibility of Completing Statement, Even if Hearsay, to Prove a Fact, and Covering Oral Statements.***

**Note:** Many thanks to the Style Subcommittee of the Standing Committee for suggestions on the best way to implement all the possible changes in the Rule.

**Rule 106. ~~Remainder of or Related Writings or Recorded Statements~~  
Correcting a Misleading Statement**

**a) Introducing the Correction.** If a party introduces all or part of a ~~writing or recorded~~ person's statement that is misleading, an adverse party may require the introduction, ~~at that time,~~ of any other part — or any other ~~writing or recorded~~ statement by that person — ~~that in fairness ought to be considered at the same time if its contents are not substantially disputed and it corrects the misleading impression.~~ The adverse party may do so even if the statement would be inadmissible under the rule against hearsay.

**b) Timing the Introduction.** The court may determine the time to introduce the correcting statement.

***Draft Committee Note***

Rule 106 has been amended in a number of respects. First, the amendment provides that if evidence is found necessary to correct a misimpression about a proffered statement, 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 a misimpression about the meaning of a proffered statement can then object to evidence that corrects the misimpression on hearsay grounds. *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) (noting that “[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court”). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading because it suggests that the defendant admitted owning the weapon at the time of the crime. 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 forfeited 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).

Second, the amendment clarifies that the right to completion is triggered by a misleading presentation about the statement 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 intent is to capture the existing law on “fairness” and not to change the standard for completion.

Third, Rule 106 has 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. *See United States v. Bailey*, 2017 WL 5126163, at \*7 (D.Md. Nov. 16, 2017) (“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 . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.”). The amendment does give the court discretion to exclude completing oral statements if the content of the statement is subject to a substantial, legitimate dispute. But fundamentally, any question about the content of an oral unrecorded statement is no different under Rule 106 than it is in any other case in which an oral unrecorded statement is proffered. Disputes over what a declarant said are generally for the factfinder.

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.

Fourth, the amendment clarifies that the source of the completing information must be the same as the source of the misleading information. *See, e.g., Lambert v. Fulton County*, 253 F.3d 588, 596 (11<sup>th</sup> Cir. 2001) (“the rule of completeness embodied in Fed.R.Evid. 106 does not extend to a different interview of a different witness”). Allowing completion through third party statements and other evidence could lead to significant disruption of the order of proof. Moreover if one person’s statement is misleading it will rarely be sufficiently clarified by statements or writings of other persons.

Fifth, the rule has been amended to provide more flexibility of the timing of completion. 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. *See, e.g., United States v. Holden*, 557 F.3d 698, 704 (6<sup>th</sup> Cir. 2009) (stating that under Rule 106 the trial judge should have “discretion to determine whether and when the curative evidence should be admitted”). 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. Moreover, the amendment clarifies that completion is required only when the statement itself is misleading and the completing statement corrects a misimpression about the meaning of the statement itself. The mere fact that the probative value of a statement offered by a proponent can be contradicted by a statement offered by the opponent is not enough to justify completion under Rule 106.

**Reporter’s Comment:** One possibility is to allow 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 by deleting “under the rule against hearsay.” There would also need to be changes to the Note to accommodate this broader language.

## *C. Draft Two: Admissibility for Context Only*

### **Rule 106. ~~Remainder of or Related Writings or Recorded Statements~~ Correcting a Misleading Statement**

**a) Introducing the Correction.** If a party introduces all or part of a ~~writing or recorded~~ person's statement that is misleading, an adverse party may require the introduction, ~~at that time~~, of any other part — or any other ~~writing or recorded~~ statement by that person — that in fairness ought to be considered at the same time if its contents are not substantially disputed and it corrects the misleading impression, in which event the statement is admissible for the non-hearsay purpose of providing context.

**b) Timing the Introduction.** The court may determine the time to introduce the correcting statement.

### *Draft Committee Note*

Rule 106 has been amended in a number of respects. First, the amendment clarifies that if evidence is found necessary to correct a misimpression about a proffered statement 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 simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading because it suggests that the defendant admitted owning the weapon at the time of the crime. 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.

Second, the amendment clarifies that it is triggered by a misleading presentation about the statement 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 intent is to capture the existing law on “fairness” and not to change the standard for completion.

Third, the rule has 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. *See United States v. Bailey*, 2017 WL 5126163, at \*7 (D.Md. Nov. 16, 2017) (“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 . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.”). The amendment does give the court discretion to exclude completing oral statements if the content of the statement is subject to a substantial, legitimate dispute. But fundamentally, any question about the content of an oral unrecorded statement is no different under Rule 106 than it is in any other case in which an oral unrecorded statement is proffered. Disputes over what a declarant said are generally for the factfinder.

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.

Fourth, the amendment clarifies that the source of the completing information must be the same as the source of the misleading information. *See, e.g., Lambert v. Fulton County*, 253 F.3d 588, 596 (11<sup>th</sup> Cir. 2001) (“the rule of completeness embodied in Fed.R.Evid. 106 does not extend to a different interview of a different witness”). Allowing completion through third party statements and other evidence could lead to significant disruption of the order of proof. Moreover if one person’s statement is misleading it will rarely be sufficiently clarified by statements or writings of other persons.

Fifth, the rule has been amended to provide more flexibility of the timing of completion. 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. *See, e.g., United States v. Holden*, 557 F.3d 698, 704 (6<sup>th</sup> Cir. 2009) (stating that under Rule 106 the trial judge should have “discretion to determine whether and when the curative evidence should be admitted”). 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. Moreover, the amendment clarifies that completion is required only when the statement itself is misleading and the completing statement corrects a misimpression about the meaning of the statement itself. The mere fact that the probative value of a statement offered by a proponent can be contradicted by a statement offered by the opponent is not enough to justify completion under Rule 106.

### *C. Draft Three: No Coverage of Unrecorded Oral Statements*

#### **Rule 106. ~~Remainder of or Related Writings or Recorded Statements~~ Correcting a Misleading Statement**

**a) Introducing the Correction.** If a party introduces all or part of a person's writing or recorded statement that is misleading, an adverse party may require the introduction, ~~at that time~~, of any other part — or any other writing or recorded statement by that person — that in fairness ought to be considered at the same time if it corrects the misleading impression. The adverse party may do so even if the statement would be inadmissible under the rule against hearsay.

**b) Timing the Introduction.** The court may determine the time to introduce the correcting statement.

#### *Draft Committee Note*

Rule 106 has been amended in a number of respects. First, the amendment provides that if evidence is found necessary to correct a misimpression about a proffered statement 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 a misimpression about the meaning of a proffered

statement can then object to evidence that corrects the misimpression on hearsay grounds. *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) (noting that “[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court”). For example, assume the defendant in a murder case admits in a written confession that he owned the murder weapon, but also simultaneously adds that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading because it suggests that the defendant admitted owning the weapon at the time of the crime. 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 forfeited 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).

Second, the amendment clarifies that it is triggered by a misleading presentation about the statement 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 intent is to capture the existing law on “fairness” and not to change the standard for completion.

Third, the amendment clarifies that the source of the completing information must be the same as the source of the misleading information. *See, e.g., Lambert v. Fulton County*, 253 F.3d 588, 596 (11<sup>th</sup> Cir. 2001) (“the rule of completeness embodied in Fed.R.Evid. 106 does not extend to a different interview of a different witness”). Allowing completion through third party statements and other evidence could lead to significant disruption to the order of proof. Moreover if one person’s statement is misleading it will rarely be sufficiently clarified by statements or writings of other persons.

Fourth, the rule has been amended to provide more flexibility of the timing of completion. 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. *See, e.g., United States v. Holden*, 557 F.3d 698, 704 (6<sup>th</sup> Cir. 2009) (stating that under Rule 106 the trial judge should have “discretion to determine whether and when the curative evidence should be admitted”). 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.

Rule 106 retains the limitation that it does not cover oral statements that are unrecorded. The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the Rule to writings and recordings. Many courts, however, have found unrecorded completing statements to be admissible under either Rule 611(a) or the

common-law rule of completeness. *See, e.g., United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987) (noting that Rule 611(a), “compared to Rule 106, provides equivalent control over testimonial proof” and concluding 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”). Nothing in the amendment is intended to affect that case law. Courts continue to have discretion to admit evidence of an unrecorded oral statement after considering the probative value of the statement in correcting a misimpression against the time and effort necessary to prove it up.

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. Moreover, the amendment clarifies that completion is required only when the statement itself is misleading and the completing statement corrects a misimpression about the meaning of the statement itself. The mere fact that the probative value of a statement offered by a proponent can be contradicted by a statement offered by the opponent is not enough to justify completion under Rule 106.

# TAB 4B

## MEMORANDUM

To: Advisory Committee on Evidence Rules

From: Liesa L. Richter, Academic Consultant to the Evidence Advisory Committee

Date: February 25, 2019

Re: State Counterparts to Fed. R. Evid. 106/Completion of Oral Statements

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Federal Rule of Evidence 106, the “rule of completion,” permits an adverse party to insist upon the completion of a partial written or recorded statement offered by his opponent when the remainder “in fairness ought to be considered at the same time.”<sup>1</sup> Although Federal Rule 106 does not authorize the completion of oral statements, some federal courts nonetheless permit completion of oral statements through the court’s power pursuant to Rule 611(a).<sup>2</sup> The Advisory Committee has been exploring the possibility of amendments to Rule 106, including a possible amendment to extend application of Rule 106 to unrecorded, oral statements. Several states have enacted counterparts to Federal Rule of Evidence 106 that expressly permit the completion of oral statements or “conversations” in addition to written or recorded statements. California, Connecticut, Georgia, Iowa, Montana, Nebraska, New Hampshire, Oregon, and Texas all have completion rules that permit the completion of unrecorded oral statements. I have examined numerous completion cases in these jurisdictions to evaluate whether extending the rule of completion to oral statements has caused inefficiencies or other practical difficulties.

### *Summary*

A review of the case law in these jurisdictions reveals several trends. First, most of the cases involving the rule of completion in these jurisdictions continue to involve written or recorded statements. Notwithstanding the express ability to complete oral statements, the vast majority of appellate cases reviewing a trial court’s application of the doctrine of completeness deal with recorded witness interviews, signed written statements, or depositions. The completion of oral statements arises very infrequently in the appellate cases. Second, none of the appellate cases suggested any dispute or inefficiency surrounding proof of the content or nature of oral statements when the issue of completion of oral statements did arise. In cases involving oral statements, the typical questions regarding whether the initial partial presentation created a misleading impression and whether the proffered remainder served to place that portion of the statement in context predominated. Finally, much like the federal cases, the state cases involving completion construe completion narrowly and frequently reject attempts by criminal defendants to force the introduction of the remainder of their own self-serving statements to “complete” incriminating portions offered by the prosecution. In sum, the express inclusion of oral statements within the

<sup>1</sup> Fed. R. Evid. 106.

<sup>2</sup> *United States v. Holden*, 557 F.3d 698, 704 (6<sup>th</sup> 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).”).

rule of completeness at the state level has not generated difficulties in the administration of the doctrine of completeness visible at the appellate level.

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A discussion of the case law in each of the aforementioned jurisdictions follows. It includes some cases involving written and recorded statements to give a flavor of the completion cases in each jurisdiction, as well as the few cases involving completion of oral statements.

## ***I. California***

Section 356 of the California Evidence Code allows for the completion of written or oral statements, as follows:

“Where 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 an adverse party; 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.”

California courts describe their rule of completeness in broad terms, explaining that “[i]n the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence.”<sup>3</sup> Notwithstanding that broad description of the standard for requiring completeness, California courts limit completion in a manner that is similar to the federal courts. The appellate cases on completion seem to favor the prosecution, either by holding that completion by the prosecution allowed by the

<sup>3</sup> *People v. Harris*, 118 P.3d 545 (Cal. 2005). Interestingly, on the unrelated issue of whether the rule of completeness should trump the hearsay rule, the California Supreme Court has held that the rule of completeness extinguishes a criminal defendant’s Sixth Amendment Confrontation rights. The California court has analogized the rule of completeness to forfeiture by wrongdoing, finding that a criminal defendant’s use of a portion of a statement in a misleading manner forfeits any right to object to the remainder on *Crawford* grounds. See *People v. Vines*, 251 P.3d 943, 968–69 (Cal. 2011), *as modified* (Aug. 10, 2011), and *overruled by People v. Hardy (on other grounds)*, 418 P.3d 309 (Cal. 2018). In *Vines*, the defendant sought to admit a portion of an out-of-court statement made to police by his accomplice implicating a third party in the robbery at issue. The trial court held that the prosecution would be permitted to admit the remainder of the accomplice’s statement in which he implicated the defendant in the shooting that occurred during the robbery if the defendant introduced a portion of the statement. The California Supreme Court affirmed: “like forfeiture by wrongdoing, section 356 is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on confrontation clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood.... As *Crawford* forbids only the admissibility of evidence under statutes purporting to substitute another method for [the] confrontation clause test of reliability, evidence admissible under section 356 does not offend *Crawford*.” See also *People v. Parrish*, 152 Cal. App. 4th 263, 272, 60 Cal. Rptr. 3d 868, 875 (2007) (after defendant was permitted to introduce statements of accomplice to detective during interview, court held that prosecution was properly permitted to introduce other portions of same interview implicating defendant to complete and place in context exculpatory portions admitted by defendant. Completeness satisfied *Crawford*.)

trial court was appropriate or affirming the trial court's rejection of defense efforts to complete. Because the California rule of completeness does not distinguish between written, recorded, and oral statements, many of the cases do not discuss whether statements were oral or recorded. Even in the cases in which it seems that the underlying statements were made orally, I could find no discussion of any difficulty or disagreement with respect to the content of those oral statements. Cases rejecting and requiring completion are described below.

### ***A. Completion Not Required***

Most of the cases in which the California courts reject completion involve attempts by criminal defendants to introduce self-serving statements after the prosecution's admission of defendants' incriminating statements. The California appellate court affirmed the trial court's refusal to allow the defense to complete the defendant's partial oral statement introduced by the prosecution in *People v. Mendoza*.<sup>4</sup> In that case, Amanda Rodriguez was working as a greeter at a grocery store. She saw a man, later identified as the defendant, bypass the cash registers and exit the store holding a clear bag containing several food items. Rodriguez followed Mendoza to the parking lot and asked if he had a receipt. Mendoza responded by loudly exclaiming: "No, bitch. I don't have a receipt. I'm hungry." The prosecution moved *in limine* to exclude the "I'm hungry" portion of Mendoza's statement to Rodriguez arguing that the statement was irrelevant, had no probative value, and would only serve to confuse and mislead the jury. Mendoza objected, citing section 356, arguing that it was improper for the court to present only portions of his statement. After hearing argument from both sides on the issue, the court granted the motion *in limine* and excluded the portion of Mendoza's statement in which he said "I'm hungry." On appeal, Mendoza argued that the trial court erred under the rule of completeness. The appellate court affirmed, explaining that: "the omitted part of Mendoza's statement does nothing to qualify or enlighten the jury's understanding of Mendoza's previous statements. Each of Mendoza's statements, "No bitch. I don't have a receipt" and "I'm hungry," are easily understood without the other. Omitting "I'm hungry" does nothing to mislead the jury."

*People v. Chandler* was a sexual assault prosecution against a teacher.<sup>5</sup> In that case, the prosecution introduced evidence that a school administrator had an oral conversation with the defendant to warn the defendant not to be alone with students in his classroom with the door closed. The defense unsuccessfully sought to complete the conversation by introducing the defendant's exculpatory statements to the administrator in the same conversation explaining his innocent reasons for being alone with his students. The appellate court affirmed the trial court's refusal to allow the defendant's completion of his oral statements, stating that: "[T]he defendant's explanation of what he had been doing in the classroom was simply irrelevant; it was not needed to make Vijayendran's statements to appellant understood." The court concluded that excluding appellant's explanation of what he was doing in the classroom "did not result in a misleading impression of what Vijayendran intended to convey or did convey."

<sup>4</sup> *People v. Mendoza*, No. G055457, 2018 WL 6565927, at \*1 (Cal. Ct. App. Dec. 13, 2018), review filed (Dec. 14, 2018).

<sup>5</sup> *People v. Chandler*, No. H040429, 2015 WL 7726506, at \*15 (Cal. Ct. App. Nov. 30, 2015).

In *People v. Brooks*, the court also rejected the defendant's completion argument with respect to oral statements.<sup>6</sup> After the prosecution admitted portions of oral statements made by the victim concerning her fear of the defendant, the defendant sought to introduce other oral statements made by the victim regarding her husband's prior physical abuse. The court rejected the defense efforts to offer these statements through the rule of completion because (1) they were not part of the same conversation as the admitted statements concerning the victim's fear of the defendant and (2) they did not remedy any distortion in the admitted statements concerning her fear of the defendant.

In *People v. Lopez*, , the California appellate court found that the defendant's trial counsel was not ineffective in failing to seek admission of the defendant's helpful statements made during phone calls regarding the same subject addressed during an oral conversation in a taxi cab that was admitted at trial.<sup>7</sup> The court found that the defendant's statements during the phone calls were not part of the same conversation as the admitted statements and thus were not admissible to complete under Section 356:

The conversation to be placed in context was the one between Corey and Isenhower. Lopez was entitled to have placed in evidence all that was said to or by 'the declarant'—Corey or Isenhower—in the course of the conversation between them. Lopez was not the declarant in that conversation. Lopez's statements to Isenhower during the pretext telephone conversations were not statements made by the declarant admissible under Evidence Code section 356 to provide context to the conversation between Corey and Isenhower.

In *People v. Ayon*, the appellate court upheld the trial court's refusal to allow the defendant to offer his own exculpatory statements in a phone call he made from jail after the prosecution admitted inculpatory statements he made during the same call.<sup>8</sup> In the first part of the phone call admitted by the prosecution, the defendant spoke to his young child and told her "dada did something bad, baby, so the cops have him, baby" and "dada's a bad boy." An adult woman was on the phone as well when the defendant made these statements to his daughter. After the child got off the phone, the defendant began to converse with the woman. The woman indicated that she had bought the defendant a "mystery thriller" book and they argued about whether the defendant would accept the book, with the defendant insisting that he wanted a book about "ghosts and demons...." Thereafter, the woman asked the defendant if he had talked to his lawyer. In answering the question, the defendant claimed, "they know I didn't do that shit." The trial court rejected the defense efforts to admit this exculpatory statement to place the incriminating statements he made to his young child in context. The trial court found that the jail call involved two separate conversations, one with the child and one with the child's mother, and therefore found that the doctrine of completeness did not necessitate admission of the later exculpatory statements. The appellate court agreed: "The conversation between Ayon and the adult woman did not give context or meaning to Ayon's conversation with his daughter. The two conversations thus were unrelated. The trial court's ruling that the exculpatory statement could not be admitted into evidence did not

<sup>6</sup> *People v. Brooks*, 3 Cal. 5th 1, 49–50, 396 P.3d 480, 518, as modified on denial of reh'g (May 31, 2017), reh'g denied (July 12, 2017), cert. denied sub nom. *Brooks v. California*, 138 S. Ct. 516, 199 L. Ed. 2d 397 (2017).

<sup>7</sup> *People v. Lopez*, No. G050281, 2015 WL 264577, at \*16–17 (Cal. Ct. App. Jan. 20, 2015).

<sup>8</sup> *People v. Ayon*, No. D064994, 2015 WL 4557042, at \*8 (Cal. Ct. App. July 29, 2015).

prejudicially distort the conversation between Ayon and his daughter or present a misleading or distorted version of the relevant events.”

### ***B. Completion Required***

There are many cases in which the California courts find completion appropriate – *typically in favor of the prosecution in a criminal case*. Although some of these cases clearly involved oral statements, it is difficult to determine whether others involved testimony concerning oral statements or recorded statements originally provided orally.

In *Carson v. Facilities Dev. Co.*, the court found that the trial court erred in refusing to allow completion of an admitted oral statement.<sup>9</sup> In the civil suit arising out of the death of the plaintiff’s wife in a collision with the defendant’s car, the defense admitted an oral statement made by the plaintiff to police immediately after the accident in which he stated that his wife did not have adequate time to pull out into the intersection where she was hit. The appellate court found that his second oral statement to the same officer to the effect that the driver of the vehicle that hit plaintiff’s wife was driving “fast” should have been admitted to complete the conversation because it suggested that the driver’s speed may have explained his wife’s inability to clear the intersection. Although it found the error harmless, the appellate court found that the trial judge erred in refusing to allow the plaintiff to admit his second oral statement to complete the one admitted by the defense:

Here, the second statement appears to explain the first statement. Carson may have felt that his wife could not get through the intersection without being hit due to the speed with which Kurtz was coming toward her. The self-serving nature of the second hearsay statement does not preclude its admission under Evidence Code section 356. Therefore, the trial court erred in refusing to allow witness Varlas to state whether Carson had told him that Kurtz's “car went by him fast.”

The court in *People v. Harris* interpreted completion expansively in favor of the prosecution. In that case, the court held that the trial court properly allowed the prosecution to admit the remainder of a shooting victim’s oral statement to a police officer after the defense admitted a portion of the victim’s statement from the same conversation to impeach his preliminary hearing testimony.<sup>10</sup> During his preliminary hearing testimony, the victim had denied that he was a loan shark. At trial, after this preliminary hearing testimony was admitted, the defendant called a police officer who testified to a small portion of a telephone conversation he had with the victim in which the victim admitted that he was a loan shark. The prosecution was thereafter permitted to ask the officer about the remainder of the same telephone conversation with the victim in which the victim recounted how the defendant shot him on the way to obtain money to repay a loan. The court found that the remainder of this conversation, which concerned the victim’s loan-sharking activity and its connection to the defendant, was important to place the portion of the conversation admitted by defendant into context: “In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in

<sup>9</sup> *Carson v. Facilities Dev. Co.*, 36 Cal. 3d 830, 850–51, 686 P.2d 656, 668 (1984).

<sup>10</sup> *People v. Harris*, 37 Cal. 4th 310, 334–35, 118 P.3d 545, 563 (2005).

evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence....”

The California appellate court also upheld the prosecution’s completion of a witness’s oral statement to a police officer in *People v. Hernandez*.<sup>11</sup> In that sexual assault case, defense counsel asked a police officer during cross-examination about the officer’s oral conversation with a witness in which the witness related statements made to her by the minor sexual assault victim.<sup>12</sup> The defense questioning suggested that the minor reported to the witness that the defendant had asked her to watch a pornographic movie but that she had refused and walked away. On redirect, the prosecution was permitted to ask about the remainder of the same oral conversation between the victim and witness in which the victim then told the witness about sexual abuse committed by the defendant. The appellate court affirmed:

During cross-examination, defense counsel questioned Xiong about the details of what Sylvia told him about what Norma had said about appellant showing her pornographic movies. On redirect examination, the prosecutor asked about additional details from the same conversation. Appellant objected on the grounds of hearsay and “beyond the scope.” ... Because the testimony elicited by the prosecutor on redirect examination regarding additional parts of Xiong's conversation with Sylvia C. had “some bearing upon” Xiong's testimony about the same conversation on cross-examination, the jury was “entitled to know the context in which” statements on cross-examination were made.

In *People v. Harrison*, the defendant elicited a police officer's testimony that one Johnson told the officer that he was present when the defendant was negotiating with one of the murder victims about buying crack cocaine and when the defendant killed both victims.<sup>13</sup> Over the defendant's objection, the prosecution elicited the officer's testimony about additional details Johnson gave of the murders. The California Supreme Court affirmed, reasoning: “[O]nce defendant had introduced a portion of Johnson's interview into evidence, the prosecution was entitled to introduce the remainder of Johnson's interview to place in context the isolated statements of Johnson related by [the officer] on direct examination by the defense.”

In *People v. Wharton*, the defendant elicited evidence from a police officer that the defendant showed contrition by confessing to a previous murder.<sup>14</sup> Over the defendant's objection, the prosecutor introduced evidence of the details of that confession. The appellate court held that the evidence elicited by the prosecution was admissible under section 356, reasoning that the “defendant presented evidence from which the jury could infer that his moral culpability for that crime was somewhat reduced. On redirect, the prosecutor was entitled to rebut that inference with evidence of the entire conversation, revealing that the defendant's admission of guilt was not an

<sup>11</sup> *People v. Hernandez*, No. A117006, 2008 WL 1736061, at \*11–12 (Cal. Ct. App. Apr. 16, 2008).

<sup>12</sup> Hearsay issues were apparently satisfied by California hearsay exceptions.

<sup>13</sup> *People v. Harrison* (2005) 35 Cal.4th 208, 25 Cal.Rptr.3d 224, 106 P.3d 895.

<sup>14</sup> *People v. Wharton* (1991) 53 Cal.3d 522, 592–593, 280 Cal.Rptr. 631, 809 P.2d 290.

admirable expression of remorse but was instead made under circumstances showing a false and morally objectionable sense of personal justification.”

In *People v. Clark*, the court upheld the prosecution’s completion with a tape-recorded portion of a witness interview and rejected a defense argument that the completing portion of a statement must be introduced in the same form as the original portion of the statement. In that case, defense counsel used transcripts of a witness’s interview with police to refresh the witness’s recollection during questioning on cross-examination.<sup>15</sup> On re-direct, the prosecution was permitted to introduce completing portions of the tape recorded interview itself. Although the defense acknowledged questioning the witness concerning the interview, the defense argued that no portion of the transcript was ever put into evidence and argued that Evidence Code section 356 would only allow the complete conversation to be admitted in the form of further questioning of the witness, rather than in its recorded form as a tape or its written form as a transcript. The California court rejected this argument about consistent form: “Here, whatever the form of the evidence, the “subject of inquiry” under Evidence Code section 356 concerned the same conversation, the one Grasso had with Weaver. The trial court therefore did not err in admitting the tape recordings under Evidence Code section 356.”

In sum, a review of recent California appellate cases reveals no unique inefficiencies or disputes concerning the completion of oral statements.

## **II. Connecticut Rule 1-5**

The Connecticut completeness provision applies broadly to “statements” of all varieties:

**(a) Contemporaneous Introduction by Proponent.** When a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it.

**(b) Introduction by Another Party.** When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it.<sup>16</sup>

<sup>15</sup> *People v. Clark*, 63 Cal. 4th 522, 600, 372 P.3d 811, 871–72 (2016).

<sup>16</sup> Conn. Code Evid. Sec. 1-5. The commentary to Rule 1-5 explains the distinction between subsections (a) and (b) of the Rule as follows: “Unlike subsection (a), subsection (b) does not involve the contemporaneous introduction of evidence. Rather, it recognizes the right of a party to subsequently introduce another part or the remainder of a statement previously introduced in part by the opposing party under the conditions prescribed in the rule. See *State v. Paulino*, 223 Conn. 461, 468-69, 613 A.2d 720 (1992). Although the cases upon which subsection (b) is based deal only with the admissibility of oral conversations or statements, the rule logically extends to written and recorded statements. Thus, like subsection (a), subsection (b)’s use of the word “statement” includes oral, written and recorded statements. In addition, because the other part of the statement is introduced under subsection (b) for the purpose of putting the first part into context, the other part need not be independently admissible. See *State v. Paulino*, supra, 223 Conn. 468-69; *State v. Castonguay*, supra, 218 Conn. 496; cf. *Starzec v. Kida*, 183 Conn. 41, 47 n.6, 438 A.2d 1157 (1981).”

The commentary to Connecticut Rule of Evidence 1-5 expressly recognizes the Rule's application to oral statements and its ability to overcome hearsay and other evidentiary objections: "'Statement,' as used in this subsection, includes written, recorded and oral statements. Because the other part of the statement is introduced for the purpose of placing the first part into context, the other part need not be independently admissible. See *State v. Tropicano*, 158 Conn. 412, 420, 262 A.2d 147 (1969), cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288 (1970)."<sup>17</sup> Notwithstanding the applicability of Connecticut Rule 1-5 to oral statements, almost all of the completion cases in Connecticut involve written or recorded statements and almost all of the appellate rulings favor the prosecution.

### ***A. Completion Not Required***

In *State v. Jackson*, the Connecticut Supreme Court upheld the trial court's decision to allow the prosecution to admit a redacted and partial version of the defendant's written statement to police.<sup>18</sup> The prosecution admitted a portion of the defendant's statement in which he denied being present "at 903 Hancock Street at the time the victim was shot in order to show not only the defendant's consciousness of guilt, but that he was attempting to establish a false alibi."<sup>19</sup> The defendant objected, arguing that his entire statement should be admitted into evidence to clarify the context of his denial. The appellate court affirmed the trial court's admission of the defendant's partial written statement over the defendant's completeness objection:

Rather than relating to the question of the purported false alibi and the defendant's whereabouts at the time of the shooting, the balance of the statement concerned only references to the defendant's claims that: (1) he knew the victim was his sister's boyfriend; (2) on the day in question, the victim had come to Hancock Street to sell drugs; (3) he had played cards with the victim on the day of the shooting but denied that the defendant owed the victim money at the conclusion of the card game; (4) he never saw the victim with a gun; and (5) he never harbored any ill will toward the victim and did not shoot him. The assertions set forth by the defendant were not related to the issue of his alibi, which was the purpose of the state's offering of the statement.

In *State v. Castonguay*, the defendant testified at his first trial, but elected not to testify when his case was retried.<sup>20</sup> At the second trial, the prosecution admitted portions of the defendant's cross-examination from his first trial. The defendant argued that he was deprived of due process and a fair trial when the trial court refused to allow him to introduce portions of his direct testimony from his first trial to balance the state's offer of his cross-examination testimony. The appellate court agreed with the prosecution that the defendant's statements from his direct examination in his first trial were self-serving, inadmissible hearsay that were unrelated to the admissions upon which the state intended to rely and, therefore, did not serve to place the state's offer in context.

<sup>17</sup> Commentary to Conn. Code Evid. Sec. 1-5.

<sup>18</sup> *State v. Jackson*, 257 Conn. 198, 211, 777 A.2d 591, 601 (2001).

<sup>19</sup> *Id.*

<sup>20</sup> *State v. Castonguay*, 218 Conn. 486, 496, 590 A.2d 901, 907 (1991).

In *State v. Savage*, the defendant's effort to introduce the remainder of his oral conversation with his arresting officer was rejected after the officer testified that the defendant had denied his daughter's accusations of sexual abuse.<sup>21</sup> Because it was the defense that elicited the defendant's denial on cross-examination of the officer, the rule of completeness did not apply and would not allow the defendant to open his own door to the remainder of his oral statements.

### ***B. Completion Required***

In *State v. Falcon*, the prosecution sought to call a cooperating co-conspirator of the defendant's to testify against the defendant.<sup>22</sup> The defense indicated that it intended to call the cooperating co-conspirator's cellmate to testify to oral statements made by the cooperating co-conspirator implicating himself in the victim's killing to impeach the co-conspirator's testimony for the prosecution. The Connecticut trial court ruled *in limine* that the prosecution would be permitted to introduce the entirety of the co-conspirator's oral statements made to his cellmate in the same conversation – including ones implicating the defendant in the kidnapping of the victim -- if the defense introduced some of the statements made to the cooperating co-conspirator's cellmate. “Should the defendant choose to have Marquez testify regarding Cardona–Dingui's prior inconsistent statement regarding the shooting, then the entire statement including the inculpatory statements regarding the kidnapping and the scene of the shooting are also admissible.”

The completeness doctrine sometimes intersects with the Connecticut Evidence Rule permitting the substantive admissibility of the written prior inconsistent statements of testifying witnesses. In *State v. Arthur S.*, for example, an alleged victim of sexual assault testified against the defendant.<sup>23</sup> Her testimony was inconsistent, in part, with a written statement she had previously provided to the police, however. Thereafter, the prosecution sought to admit portions of the victim's prior inconsistent statement for its truth under the Connecticut rule permitting substantive use of written prior inconsistencies. The defendant argued that all information in the prior statement that was consistent with the witness's trial testimony should be redacted, but the prosecution sought to include some consistent portions of the written statement for context. Referencing the Connecticut rule of completeness, the court found that some of the consistent portions of the testifying victim's prior written statement were admissible to place admitted inconsistent portions of the witness's statement in context. “We agree with the court that under the circumstances of this case, in which the timing of the charges, as well as the ages of the victims during the conduct in question, were critical, the context is relevant. Specifically, the defendant sought to have all but three sentences redacted. Those lone three sentences refer to the defendant's sexual conduct but, with the exception of one sentence, do not place that conduct at the first Bristol residence when A and B were thirteen years old and J was twelve years old. The court's analysis reflects the exercise of sound discretion.”

<sup>21</sup> *State v. Savage*, 161 Conn. 445, 447–48, 290 A.2d 221, 223 (1971).

<sup>22</sup> *State v. Falcon*, No. CR10072831, 2012 WL 6846406, at \*2 (Conn. Super. Ct. Dec. 14, 2012).

<sup>23</sup> *State v. Arthur S.*, 109 Conn. App. 135, 141, 950 A.2d 615, 618 (2008).

### **III. Georgia**

Georgia's rule of completeness is found within Georgia's hearsay exceptions:

When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence.

Ga. Code Ann. § 24-8-822 (West).

The Georgia rule encompasses oral statements and there are more cases involving completion of seemingly oral statements in Georgia than in other jurisdictions.

#### **A. Completion Required**

The seminal Georgia Supreme Court case often cited in completeness cases involved oral conversations. In *West v. State*, the court held that the defense should have been allowed to introduce statements in mitigation that the defendant made to a witness in an earlier oral conversation after the prosecution admitted inculpatory statements the defendant made to the same witness in a later conversation.<sup>24</sup> In that case, the defendant had two conversations with the sheriff who ended up testifying for the prosecution. In the defendant's first conversation with the sheriff, the defendant admitted killing the victim but explained why he had done so. In a second conversation with the same sheriff, the defendant elaborated on the positions of both parties at the time of the killing and identified the shotgun used, but did not reiterate the reasons for the killing. The prosecution elicited only the defendant's statements to the sheriff in the second conversation and the trial court rejected the defendant's efforts to introduce evidence of his initial conversation with the sheriff in which he explained his justification for the killing. The Georgia Supreme Court agreed with the defense that the trial court had erred in this unique situation:

If the accused, in the first statement, related as reasons why he killed the deceased circumstances of justification or mitigation, then it would seem contrary to the normal custom of conversations, for the accused, upon every occasion thereafter when discussing any circumstances of the killing with the same person, to reiterate the reasons already stated. To require the accused to repeat this part of his statement on every subsequent conversation with the same party, or else suffer the consequences of having the subsequent conversation used against him to establish a prima facie case, would be placing an unreasonable, unfair, and unjust burden upon him. After making the first statement in which the reasons for the killing are stated, it is but natural that, in a subsequent conversation with the same person and upon the same subject, what was said in the first statement, in the absence of something to the contrary, is necessarily understood, and must be taken and considered as a component part of the subsequent conversation. Accordingly, we think that the trial court erred in not permitting the accused, as provided in the Code, § 38-1705, to cross-examine Sheriff Deal and elicit statements which the accused made to him in the first conversation as to why the accused had killed the deceased.

<sup>24</sup> *West v. State*, 200 Ga. 566, 569–70, 37 S.E.2d 799, 801 (1946).

More recent Georgia cases have also required completion of partial oral statements. In *Allaben v. State*, the Georgia Supreme Court reversed a murder conviction because the defense was denied the opportunity to present the self-serving remainder of a partial oral conversation between the defendant and a prosecution witness that was presented by the prosecution.<sup>25</sup> The portion of the conversation admitted by the prosecution revealed the defendant's oral statements to the witness that he had killed his wife and that her body was in his truck. Thereafter, the trial court denied the defense request to admit the remainder of the conversation, in which the defendant claimed that he did not want his wife to die. The Georgia Supreme Court found that it was error to deny the defense the opportunity to present a complete picture of the oral conversation:

The defense's proffer of Crane's expected testimony demonstrates that the remainder of the conversation between the two men was, in fact, relevant to both Crane's direct testimony and the charges for which Appellant was on trial. Specifically, it explained both the impetus for Appellant's actions toward his wife as well as his intent at the time of the incident. Indeed, Appellant's intent with respect to the use of the ether and sleeper hold—whether he intended to kill his wife or merely subdue her—was the central, and perhaps only disputed issue at trial, and evidence on that point was sparse. Further, the excluded portion of Crane's testimony supported Appellant's defense that the victim's death was unintentional.<sup>26</sup>

Completion of oral statements has also worked in the prosecution's favor in Georgia. In *Thomas v. State*, the defense was permitted to introduce the oral inculpatory statement of the defendant's daughter that she made to officers during the execution of a search warrant in connection with the pending drug charges against the defendant as an against-interest statement.<sup>27</sup> The trial court ruled that the daughter's oral statements to officers later during the same search recanting her confession and implicating the defendant were also admissible to complete the portion of her statement introduced by the defense. The Georgia Supreme Court agreed:

As the first, exculpatory, statement was not the entire substance of what was said during the search, admission of any portion of the remainder of what was said was proper, and the trial court's admission of the second statement was not error.

*Westbrook v. State* involved the completion of oral statements made by a prosecution witness.<sup>28</sup> In that case, a prosecution witness in a murder case testified that defendant had shot and killed other players at a dice game. Thereafter, the defense was permitted to call a legal intern to

<sup>25</sup> *Allaben v. State*, 299 Ga. 253, 255–57, 787 S.E.2d 711, 715–16 (2016).

<sup>26</sup> The Georgia Supreme Court seems to apply a standard of “relevance” to completion in this case that is broader than the FRE 106 standard requiring that the initial partial introduction create a misleading or distorted impression. Under a standard of distortion, the admitted statement might have suggested that defendant confessed to intentionally killing his wife, which was not the case. Under that interpretation, the remainder might have qualified the admitted portion. On the other hand, one could argue that the defendant's claim that he did not want his wife to die in no way changes his earlier statement that she was dead and that he killed her. Either way, there appeared to be no dispute as to the content of the defendant's oral statements.

<sup>27</sup> *Thomas v. State*, 196 Ga. App. 88, 89–90, 395 S.E.2d 615, 616–17 (1990).

<sup>28</sup> *Westbrook v. State*, 727 S.E.2d 473, 476–77 (Ga. 2012).

the stand to describe a prior oral inconsistent statement made to the defense by the witness. In his pretrial interview with the defense, the witness had denied that defendant had shot anybody. Thereafter, the trial court permitted the prosecution to bring out additional oral statements that the witness made to the defense during the same interview that undercut the defendant's claim of self-defense, namely that the witness reported that he had told the defendant that nobody at the dice game where the shooting occurred would be armed. The defendant argued that admission of the remaining oral statements constituted improper rehabilitation and hearsay, but the Georgia Supreme Court affirmed the trial court's admission of the additional oral statements by the prosecution under the Georgia rule of completeness, reasoning that the statements "helped to rebut the defense's charge that Moses had fabricated his incriminating testimony at trial by showing that he had also made statements incriminating Appellant during his pre-trial interview with defense counsel."

### ***B. Completion Not Required***

The Georgia Supreme Court has taken a more restrictive view of completion in other cases, most of which involve recorded statements. For example, in *Jackson v. State*, the Georgia Supreme Court rejected defendant's appeal based upon an alleged completeness violation, finding that an omitted portion of a recorded phone call between the defendant and his mother was not necessary to place a portion admitted by the prosecution in context.<sup>29</sup> In that case, the defendant called his mother from jail. At the beginning of the phone call, he told his mother that he would not plead guilty because he "had not done anything wrong." Later in the phone call, defendant and his mother discussed a potential witness and the defendant told his mother to encourage the witness to stay "out of sight, out of mind" while police investigators were looking for him. The prosecution was permitted to play the latter portion of the call regarding the witness for the jury without the earlier portions of the call during which the defendant claimed that he had not done anything wrong. The Georgia Supreme Court found that this partial presentation of the call did not violate the rule of completeness:

Here, the portion of the phone call in which the appellant told his mother about a potential plea offer (and in which he denied having done anything wrong) was unrelated to the later conversation about Stewart (and separated by conversations about a potential alibi and family issues involving the appellant's father). The discussion about a plea was not necessary "in fairness ... to be considered" as part of the later discussion about Stewart because it did not qualify, explain, or place into context the appellant's request that his mother encourage Stewart to remain unavailable to investigators.

Similarly, in *Thompson v. State*, the court applied a plain error standard of review and rejected the defendant's argument that the completeness rule required the trial court to play an entire recorded witness interview for the jury after the prosecution played certain portions of that interview.<sup>30</sup> The trial court allowed the defense to play some portions of the recorded statement

<sup>29</sup> *Jackson v. State*, 804 S.E.2d 367, 370–71 (Ga. 2017).

<sup>30</sup> *Thompson v. State*, 816 S.E.2d 646, 653 (Ga. 2018). See also *West v. State*, 808 S.E.2d 914, 917 (Ga. App. 2017) (Court properly refused to allow defendant to introduce portions of his recorded statement to law enforcement that prosecution omitted when it introduced his statement against him, including that the victim told him that she was almost 18 years old and he would not have had sex with her if he had known that she was younger. The rule of

suggesting that the witness was on medication during the interview. The Georgia Supreme Court found that the omitted portion of the recording did not serve to correct any misimpression.

#### **IV. Iowa**

Iowa's rule of completeness also expressly allows for completion of "acts," "declarations," and "conversations":

- a. If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any other part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time.
- b. Upon an adverse party's request, the court may require the offering party to introduce at the same time with all or part of the act, declaration, conversation, writing, or recorded statement, any other part or any other act, declaration, conversation, writing, or recorded statement that is admissible under rule 5.106(a). Rule 5.106(b), however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a).

Iowa R. Civ. P. 5.106. The express language of the Iowa Rule also allows completion with "any other act, declaration, conversation, writing, or recorded statement" that ought to be considered at the same time as an admitted act, declaration, conversation, writing, or recorded statement.

##### **A. Completion Not Allowed**

The Iowa Supreme Court appears to have construed its rule of completeness restrictively. In *State v. Huser*, the Iowa Supreme Court reversed a defendant's conviction due to a trial court ruling allowing the prosecution to complete oral statements properly admitted by the defense under the against-interest exception to the hearsay rule with oral statements made by the same declarant on a separate occasion.<sup>31</sup>

For the reasons expressed above, we conclude that Woolheater's statement to Zwank after the crime—that Morningstar had something on Woolheater that could send him to prison—was admissible as a statement against interest. We further conclude there is no basis for requiring admission of other Woolheater statements based on opening the door, curative admissibility, or rule 5.106. In particular, we view rule 5.106 as not permitting admission of other hearsay conversations that have no bearing on the Zwank conversation itself.

completeness "prevents parties from misleading the jury by presenting portions of statements out of context, but it does not make admissible parts of a statement that are irrelevant to the parts of the statement introduced into evidence by the opposing party." The defendant's belief as to the victim's age was not relevant because it was not an essential element of either statutory rape or child molestation, and because mistake of fact regarding the victim's age was not a defense to either crime.); *Roberts v. State*, 503 S.E.2d 614 (Ga. App. 1998) (decided under former OCGA § 24-3-38)(trial court did not err by admitting taped interview of child molestation victim that had been redacted in order to exclude mention of her past sexual history).

<sup>31</sup> *State v. Huser*, 894 N.W.2d 472, 509 (Iowa 2017).

In *State v. Turecek*, the Iowa Supreme Court found that the trial court properly rejected defense efforts to admit a previous oral communication between the defendants and their alleged victim to place seemingly incriminating statements by the defendants in a later admitted recorded conversation into proper context.<sup>32</sup> At trial, the prosecution admitted a recorded conversation in which the alleged minor victim of defendants' sexual assault said: "I didn't like that. That's rape. I'm only 13. I mean, that's pretty bad." In response, the defendants stated: "We apologize. We're sorry. I know we did wrong." Thereafter, one defendant sought to testify concerning a prior oral conversation with the victim in which she allegedly told him that drinking alcohol was akin to rape in her mind due to past sexual assaults by her father involving excessive drinking. The defendant claimed that the previous oral conversation was necessary under the rule of completeness to clarify that he thought he was admitting excessive drinking with the victim during the recorded conversation. Although the trial court permitted the defendant to testify generally that the victim had previously stated that drinking alcohol was like rape to her, the court denied the defense request to admit the precise oral conversation due to the inadmissible references to past sexual assaults by the victim's father. The Supreme Court upheld the trial court's ruling, finding that the court struck a proper balance between the doctrine of completeness and the Iowa rape shield rule.

In *State v. Chiavetta*, the Iowa appellate court affirmed the trial court's decision to allow the prosecution to admit a redacted version of the defendant's written statement to police that excluded self-serving portions of the statement.<sup>33</sup> The court rejected the defendant's argument that the remaining portions of the statement reflecting diminished responsibility should have been admitted through 5.106. The defendant's written statement was admitted as follows, with the italicized portions redacted:

*Several weeks ago, Frank thought that I was too drowsy and he wanted me to take only half of my Effexor. Effexor has an effect on my moods and it's a blood level drug. After I started taking less and less of my Effexor, I started getting horrible thoughts in my head. I just want everyone to know that I didn't mean for Frank to die. I don't know what I was thinking and I know it's because of the Effexor. I'm so sorry.*

The appellate court found that the trial court did not abuse its discretion in allowing redaction of the italicized portions of the statement:

The redacted evidence was essentially an assertion of diminished responsibility. That defense was not formally raised by defense counsel. Moreover, Chiavetta was found guilty of second-degree murder, which is not a specific intent crime to which the defense applies. Third, diminished responsibility cannot negate the element of malice aforethought. Finally, the court left in the following sentences: "I just want everyone to know that I didn't mean for Frank to die. I don't know what I was thinking." These sentences conveyed to the jury her defense, as characterized by appellate counsel, that "she acted recklessly and that Frank's death was accidental and not intended." For these reasons, we affirm the district court's redaction ruling.

<sup>32</sup> *State v. Turecek*, 456 N.W.2d 219, 225–26 (Iowa 1990).

<sup>33</sup> *State v. Chiavetta*, 737 N.W.2d 325 (Iowa Ct. App. 2007).

## ***B. Completion Required***

An Iowa appellate court rejected a defense argument that the trial court committed reversible error when it excluded an oral hearsay statement of a third party claiming ownership of the drugs defendant was charged with possessing in *State v. McLachlan*.<sup>34</sup> The appellate court found that admission of that third-party confession by the defense would have required the simultaneous admission of the defendant's oral statement immediately preceding the confession asking someone else to take responsibility for the drugs under the rule of completeness:

[T]he district court could not have allowed the defense to offer Jones's statement—"Yeah, it's mine"—into evidence without also allowing the State to offer the part of the exchange which immediately preceded the admission, which was McLachlan's call for someone to "take this for me. I'm looking at ten years." It has long been our law that "when one party inquires as to part of a conversation, the other is entitled to the whole thereof, bearing upon the same subject.

In *State v. Wycoff*, the Iowa Supreme Court confronted a case in which the prosecution and defense disagreed about the content of an oral conversation, but resolved it by approving testimony by both sides about the statement.<sup>35</sup> The defendant in the prison murder case called a fellow prison inmate to testify about that inmate's conversation with a prison guard in which the prison guard asked the inmate to implicate the defendant in the killing. When the prosecution attempted to ask the inmate on cross about completing oral statements the inmate made to the guard implicating the defendant during the same conversation, the inmate denied making any oral statements implicating the defendant. Thereafter, the trial court permitted the prosecution to call the prison guard to testify during its rebuttal case to relate oral statements made by the inmate in the conversation that implicated the defendant. Although the court did not expressly reference the doctrine of completion, it upheld the trial court's decision to allow the prosecution and the defense to call each of the participants in the oral conversation to examine the true tenor of the exchange:

First, defendant himself, on his direct examination of Tressler, brought out the Tressler-Menke conversation. He did so because of Tressler's favorable testimony that Menke tried to get Tressler to testify against defendant. Now defendant objects because the State contradicts Tressler's testimony by the other party to the conversation: Menke testifies that the content of the conversation was different. We think it would be a strange doctrine indeed, and one to which we cannot subscribe, that would permit one side to show the content of a conversation and then be able to silence the other side about the conversation, on the ground of hearsay.

Courts sometimes apply the doctrine of completion in circumstances involving the rehabilitation of a trial witness impeached with a prior inconsistent statement. In these cases, the proponent of the witness attempts to introduce other portions of the statement used to impeach the witness to suggest consistency with trial testimony and to repair the impeachment. Although it seems that common law doctrines of relevance and rehabilitation would be adequate to allow this

<sup>34</sup> *State v. McLachlan*, 856 N.W.2d 382 (Iowa Ct. App. 2014).

<sup>35</sup> *State v. Wycoff*, 255 N.W.2d 116, 117–18 (Iowa 1977).

use of the remainder of a witness statement without the doctrine of completion, courts sometimes rely on completion in deciding whether to allow such rehabilitation.<sup>36</sup> In *State v. Austin*, the Iowa Supreme Court relied upon the rule of completeness in affirming the trial court's decision to allow the prosecution to play the entire videotape of a victim's interview with a social worker to clear up defense suggestions during the cross-examination of the victim that her statements during that interview were inconsistent with her trial testimony.<sup>37</sup>

In this case, Austin chose very specific points from the interview about which to cross-examine A.H. Taken out of the context of the entire interview, the jury might have concluded that A.H.'s statements at the interview were inconsistent with her testimony at trial concerning such matters as whether Austin beat her before or after the assault or both times. The videotaped interview also helped to clear up apparent inconsistencies pointed out on cross-examination on such matters as whether A.H. was standing or prone during the assault...The court was well within its discretion in allowing introduction of the videotaped interview.

## V. *Montana*

Montana's rule of completeness also covers "acts," "declarations," and "conversations."

### *Montana 106*

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:

(1) an adverse party may require the introduction at that time of any other part of such item or series thereof which ought in fairness to be considered at that time; or

(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.

(b) This rule does not limit the right of any party to cross-examine or further develop as part of the case matters covered by this rule.

MT R REV Rule 106 (West).<sup>38</sup> The Montana completion cases routinely reject completion, include only a couple that deal with oral statements, and reveal no special problems or inefficiencies generated by the completion of oral statements.

<sup>36</sup> In a state that permits the rule of completeness to overcome a hearsay objection (but does not allow substantive admissibility of prior consistent statements offered to repair impeachment with a prior inconsistent statement), the doctrine of completeness could permit otherwise impermissible substantive use of completing statements.

<sup>37</sup> *State v. Austin*, 585 N.W.2d 241, 243 (Iowa 1998).

<sup>38</sup> There is some confusion in the Montana cases concerning the admissibility of otherwise inadmissible hearsay through Rule 106. In the commentary to the Rule, it states that otherwise inadmissible hearsay *is* admissible if it is necessary to complete: "The Montana completeness rule allows evidence which would ordinarily be inadmissible on its own to be admitted. *McConnell v. Combination M & M Co.*, 30 Mont. 239, 263, 76 P 14 (1904)." Some Montana Supreme Court cases suggest that the opposite is true. See *State v. Castle*, 285 Mont. 363, 374, 948 P.2d 688, 694 (1997). ("Rule 106 does not, however, provide a separate basis for admissibility. As we stated in *Campbell*, this rule is separate and distinct from the hearsay rule. In that case we held that the defendant's line of inquiry to an informant did not open the door to all hearsay communications under this doctrine. Rule 106 does not make admissible statements that would otherwise be inadmissible."). It is not at all clear that the otherwise inadmissible hearsay at issue in *Castle* was completing within the meaning of Rule 106, however.

### ***A. Completion Not Required***

In *Territory v. Clayton*, the court held that the trial court properly excluded self-serving oral statements the defendant made upon surrendering the murder weapon, over a claim that the rule of completeness required their admission.<sup>39</sup> Although the witness to whom the defendant surrendered the weapon had testified about obtaining the weapon from the defendant, that witness had not related any conversation between himself and the defendant at that time. Therefore, there was no partial presentation of the conversation to complete.

The court also upheld the exclusion of recorded statements made by the defendant in *State v. Le Duc*.<sup>40</sup> The defendant made a voluntary statement concerning the shooting at issue on the day of the homicide, which was recorded in shorthand by the county attorney's stenographer. At trial, during cross-examination of defendant, the county attorney was permitted to ask him if he had been asked a certain question when he was making his statement and whether he provided a certain answer. The defendant responded by saying, "I don't think so." On redirect examination, defense counsel sought to admit the defendant's entire statement, claiming that "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." The trial court excluded the statement at that time. The stenographer for the county attorney testified on rebuttal that the defendant did make the statement in question. After his conviction, the defendant appealed the exclusion of the entirety of his statement and the appellate court affirmed the trial court's exclusion.

At the time defendant offered the entire statement, there had been as yet no part of the statement actually admitted in evidence. The defendant had simply stated that he did not think he had made such a statement. It is true that Mary Hogan was called in rebuttal, and testified that defendant did make such a statement. Defendant, in surrebuttal, or in the cross-examination of Mary Hogan, had he so requested, might have offered such parts of the entire statement as would have a tendency to qualify, explain, or contradict that part of the statement testified to by Mary Hogan, but no such request was made. At the time the entire statement was offered it was properly excluded.

In *State v. Sheriff*, the defendant was interrogated by a detective following his arrest and eventually gave a recorded statement.<sup>41</sup> At trial, the prosecution questioned the detective about some incriminating portions of the defendant's post-arrest statement. Relying upon the Montana rule of completeness, the defense sought to cross-examine the detective about a portion of the defendant's statement in which the defendant stated that he would submit to a polygraph test in an effort to show his willingness to cooperate with the police. The appellate court found that the trial court properly applied the rule of completeness in excluding the portion of the statement referring to the polygraph:

The part of defendant's statement testified to by Fox on direct examination related to whether or not defendant owned a gun or the clothing found in the back seat of his car. The fact that defendant also made a statement showing that he would take a polygraph test is

<sup>39</sup> *Territory v. Clayton*, 8 Mont. 1, 19 P. 293, 296–97 (1888).

<sup>40</sup> *State v. Le Duc*, 89 Mont. 545, 300 P. 919, 925 (1931).

<sup>41</sup> *State v. Sheriff*, 190 Mont. 131, 135–36, 619 P.2d 181, 183–84 (1980).

not of the nature that to omit it created a misleading impression on those statements that were admitted.

In *State v. Elliott*, the defendant argued that tapes of her interview with a law enforcement agent should have been excluded because they were incomplete.<sup>42</sup> Specifically, the defendant claimed that she was interviewed by the agent for more than one hour before the recording began and that the oral unrecorded statements she made prior to the tapes being commenced were necessary to provide a fair and complete picture of her interview. The appellate court found no error in admitting the tapes, noting that the defendant could have asked the agent about the unrecorded oral statements on cross-examination under the rule of completeness and that the prosecution did inquire about the unrecorded portion of the interview during the agent's direct examination. The court showed no concern about any dispute that might arise as to the oral statements.

## **VI. Nebraska**

The Nebraska rule of completeness also covers “acts,” “declarations,” and “conversations.”

- 1) 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, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.
- (2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.

Neb. Rev. Stat. Ann. § 27-106 (West). Only a few of the Nebraska cases involve oral statements or conversations. The cases apply the rule of completeness to oral statements in the same way that they do in connection with written or recorded statements and reveal no disputes or other problems in determining the content of oral statements for purposes of completion.

### **A. Completion Not Required**

*Chirnside By & Through Waggoner v. Lincoln Tel. & Tel. Co* was a negligence action against a company based upon a company driver hitting and injuring a child.<sup>43</sup> The plaintiff called the officer who responded to the scene of the accident who testified that the company driver told him that his brakes were not working properly. During the defense case, the officer was recalled to the stand and asked about the remainder of the driver's oral conversation with him, including the driver's observation that the plaintiff child had been running into the intersection just before the collision. The plaintiff appealed a defense verdict claiming that introduction of this oral statement

<sup>42</sup> *State v. Elliott*, 43 P.3d 279, 287 (Mont. 2002).

<sup>43</sup> *Chirnside By & Through Waggoner v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 789–91, 401 N.W.2d 489, 493–95 (1987).

by the defense was error according to the rule of completeness and the Nebraska Supreme Court agreed:

“When part of a conversation is brought out on cross-examination the remainder of the conversation may be brought out ... if it tends to qualify or explain the part disclosed ...; *otherwise not.*”... The conversation introduced by plaintiff dealt only with whether the truck had faulty brakes. The proffered conversation did not qualify or explain the previous testimony. Whether Chadd was running or not running cannot conceivably be said to embrace the subject of faulty brakes. The admission of the testimony was error.

In *State v. Molina*, the trial court rejected the defendant’s attempt to provide a “complete” picture of a prosecution witness’s prior statements by introducing a 6 ½ hour video recording of her pre-trial interview.<sup>44</sup> The defendant was prosecuted for the murder of his child and the prosecution called the defendant’s wife and the child’s mother to testify concerning the killing at trial. During her direct testimony, the mother admitted that she had given a 6 ½ hour interview to authorities after the death in which she had not been entirely truthful. At that time, the defendant sought to introduce a recording of the entire 6 ½ hour interview to give the jury the full picture of the wife’s prior inconsistent statements. The court stated that the defense could cross-examine the mother about her prior inconsistent statements in the interview and that the court would consider allowing some edited portions of the recording to be introduced for that purpose, but that it would not permit the defense to play the entire interview. The defense cross-examined the mother extensively, but did not attempt to impeach her with her interview statements, or to introduce the video recording of any part of the interview. Thereafter, the defendant again offered the entire 6 ½ hour interview into evidence and the court sustained the State’s objection to the exhibit. The Nebraska Supreme Court rejected the defendant’s arguments that the trial court had abused its discretion:

Molina was offered the opportunity to present sections of the interview and argue how those sections might have been admissible, under rule 106, to explain the context of Mrs. Molina’s statements. Instead, Molina chose to offer the entire 6 ½-hour interview, and he did not explain in what way the entire interview was necessary to understand the statements about which evidence had already been adduced, and regarding which Mrs. Molina had been examined. Under such circumstances, we cannot say it was an abuse of discretion for the district court to conclude that the relevance of playing the entire video-recorded interview would be substantially outweighed by considerations of undue delay or wasting time.

### ***B. Completion Required***

The defendant in *State v. Rice* was convicted of murder and claimed on appeal that the trial court erred in rejecting defense efforts to introduce oral statements made by the defendant to complete a partial presentation by the State.<sup>45</sup> At trial, the prosecution introduced oral statements made by the defendant to law enforcement authorities immediately after the killing in which he admitted stabbing the victim and told officers the location of the murder weapon. The prosecution

<sup>44</sup> *State v. Molina*, 271 Neb. 488, 510–11, 713 N.W.2d 412, 435 (2006).

<sup>45</sup> *State v. Rice*, No. A-13-414, 2014 WL 815366, at \*3–4 (Neb. Ct. App. Mar. 4, 2014).

omitted the defendant's contemporaneous oral statements claiming that the killing was in self-defense and the trial court sustained the prosecution's hearsay objection when defendant sought to have them introduced. Although the Nebraska appellate court found any error to be harmless, it suggested that the court's exclusion of the remainder of the oral statement during the prosecution case likely violated the Nebraska rule on completeness. There was no apparent dispute about the content of the defendant's oral statements:

In the present case, we recognize that it is arguable that the proffered additional statements made by Rice to law enforcement officers could have been admissible under § 27-106. The State's primary argument at trial seemed to be that the statements were hearsay. Such an assertion is immaterial, however, as the very basis for § 27-106 is that it is a way to gain admission of evidence that would otherwise be inadmissible. ...The State adduced evidence that Rice "admitted" to some kind of wrongdoing by making statements that he knew he was going to jail and by telling law enforcement officers where to locate the knife that was used in the stabbing. The additionally proffered statements concerned Rice's assertion to law enforcement that the victim had attacked him, that the victim had called him a derogatory name, and that he was defending himself from the victim's attack. The proffered additional statements arguably would have provided context for any kind of admission to having stabbed the victim, as they arguably indicate that although Rice was acknowledging having stabbed the victim, he did so in self-defense.

*State v. Swenson* was a prosecution for sexual assault on a minor.<sup>46</sup> At trial, the defense impeached a prosecution witness with inconsistent statements she made during a deposition. After the prosecution suggested that the witness was scared during her deposition and that her fear explained the inconsistencies, the defense asked the witness what she had said at the deposition when defense counsel asked her if she was scared and she responded that she had said "no, because you [the defense lawyer] seem like a nice guy." Thereafter, the prosecution asked the witness how defense counsel had responded when she said he seemed nice. Over a defense objection, the witness was allowed to relate defense counsel's response that he "was not such a nice guy." The appellate court found that the rule of completeness permitted the prosecution to ask about the lawyer's statement to the witness during the deposition to give the full tenor of the exchange between the witness and the lawyer:

This statement was necessary to fully portray the exchange that occurred during her deposition so that the jury could determine whether or not it believed K.J.'s explanation for her inconsistent statements. While the testimony had the unfortunate effect of reflecting on defense counsel's character, defense counsel necessitated the testimony by eliciting incomplete testimony on the issue, and it did not constitute prosecutorial misconduct.

*Nickell v. Russell* was a civil negligence action that was retried after an appeal and following the death of the investigating officer.<sup>47</sup> At the second trial, the defense introduced portions of the dead officer's former testimony from the first trial pursuant to the former testimony exception that suggested that defendant may have been minimally negligent. The trial court excluded other portions of the same officer's former testimony proffered by the plaintiff suggesting

<sup>46</sup> *State v. Swenson*, No. A-12-277, 2013 WL 2106773, at \*7 (Neb. Ct. App. May 7, 2013).

<sup>47</sup> *Nickell v. Russell*, 260 Neb. 1, 8-9, 614 N.W.2d 349, 355-56 (2000).

the officer's ultimate conclusion that the defendant was, in fact, negligent (apparently on the erroneous grounds that this portion of his testimony was read from his police report and constituted hearsay within hearsay). The Nebraska Supreme Court held that the excluded portions suggesting that the defendant may have been negligent were necessary under the rule of completeness:

Those portions of Jacobsen's testimony offered by Russell, and admitted into evidence, would suggest to the jury that Jacobsen, a neutral investigating officer, had concluded that the accident was due only in slight part, if any, to Russell's negligence. That portion of Jacobsen's testimony offered by Nickell, however, would suggest to the jury that Jacobsen may have ultimately reached a different conclusion, i.e., that Russell had adequate time to avoid colliding with Nickell. In other words, Nickell attempted to offer portions of Jacobsen's testimony that would qualify and explain those portions of Jacobsen's testimony read into evidence by Russell. Based on § 27-106, we conclude that the district court abused its discretion in precluding that portion of Jacobsen's prior testimony offered to be read into evidence by Nickell.

## ***VII. New Hampshire***

The New Hampshire rule of completeness was amended in 2017 to add a right to complete "unrecorded statements or conversations." According to the commentary to the rule, the amendment was designed to bring the New Hampshire Evidence Rule into line with the common law of New Hampshire that permits the completion of oral statements:

**(a)** If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at the time, of any other part-- or any other writing or recorded statement-- that in fairness ought to be considered at the same time.

**(b)** A party has a right to introduce the remainder of an unrecorded statement or conversation that his or her opponent introduced so far as it relates:

(1) to the same subject matter; and

(2) tends to explain or shed light on the meaning of the part already received.

N.H. R. Evid. 106. "The amendment made by supreme court order dated April 20, 2017, effective July 1, 2017, made stylistic and substantive changes to the rule.

The amendment designated the first paragraph (a) and added subdivision (b). The changes to (a) are stylistic and mirror the federal rule. The addition of (b), not included in Federal Rule of Evidence 106, codifies New Hampshire case law as set forth in *State v. Lopez*, 156 N.H. 416, 421 (2007)."<sup>48</sup>

<sup>48</sup> In discussing the completion of oral statements, the commentary to New Hampshire Rule 106 suggests that concerns about the completion of oral statements relate to the timing of the completion and not to issues of manageability. It demonstrates that this timing issue has led to the exclusion of oral statements in other jurisdictions, as follows: "The Reporter's Notes for the Vermont Rules of Evidence explain that:

The rule permits the adverse party to require immediate introduction of remaining parts or related documents in the case of a writing in order to prevent the misleading impression given by an out-of-context presentation from taking root. ***Conversations are not accorded similar treatment, because of the cumbersomeness of presenting testimonial evidence of related parts in the middle of proponent's case.***

### ***A. Completion Required***

In *State v. Warren*, the New Hampshire Supreme Court considered the application of the doctrine of completeness to purely oral statements that were at that time omitted from New Hampshire Rule 106 and reversed the defendant's conviction due to the improper exclusion of his oral exculpatory statements to a responding officer under the doctrine of verbal completeness.<sup>49</sup> In that case, the defendant was prosecuted for stabbing and killing his brother-in-law during a domestic dispute. The defendant had an oral conversation with the arresting officer shortly after the killing in which he told the officer that he and the victim were fighting, that the victim pulled a knife, and that he did not know where the knife was and was sorry for the killing. Before trial, the court granted a prosecution motion *in limine* to exclude the defendant's oral assertion that the victim had pulled a knife as hearsay. At trial, the prosecution called the arresting officer to the stand and elicited from him defendant's statement of remorse for killing the victim. Thereafter, the defendant sought permission to ask the officer about the defendant's assertion that he and the victim had been fighting and that the victim had pulled a knife pursuant to the doctrine of verbal completeness. The court denied the request. Because the defendant's oral exculpatory statements served to place his expression of remorse in context and were part of the same conversation, the New Hampshire Supreme Court held that these oral statements should have been admitted under the doctrine of completeness. The court first addressed the applicability of the doctrine of completeness to oral statements:

By its express terms, Rule 106 applies only to writings or recorded statements. The common law rule, however, applied to conversations as well as to writings and recorded statements. ...The defendant argues that while Rule 106 permits a party in certain circumstances to require an opponent to introduce simultaneously with a writing or recorded statement other related writings or recorded statements, the completeness doctrine applies to any verbal utterance. We agree. We note that nothing in Rule 106 appears to alter or conflict with the common law doctrine as applied to conversations. *See N.H. R. Ev. 100* (rules of evidence govern to extent they alter or conflict with common law evidence doctrines). Indeed, the Reporter's Notes to Rule 106 state that while "[c]onversations are not accorded similar treatment, ... [t]he adverse party may ... present related parts of conversations by way of cross-examination or as part of his own case." *N.H. R. Ev. 106* Reporter's Notes (quotation omitted). Accordingly, we conclude that Rule 106 has not replaced the common law rule of verbal completeness as applied to conversations. *Cf. United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir.1993) (finding that Federal Rule of

***The adverse party may, however, present related parts of conversations by way of cross-examination or as part of his own case.*** He may, of course, also present the remainder of a writing in the same fashion *if he wishes.*

See generally, Federal Advisory Committee's Note to Rule 106; McCormick, *Evidence* 130-131 (2d Ed.1972)." (emphasis added). This timing concern was managed in New Hampshire by the adoption of a separate subsection of the completion rule relating to oral statements. The working draft of an amended Fed. R. Evid. 106 would also handle this concern by leaving the timing of completion to the discretion of the court.

<sup>49</sup> *State v. Warren*, 143 N.H. 633, 635, 732 A.2d 1017, 1018 (1999).

Evidence 611(a), which is identical to New Hampshire Rule of Evidence 611(a), gives the same authority to federal district courts as Rule 106 with respect to oral statements).

The court then found that the trial court had erred in denying the defendant's request to introduce his exculpatory oral statements:

In this case, the defendant made three separate assertions in a single statement to Officer Blair: (1) he did not know where the knife was; (2) he was sorry; and (3) they were fighting and Connolly pulled a knife. The State selectively entered into evidence the first two assertions, as well as evidence that the defendant had indeed hidden his knife. Without the qualifying statement that they had been fighting and Connolly had pulled a knife, a rational juror could have inferred that moments after the stabbing the defendant was confessing guilt, rather than offering an explanation for the event that was consistent with his defense. Thus, the exculpatory phrase was necessary for the jury's proper evaluation of the inculpatory phrases that the State chose to elicit, and "to prevent [a] misleading impression ... from taking root."

In *State v. Ellsworth*, the New Hampshire Supreme Court reversed the defendant's conviction for sexual assault due to improper prosecutorial comments regarding his failure to testify.<sup>50</sup> The court also ruled on a verbal completeness issue raised by the defendant with respect to his apparently oral statements to an investigator to assist in retrial of the charges. In his conversation with the investigator, the defendant admitted to sleeping on a couch with the victim, but steadfastly denied any inappropriate contact. At trial, the prosecution offered the defendant's admission to sleeping on the couch with the victim, but successfully objected to the defendant's request to admit the remainder of the conversation. The New Hampshire Supreme Court found that this violated the rule of verbal completeness:

Thus, there are two requirements to trigger the doctrine respecting conversations: first, the statements must be part of the same conversation; and second, admission of only a portion would mislead the jury. We agree with the defendant that the doctrine of verbal completeness was triggered. The defendant made two statements in his interview with Banaian: (1) he admitted sleeping on the couch with the victim; and (2) he denied assaulting the victim. The first prong of the verbal completeness analysis is thus satisfied—both statements were part of the same conversation. The second prong of the analysis is also satisfied. At trial, the State selectively introduced only one of the two statements. The introduction of the defendant's first statement created an inference that because the defendant slept on the couch with the victim, he also assaulted her. Nevertheless, the defendant was not allowed to introduce the statement in which he denied assaulting the victim. The admission of only one of the defendant's two statements was misleading to the jury. Accordingly, we conclude that the trial court erred when it excluded the statement in which the defendant denied assaulting the victim.

<sup>50</sup> *State v. Ellsworth*, 151 N.H. 152, 159, 855 A.2d 474, 480 (2004).

## ***B. Completion Not Required***

In *State v. Lopez*, the New Hampshire Supreme Court rejected a defendant's completion argument with respect to oral statements. In that case, the defendant appealed his conviction for murder after beating his pregnant girlfriend to death with a hammer.<sup>51</sup> At trial the prosecution introduced evidence of oral statements the defendant made to his aunt at his mother's home shortly after the killing in which he stated: "I wish I could have took [sic] her head, that f\* \* \*ing bitch. No regrets. I have no regrets." The defendant's mother was not present when this statement was made, but arrived shortly thereafter. After the defendant had been arrested and was being escorted to a police cruiser, the defendant's mother asked him why he had killed his girlfriend. In response to this question, he stated that he had "snapped." Although the trial court permitted the prosecution to admit the incriminating oral statement the defendant made to his aunt, it refused the defense attempt to introduce the oral statement he made to his mother. The New Hampshire Supreme Court held that the trial court had not abused its discretion in declining to admit the defendant's self-serving statements under the doctrine of verbal completeness:

Thus, there are two requirements to trigger the doctrine respecting conversations: first, the statements must be part of the same conversation; and second, admission of only a portion would mislead the jury. The trial court found that the defendant's initial statement to his aunt and his later statement to his mother were not part of the same conversation. Therefore, the trial court permitted the defendant's aunt to testify about the defendant's first statement to her, but did not permit the defendant's aunt or brother to testify about the later statement to the defendant's mother. We agree that the statements were not part of the same conversation. The defendant's initial statements to his aunt were made immediately upon his arrival at his mother's home, when his mother was not present. The allegedly exculpatory statements to his mother were made sometime later, after she arrived, and after the defendant had been arrested. The statements simply were not part of the same conversation. Moreover, we conclude that the defendant's later statements ... "would not help explain the initial statements because they took place under entirely different circumstances after the defendant had been arrested and charged with murder in the interim, and because the statements are self-serving."

In *State v. Douthart*, the New Hampshire Supreme Court held that the exclusion of a defendant's oral exculpatory statements did not violate the doctrine of verbal completeness.<sup>52</sup> In that case, the defendant appealed the exclusion of oral exculpatory statements he made to his girlfriend after she testified to inculpatory oral statements he made on a different occasion. The Court held that the trial court properly excluded the defendant's self-serving exculpatory statements because they were not part of the same conversation and were not necessary for verbal completeness:

The defendant argues that both the inculpatory and exculpatory statements are part of an "on-going dialogue" between him and Bixby, and therefore once the inculpatory statements

<sup>51</sup> *State v. Lopez*, 156 N.H. 416, 420, 937 A.2d 905, 908–09 (2007).

<sup>52</sup> *State v. Douthart*, 146 N.H. 445, 448–49, 772 A.2d 1289, 1292 (2001).

were admitted, the exculpatory statements were required in the interest of completeness. The State counters that the statements are remote in time and cannot be considered part of the same statement. We agree. The defendant's statements made prior to arrest and those made after the arrest simply are not part of the same conversation. The doctrine of completeness would be strained if we adopted the defendant's "on-going dialogue" theory.

The court in *State v. Mitchell* rejected the defendant's argument that the trial court erred in excluding a portion of his recorded custodial interview in which he offered to take a polygraph after the prosecution introduced other portions of the same interview in defendant's trial for aggravated felonious sexual assault and violation of a protective order.<sup>53</sup> The court found that the jury was not misled by the exclusion of the portion of the interview in which the defendant offered to take a polygraph because it heard other portions of the interview in which defendant adamantly denied his guilt. "The doctrine of completeness does not require the admission of otherwise inadmissible evidence simply to bolster a defendant's claim of innocence, but rather exists to correct misleading impressions by omission."

Similarly, the court in *State v. Botelho* held that a mother's statements during her recorded interview with a detective after the drowning death of her 12 month-old baby that she "didn't do this" and her emphatic narrative regarding her concern for her surviving child were not necessary to rebut portions of her redacted interview offered by the prosecution regarding the length of time that she left her children unattended in the bath to spend time on her computer under the doctrine of completeness.<sup>54</sup> The court found that there was no plausible link between the defendant's concern for her surviving child and her own perception of time she spent on her computer during the incident.

### **VIII. Oregon**

The Oregon Rule of completion seems internally conflicted. On the one hand, it embraces acts and oral conversations to achieve the broad fairness goals of the rule of completion. On the other, it expressly excludes completing evidence that is not otherwise admissible, thereby restricting completeness significantly.

When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, *where otherwise admissible*, may at that time be inquired into by the other; when a letter is read, the answer may at that time 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 at that time also be given in evidence.

Or. Rev. Stat. Ann. § 40.040 (West).

The 1981 conference committee commentary regarding the rule discusses the inclusion of oral statements and notes that the Oregon "Legislative Assembly considered but did not adopt

<sup>53</sup> *State v. Mitchell*, 166 N.H. 288, 94 A.3d 859 (2014).

<sup>54</sup> *State v. Botelho*, 165 N.H. 751, 83 A.3d 814 (2013).

Federal Rule of Evidence 106” because “[t]he federal rule applies only to a ‘writing or recorded statement’ [and] would exclude the possibility of admitting the remainder of any contemporaneous act, declaration or conversation.” According to the commentary, “[t]his limitation is inconsistent with the broad purpose of the rule, which is one of fairness.” The commentary also emphasizes that the Oregon rule only allows completion of any form of statement “if the remaining evidence is otherwise admissible.”

Requiring that the remainder of a statement be otherwise admissible severely limits the doctrine of completion in Oregon and there are fewer appellate opinions concerning completion in Oregon than there are in other states that allow completion of oral statements. In *State v. Tooley*, the defendant challenged the exclusion of several potentially exculpatory statements he made during interviews with police following the admission of other inculpatory portions of those same interviews by the prosecution.<sup>55</sup> The Oregon Supreme Court rejected the defendant’s completion argument without analyzing whether the State’s initial presentation caused any distorted impression because defendant’s exculpatory statements were otherwise inadmissible hearsay:

As we have previously noted, OEC 106 “is designed to prevent evidence from being presented to a jury out of context.” However, OEC 106 does not apply to allow admission of supplementary evidence that is otherwise inadmissible. Defendant concedes that the statements he sought to have introduced “were inadmissible hearsay.” Therefore, OEC 106 did not supply a basis for their admission, and the trial court did not err in so ruling.

The doctrine of completeness worked to the advantage of the prosecution in *State v. Determann*.<sup>56</sup> In that case, the defendant offered oral statements he made to police following his arrest after he invoked his right to counsel, for the non-hearsay purpose of demonstrating diminished capacity. Specifically, the defendant offered his request to be photographed with the weapon he used to commit his crimes to support his contention that he was so intoxicated that he could not have had the requisite intent to commit the alleged crimes. Thereafter, the prosecution was permitted to question the defendant about otherwise inadmissible statements he made to the officer after invoking his right to counsel, to provide context for the statements the defendant admitted that were part of same interview. The court allowed the prosecution to present the remainder of defendant’s statements pursuant to *Miranda* because the defendant opened the door:

Here, defendant introduced his statements about wanting to be photographed with the knife to support his contention that he was so intoxicated that he could not have had the requisite intent to commit the alleged crimes. In response to that, the state asked about other statements that defendant made at that time, including his comment, “You guys got me.” The state’s inquiry was relevant to rebut defendant’s contention, because it also related to his state of mind at that time. The trial court did not err in allowing the state to cross-examine Lind concerning the statements.

<sup>55</sup> *State v. Tooley*, 265 Or. App. 30, 47, 333 P.3d 348, 357 (2014).

<sup>56</sup> *State v. Determann*, 115 Or. App. 627, 631, 839 P.2d 748, 751 (1992), *decision clarified on reconsideration*, 122 Or. App. 480, 858 P.2d 171 (1993).

## ***IX. Texas***

Texas is unique in that it has two rules relating to completion in its Evidence Code. Texas Rule 106 covers the completion of written or recorded statements 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 introduce, at that time, any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time. "Writing or recorded statement" includes depositions.

TX R EVID Rule 106.

Texas Rule 107, the rule of "optional completeness," also covers acts, declarations, and conversations:

### **Rule 107. Rule of Optional Completeness**

If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. "Writing or recorded statement" includes a deposition.

TX R EVID Rule 107. The completion cases at the appellate level in Texas largely favor the prosecution.

#### ***A. Completion Not Required***

In *Lawson v. State*, the defendant was convicted of murdering his business partner after claiming self-defense at trial.<sup>57</sup> He argued on appeal that the trial court erred in excluding a portion of his recorded interview with police in which he stated that his business partner may have been involved in the Mexican drug trade before working with the defendant. The prosecution had admitted portions of the same recorded interview concerning what happened between the defendant and the victim at the time of the killing. The appellate court upheld the trial court's exclusion of the remainder of the defendant's recorded statement under the doctrine of completeness, finding that the defendant's statements related only to the chronology of the victim's work history and had no connection to the admitted portions of the interview dealing with the events leading to the victim's death:

The rule of optional completeness applies only to compel admission of evidence on "the same subject" as the previously admitted portion. ...In the instant cause, the excluded evidence does not appear to be on the subject of Leroy's death or appellant's claim of self-defense... This context indicates that appellant's excluded statements related only to the chronology of Leroy joining the business and did not indicate appellant's belief of Leroy's propensity for violence. Nor does appellant's belief that Leroy had been in a Mexican prison aid in the interpretation or completeness of his statement about what occurred on

<sup>57</sup> *Lawson v. State*, 854 S.W.2d 234, 237-38 (Tex. App. 1993).

the boat. This belief is relevant only as it bears on whether appellant reasonably believed he was in danger from Leroy such that self-defense was justified. However, the asserted belief that Leroy had been convicted of drug smuggling, a nonviolent offense, is not probative evidence of a violent nature. The only purpose that this portion of the statement could have served would be to create prejudice against Leroy. We conclude that the trial court did not abuse its discretion in preventing the jury from viewing this portion of the videotaped statement.

In *Washington v. State*, a Texas appellate court rejected a capital defendant's argument that the trial court violated the rule of optional completeness by excluding his mother's testimony about oral conversations she had with the defendant.<sup>58</sup> Although the prosecution had admitted text messages and other conversations involving the defendant, the court found that the conversations with the defendant's mother were not part of the conversations and text messages introduced by the State and did nothing to correct any misimpression created by those previously admitted statements:

The purpose of [rule 107] is to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing.... Here, appellant did not seek to introduce any missing portion of the text or phone conversations introduced by the State. Rather, appellant sought to introduce testimony from Ojeaga about separate phone calls she allegedly had with her son concerning a relationship with a woman Ojeaga never met. Appellant contends that Wolfford's testimony "opened the door" for Ojeaga's testimony. But appellant does not cite, and we have not located, anything in Wolfford's testimony that created any false impression concerning, or invited further discussion of, other conversations appellant may have had with his mother about Howard.

In *Sauceda v. State*, the Texas Court of Criminal Appeals reversed a defendant's conviction for the sexual assault of a minor because the trial court erred in ruling that the victim's entire videotaped statement would be admissible under the rule of optional completeness if the defendant called the interviewer as a witness to testify that the victim never mentioned weapons in her interview.<sup>59</sup> The court found that the video would not have corrected any misimpression because the victim *did not* mention weapons during her interview. Furthermore, the video contained prejudicial information about uncharged offenses committed by defendant:

In light of the information before the trial court, there is no theory of law that would require the introduction of the entire videotape into evidence without any showing of necessity by the State. As a witness to the interview, Stephenson could have impeached M.S.'s credibility by testifying to a single, narrow matter. Because the information on the videotape was in no way necessary to make that testimony fully understood, as required by Rule 107, the videotape would not have been admissible.

<sup>58</sup> *Washington v. State*, No. 14-17-00595-CR, 2018 WL 6684294, at \*13 (Tex. App. Dec. 20, 2018).

<sup>59</sup> *Sauceda v. State*, 129 S.W.3d 116, 124 (Tex. Crim. App. 2004).

## ***B. Completion Required***

In *Mares v. State*, the prosecution was permitted to offer completing portions of an oral conversation between the victim and the defendant after the defendant asked the victim about part of the conversation during cross-examination.<sup>60</sup> The appellate court upheld the trial court's decision to allow the completion:

During defense counsel's cross-examination of the complainant, the following questioning occurred:

Q. Okay. And what was talked about at that time?

A. He was asking me about my cousin Rick, if I knew where he was. Because he wanted to know if he was going to tell on him.

This questioning opened the door to the subject of the conversation between Mares and the complainant about her cousin. The questioning pursued by the State was limited to the same subject. Therefore, the trial court did not abuse its discretion in allowing the questioning.

In *Pena v. State*, the defendant was convicted for marijuana possession.<sup>61</sup> At trial, the prosecution played a video of the defendant's arrest that did not include an audio recording of the conversation between the defendant and the arresting officer. The officer testified at trial about his recollection of the oral statements that defendant made to him during the encounter. The officer testified that the defendant had denied that the plant material he possessed was marijuana, but the officer testified that he could not recall whether the defendant had asked that the plant material be tested at that time. After the defendant was convicted, the defense learned that the prosecution indeed had an audio recording of the arrest that it had withheld from the defense. The defense claimed that the State violated *Brady* in withholding evidence of the audio recording. To find a *Brady* violation, the Texas appellate court had to find that the withheld evidence would have been admissible at trial and the court relied upon Rule 107 to find that the audio portion of the video recording would have completed the State's presentation and was thus admissible:

In this case, while the audio portion of the videotape may be hearsay, it would be admissible under Rule 107. The State introduced and relied upon the visual portion of the videotape to prove its case. When the videotape was shown to the jury, Asby testified to the exchange that occurred between himself and Appellant during the traffic stop and Appellant's subsequent detention. Asby also referenced Appellant's denials that the plant material was marijuana, but he could not recall whether Appellant requested testing of the plant material. The audio portion of the videotape memorializes the conversation between Appellant and Asby. Hence, the audio is on the same subject as other statements introduced into evidence. In addition, the audio reflects that Appellant did indeed request testing, making the audio's disclosure necessary to clarify prior uncertainties in Asby's recollection and for the jury to have a full understanding of the case based on Appellant's own words delivered at the time of his arrest. Accordingly, the audio portion of the videotape would be admissible pursuant to Rule 107.

<sup>60</sup> *Mares v. State*, 52 S.W.3d 886, 890 (Tex. App. 2001).

<sup>61</sup> *Pena v. State*, 353 S.W.3d 797, 814–15 (Tex. Crim. App. 2011).

In *Hernandez v. State*, the court affirmed the trial court's decision to allow the State to introduce unrecorded oral statements made by the defendant to an interviewer after the defendant opened the door to those statements by cross-examining the interviewer about other oral statements he made during the same interview.<sup>62</sup> It appears that a Texas statute requiring recording of custodial interrogations limited the State's ability to use the defendant's unrecorded oral statements, but that the defendant's cross-examination opened the door under the rule of optional completeness:

Appellant asked Breedlove to tell the jury about portions of his custodial interrogation with appellant and appellant's oral responses. Accordingly, the State was entitled to ask Breedlove about other portions of that same interrogation which were necessary for the jury to fully understand the conversation as a whole. Tex.R. Evid. 107... Thus, the trial court did not abuse its discretion in allowing Detective Breedlove to testify that appellant stated he may have used a flashlight to strike Karlos.

In *Wright v. State*, the Texas Court of Criminal Appeals upheld the trial court's ruling permitting the State to introduce the remainder of an oral conversation between a testifying officer and a third party in which the third party implicated the defendant in the crime.<sup>63</sup> The defense had previously questioned the officer about an oral statement by the third party in which the third party admitted owning the knife that killed the victim. Because the portion of the oral conversation explored by the defense may have created the false impression that the third party assumed responsibility for the killing, the remainder of that same oral conversation in which the third party claimed that defendant had stabbed murder victim was admissible to complete.

<sup>62</sup> *Hernandez v. State*, No. 74,401, 2004 WL 3093221, at \*2 (Tex. Crim. App. May 26, 2004).

<sup>63</sup> *Wright v. State*, 28 S.W.3d 526, 535–36 (Tex. Crim. App. 2000).

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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Possible Amendment to Rule 615  
Date: April 1, 2019

At the last meeting, the Committee began to review possible changes to Rule 615, the rule governing sequestration of witnesses. The Committee began the review in response to a request by Judge John Woodcock, a former member of the Committee. Judge Woodcock suggested three possible changes to the Rule, and research by the Reporter raised a separate issue of application of Rule 615 on which the courts are divided. 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.

The purpose of Rule 615 is to prevent a prospective witness from tailoring their testimony in response to the testimony of prior witnesses. Its importance was described in glowing terms by the court in *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628 (4th Cir.1996): “It is now well recognized that sequestering witnesses ‘is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.’ ” (citing 6 *Wigmore on Evidence* § 1838, at 463).

Judge Woodcock suggested three changes to the Rule based on issues that arose in a case he tried. His suggestions were: 1) provide that sequestration orders are discretionary rather than mandatory upon request; 2) provide a rule governing the proper time for a motion to sequester; and 3) provide an exception that specifically allows expert witnesses to remain at trial. The minutes of the last meeting indicate that the Committee considered all three proposals and decided not to proceed on any of them.

But in the course of research on Rule 615, the Reporter brought to the Committee’s attention a conflict in the courts about the extent of a Rule 615 order. The question in dispute is whether a Rule 615 order extends only to excluding witnesses from trial (as its language indicates) or whether it prohibits a prospective witness from obtaining or receiving trial testimony while excluded. The minutes of the last meeting describe the Committee’s position on the possibility of an amendment to Rule 615 that would be directed to the extent of a Rule 615 order:

The Chair pointed out that an amendment to extend Rule 615 protection outside the courtroom may be consistent with the Committee’s ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increasing witness access to information about testimony through news, social media, or daily transcripts. The Committee agreed to consider a potential amendment to Rule 615 to deal with the issue of witnesses learning about testimony outside the courtroom in light of these concerns, and the conflict in the courts, at the Spring meeting. The Committee agreed not to proceed with any other amendments to Rule 615.

This memo is in three parts. Part One discusses the conflict in the courts about whether a Rule 615 order extends *outside* the courtroom. Part Two discusses the issues that should be addressed in drafting an amendment. Part Three sets forth three versions of an amendment that would provide for an order prohibiting disclosure of trial testimony to an excluded witness, as well as prohibiting a witness from obtaining such testimony.

If the Committee does wish to proceed on the proposal, the procedure would be to approve it with the recommendation to the Standing Committee that it be released for public comment. If the proposal were to be approved at the Spring meeting, the public comment would run from

August 15, 2019 to February 15, 2020. The earliest that any amendment could go into effect would be December 1, 2021.

## II. A Dispute in the Case Law 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 courtroom. 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 obtaining, or being provided, 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 and discussed testimony that each gave), 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 the language of 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 under current law). 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 automatically 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. Robertson*, 895 F.3d 1206, 1214 (9<sup>th</sup> Cir. 2018), is a good example of this broader view. In *Robertson* 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 (9<sup>th</sup> 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 (4<sup>th</sup> 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<sup>d</sup> 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 (11<sup>th</sup> 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 (5<sup>th</sup> 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.

Note that the conflict in the courts about the extent of a Rule 615 order 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 invoke "the witness rule" or impose "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, and so is read not to prevent out-of-court access. And it is also meaningful if your witness is charged with violating a "Rule 615 order" by accessing trial testimony on the internet, and contends that he had no idea that a "Rule 615 order" extended outside the courtroom.

The confusion about the extent of a Rule 615 order is exacerbated by the fact that many Rule 615 orders appear to be terse and vague. An example is the order in *United States v. Rhynes*, 218 F.3d 310 (4<sup>th</sup> Cir. 2000), where the entirety of the court's sequestration order is in the record as follows:

*Well, I do grant the usual sequestration rule and that is that the witnesses shall not discuss one with the other their testimony and particularly that would apply to those witnesses who have completed testimony not to discuss testimony with prospective witnesses, and I direct the Marshal's Service, as much as can be done, to keep those witnesses separate from the those witnesses who have testified separate and apart from the witnesses who have not yet given testimony who might be in the custody of the marshal.*

The lawyer for one of the defendants sought to have his investigator excepted from the sequestration order, and the court granted the exception "[s]o long as your investigator observes Rule 615 and does not talk to the witnesses about testimony that has just concluded or testimony that has concluded." After a prosecution witness testified and implicated a prospective defense witness in a crime, the defense attorney informed the witness of that accusation. The trial court found this to be a violation of Rule 615, and excluded the defense witness. The Fourth Circuit, in an en banc opinion, reversed the conviction. It found that the court's order was basically limited to the terms of Rule 615, and even if it went beyond that, nothing in it prevented a *lawyer* from disclosing trial testimony. The whole episode, including the costs of reaching an en banc opinion, show the problem of determining the actual extent of a "Rule 615 order" when the language of the Rule itself is limited to exclusion of witnesses from the courtroom.

The Ohio Advisory Committee Note to Ohio Rule 615 makes the following point about the vagueness of "Rule 615 orders" or "exclusion orders":

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.

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.

Given all these considerations, 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.

## II. Considerations in Proposing an Amendment

### *A. Should the Conflict be Rectified by a Rule Specifying that a Rule 615 Order Extends Outside the Courtroom?*

Assuming the Committee determines that the conflict in the courts over the extent of a Rule 615 order is worth rectifying in a rule amendment, it would seem that the better resolution is to provide that a Rule 615 order extends outside the courtroom --- preventing excluded witnesses from being informed about or obtaining trial testimony.<sup>1</sup> It seems clear that the threat of tailoring from, say, reading trial testimony or talking to a witness who testified, is the same as the threat that arises from hearing it in court. Indeed the Supreme Court has so recognized. In *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966), the Court criticized the state court for allowing prospective witnesses to obtain trial testimony outside the courtroom:

[T]he court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. *Although the*

<sup>1</sup> 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.”

*witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule.*

It is true that the two-step approach of *Sepulveda* (one Rule 615 order and another order under inherent power) does address the out-of-court danger. But only if the party asks for the second step. And in any case it surely seems more efficient to have both concerns (out of court and in court) addressed under one rule.

If the Committee were to agree that the Rule 615 order should be extended to out-of-court contexts, there is little doubt that an amendment to the Rule is 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 Supreme Court has held that when a witness violates a sequestration order, the court may cite the witness for contempt. *Holder v. United States*, 150 U.S. 91, 92 (1893). Such a serious consequence must be contingent on clear notice. It follows that without explicit knowledge of the extent of an order, the court will not be able to control out-of-court disclosures of information --- leading to the danger of tailoring that the Rule is designed to prevent.<sup>2</sup>

## ***B. Issues About the Wording of an Order Extending Outside the Courtroom***

One question raised by extending Rule 615 to out-of-court contacts is whether the order should be mandatory or discretionary. 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.<sup>3</sup> But clearly the dangers of tailoring will be present if the in-court exclusion is mandatory but the terms of the out-of-court exclusion are discretionary. Perhaps the answer is that the order must extend to contacts outside the courtroom, but the specific

<sup>2</sup> See *RMH Tech LLC v. PMC Industries, Inc.*, 352 F.Supp.3d 164 (D.Conn. 2018) (sequestration order mentioned only Rule 615; the prospective witness sat in on strategy sessions that discussed trial testimony: “the Court notes that Mr. Bailey’s conduct, as alleged, did not violate the express terms of the sequestration order”; “ Rule 615 has been given a long-standing and consistent judicial construction of prohibiting all prospective witnesses from hearing, overhearing, being advised of, reading, and discussing, the previously given in-court testimony of witnesses on their own side as well as the opposite side”; but there was no intentional violation, given the limitations of the order that was issued).

<sup>3</sup> 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.”).

provisions to prevent disclosure of trial testimony might be dependent on the case. In Part III, versions are provided for discretionary and mandatory orders.

Beyond the discretionary/mandatory question, 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. 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 one 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 and exclusion of witnesses. It is problematic to sanction a person, or prohibit them from testifying, for not understanding the nice distinction between "learn of" and "hear." And probably most importantly, if the rule language is about exclusion in the first instance, changing "heard of" to "learn" in the Pennsylvania rule adds nothing --- since the rule says the witnesses are "excluded so they cannot learn." The learning is tied to the exclusion, so it does not really cover a witness who obtains information outside the courtroom.

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:

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.<sup>4</sup>

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.

<sup>4</sup> **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."

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. But it doesn't address the problem of an excluded witness obtaining trial testimony *on his own* --- such as through an internet search.

**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 someone from giving a transcript of trial testimony to an excluded witness. Nor does it prevent the witness from obtaining trial testimony on his own. But the provision might be tweaked to cover the problem --- in accordance with a suggestion provided by Traci Lovitt at the last meeting. See Part Three, below.

Finally, **Ohio Rule 615** takes an opposite, and interesting tack. It *specifically* limits the order to excluding witnesses from trial:

\* \* \* 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.<sup>5</sup>

<sup>5</sup> One big problem with adopting the Ohio provision --- limiting Rule 615 orders to exclusion from the courtroom --- is that it would change the law in the majority of circuits. Currently the D.C., 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Circuits have held that a Rule 615 order extends to out-of-court contacts. See *United States v. Robinson, supra*, Carter,

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. But they don’t necessarily lead to a proposal that limits the extent of a Rule 615 order to exclusion of witnesses. The issues of fair notice can be addressed by a rule that specifically allows or requires the court to extend the order to 1) prohibit disclosure of trial testimony to an excluded witness, and 2) prohibit an excluded witness from obtaining trial testimony. An amendment that explicitly extends the order outside the courtroom will remedy the fair notice problem that *currently* exists --- where Rule 615 orders are held to apply outside the courtroom, even though that is not supported by the words of the existing rule.

### ***C. First Amendment Issues?***

An order that prohibits disclosure of testimony outside the courtroom is essentially a gag order --- unlike a simple exclusion of witnesses, which imposes no limit on anyone’s speech. The Chair asked the Reporter to do some research and analyze whether an amendment to extend Rule 615 orders beyond courtroom exclusion would raise significant First Amendment concerns. This section addresses that question.

*Exclusion of Justice, supra*, for citations. And the other big problem is that it doesn’t protect against access to testimony by witnesses outside the courtroom.

Gag orders --- preventing participants in a trial from publicly disclosing information about the trial --- are permissible under three conditions: 1) disclosure poses a “substantial likelihood” of prejudice to the trial, *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000); 2) the order is narrowly tailored, *Levine v. U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985); and (3) less restrictive alternatives are not available. *Id.* As applied to an order prohibiting prospective witnesses from obtaining or being provided trial testimony, it seems pretty obvious that these criteria are met. The very premise of Rule 615 is that a prospective witness’s exposure to trial testimony poses a substantial likelihood of prejudice to the trial. And a Rule 615 order is nothing if not narrowly tailored --- so narrowly tailored that it hardly seems to be a gag order at all. The prohibition on disclosure is narrowly directed toward a small group of persons --- prospective witnesses. Nothing in a Rule 615 order prevents participants from disclosing trial information to the general public. Moreover, the Rule 615 order is of a relatively short duration --- disclosure to a witness is prohibited only until that witness testifies. Finally, it is difficult to think of a less restrictive alternative.

The mild nature of an order prohibiting prospective witnesses from access to trial testimony outside of court is indicated by the fact that such an order is already deemed to be part of a Rule 615 order in almost all of the circuits --- and I have not found a case in those circuits that has shown any concern (or even any discussion) about a First Amendment problem.

One Supreme Court case has some bearing on the constitutionality of an order prohibiting disclosure of trial testimony to excluded witnesses. In *Butterworth v. Smith*, 494 U.S. 624 (1990), the Court reviewed the constitutionality of a Florida statute that imposed a criminal offense on a grand jury witness who disclosed his testimony publicly. The statute prohibited a grand jury witness from *ever* disclosing his testimony to any member of the public – even after the grand jury’s term had ended. The Court found that this permanent ban on any disclosure violated the witness’s First Amendment rights. So while there are First Amendment limitations on orders banning public disclosure of legal proceedings, the Court’s analysis in *Butterworth* actually supports the proposition that an order prohibiting a witness from disclosing testimony to a prospective witness is perfectly consistent with the First Amendment.

The *Butterworth* Court stated that in evaluating the constitutionality of a prohibition on disclosure of legal proceedings, the court must balance the interest of the individual in speaking against the interest of the state in secrecy. It concluded that the state’s interest in grand jury secrecy did not warrant a permanent ban. As to the individual interest, the Court noted that “the potential for abuse of the Florida prohibition, through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent.” The court, in dicta, upheld a Florida provision that imposed a permanent prohibition on disclosing the testimony of *another* witness --- because the state interest in preserving that witness’s anonymity was significant, and the citizen’s interest in disclosing the testimony of a person other than himself was minimal.

An order prohibiting disclosure of trial testimony to a prospective witness is about as far from the Florida statute in *Butterworth* as you can get. The Court in *Butterworth* was justly concerned about a complete and permanent ban on a witness disclosing his own testimony on a

matter of public interest. In contrast, a very temporary ban on disclosure of information to a few people seems to steer well clear of any First Amendment concerns.

### III. Drafting Alternatives

#### A. Discretionary

What follows is language that gives the court discretion to extend a Rule 615 order outside the courtroom. It is intended to prohibit trial participants from providing testimony to a prospective witness and also to prohibit a witness from acting to obtain the testimony.

#### **Rule 615. Excluding Witnesses; Preventing Access to Trial Testimony by Excluded Witnesses**

**(a) Orders.** 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. At its discretion, the court may issue further orders to prevent witnesses from learning about the testimony of other witnesses outside of court. ~~But this rule does not authorize excluding:~~

**(b) Exceptions.** This rule does not authorize the following witnesses from learning about the testimony of other witnesses:

~~(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~~

~~(d)~~ **(iv)** a person authorized by statute to be present.

*Reporter's Note:* I think that two subdivisions are required, because the last sentence of the first paragraph --- "But this rule does not authorize excluding" --- is out of place given the addition of a provision that is not about exclusion.

*The other way to do it would be to put the provision on extending the order in a separate subdivision, as New Hampshire does. That would look like this:*

#### **Rule 615. Excluding Witnesses; Preventing Access to Trial Testimony by Excluded Witnesses**

**(a) Exclusion and Exceptions.** 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:

~~(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~~

~~(d)~~ **(iv)** a person authorized by statute to be present.

**(b) Additional Orders.** At its discretion, the court may issue further orders to prevent excluded witnesses from obtaining or being provided trial testimony.

### *Draft Committee Note (for either version above)*

Rule 615 has been amended to clarify that the court in entering a sequestration order may also prohibit excluded witnesses from obtaining or being provided trial testimony. Most courts have found that a "Rule 615 order" extends to prohibit disclosure and receipt of trial testimony by prospective witnesses who have been excluded. But the terms of the Rule did not so provide; and other courts had held that a Rule 615 order was limited to exclusion of witnesses from the trial. On one hand the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial --- and that purpose can only be effectuated by regulating out-of-court contacts as well as in-court presence. *See United States v. Robertson*, 895 F.3d 1206, 1214 (9<sup>th</sup> Cir. 2018) ("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."). On the other hand, a rule extending an often vague "Rule 615 order" outside the courtroom raised questions of fair notice, given that the text of the Rule itself was limited to exclusion of witnesses. Under the amendment, the court may by order prevent prospective witnesses from receiving or obtaining trial testimony --- but in the interest of fair notice, the court's order must so specify.

The amendment contemplates an order that will not only prohibit *disclosing* trial testimony to an excluded witness but will also prohibit an excluded witness from *obtaining* trial testimony, such as through the internet.

As before, Rule 615 should not be interpreted to prohibit witnesses from discussing the case with trial counsel. *See, e.g., United States v. Rhynes*, 218 F.3d 310, 317 (4<sup>th</sup> Cir. 2000) (noting that "the relevant authorities interpreting Rule 615, including court decisions

and the leading commentators, agree that sequestration orders prohibiting discussions between witnesses should, and do, permit witnesses to discuss the case with counsel for either party”).

***B. Mandatory --- i.e., the Order Regulating Out-of-Court Contacts is a Required Part of the Rule 615 Order.***

**Rule 615. Excluding Witnesses; Preventing Access to Trial Testimony by Excluded Witnesses**

**(a) Issuing an Order on Request.** At a party’s request, the court must issue an order:

~~(i) order excluding witnesses excluded so that they cannot hear learn of other witnesses’ testimony; and Or the court may do so on its own.~~

~~(ii) preventing excluded witnesses from obtaining or being provided trial testimony. But this rule does not authorize excluding:~~

**(b) Issuing the Order on its own.** The court may also issue these orders on its own.

**(b c) Exceptions** This rule does not prevent the following witnesses from learning about the testimony of other witnesses:

~~(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;

~~(e)~~ **(iii)** a person whose presence a party shows to be essential to presenting the party’s claim or defense; ~~or~~

~~(d)~~ **(iv)** a person authorized by statute to be present.

***Reporter’s Note: Another way to do this is to have a provision defining the extent of a Rule 615 order. But that becomes difficult to do given the first line of the rule which talks about an order to exclude. It is confusing to later say that “the extent of the order to exclude covers obtaining information outside of court.” It***

*seems less confusing to specify that the Rule 615 order must contain both an exclusion and an order prohibiting out-of-court access.*

### ***Draft Committee Note***

Rule 615 has been amended to clarify that an order excluding witnesses also extends to prevent excluded witnesses from obtaining or being provided trial testimony. Most courts have found that a “Rule 615 order” extends to prohibit excluded witnesses from obtaining or receiving trial testimony. But the terms of the Rule did not so provide; and other courts had held that a Rule 615 order was limited to exclusion of witnesses from the trial. On one hand the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial --- and that purpose can only be effectuated by regulating out-of-court contacts as well as in-court presence. *See United States v. Robertson*, 895 F.3d 1206, 1214 (9<sup>th</sup> Cir. 2018) (“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.”). On the other hand, a rule extending an often vague “Rule 615 order” outside the courtroom raised questions of fair notice, given that the text of the Rule itself was limited to exclusion of witnesses. Under the amendment, the court must include in the Rule 615 order a provision that prevents prospective witnesses from obtaining or being provided trial testimony. So persons affected by the order will receive fair notice.

The amendment contemplates an order that will not only prohibit *disclosing* trial testimony to an excluded witness but will also prohibit an excluded witness from *obtaining* trial testimony, such as through the internet.

As before, Rule 615 should not be interpreted to prohibit witnesses from discussing the case with trial counsel. *See, e.g., United States v. Rhynes*, 218 F.3d 310, 317 (4<sup>th</sup> Cir. 2000) (noting that “the relevant authorities interpreting Rule 615, including court decisions and the leading commentators, agree that sequestration orders prohibiting discussions between witnesses should, and do, permit witnesses to discuss the case with counsel for either party”).

# TAB 6

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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.<sup>1</sup> 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).

<sup>1</sup>All 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.<sup>2</sup>

<sup>2</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> Cir. 2006) (admission of defendant’s own statements does not violate *Crawford*); *United States v. Orm Hieng*, 679 F.3d 1131 (9<sup>th</sup> 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 (6<sup>th</sup> 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 (10<sup>th</sup> 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 (1<sup>st</sup> 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<sup>d</sup> 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 (2<sup>nd</sup> 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 (4<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (8<sup>th</sup> Cir. 2010): 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:** *Lucero v. Holland*, 902 F.3d 979 (9<sup>th</sup> Cir. 2018): The defendant was charged with others for attempting to murder a fellow prisoner. At trial, the government offered a handwritten gang memo that was found on another defendant the day after the murder attempt. It detailed the assault on the victim and identified the perpetrators. The memo was admitted only against the defendant who wrote it, as a party-opponent statement. The defendant argued that admission of the memo was a violation of *Bruton*. But the court found that the memo among gang members was clearly not testimonial, as it was not prepared with the primary motive of use in a criminal prosecution. (Far from it.) The court found that “the specialized rules of *Bruton* fit comfortably within the *Crawford* umbrella” --- meaning that *Bruton* is premised on a violation of the non-confessing defendant’s right to confrontation and, after *Crawford*, the right to confrontation applies only to the admission of testimonial hearsay. The court concluded that “only testimonial codefendant statements are subject to the federal Confrontation Clause limits established in *Bruton*.”

**Statement admitted against co-defendant only does not implicate Crawford:** *Mason v. Yarborough*, 447 F.3d 693 (9<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (5<sup>th</sup> 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.

## Coconspirator Statements

**Coconspirator statement not testimonial:** *United States v. Felton*, 417 F.3d 97 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> Cir. 2007) (conspirator's statement made during a private conversation were not testimonial); *United States v. Ciresi*, 697 F.3d 19 (1<sup>st</sup> 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.") *United States v. Mayfield*, 909 F.3d 956 (8<sup>th</sup> Cir. 2018): Affirming convictions for conspiracy to distribute methamphetamine, the court found that the trial court did not err in admitting statements by one coconspirator about a completed act of distribution, and by another who informed the defendant what the police had found when he was arrested. The defendant argued that both sets of statements were testimonial, but the court found that statements made in furtherance of a conspiracy are not testimonial because, by definition, they are not made for the primary purpose of being used as evidence in a prosecution.

**Statements made pursuant to a conspiracy to commit kidnapping are not testimonial:** *United States v. Stimler*, 864 F.3d 253 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 2005); *United States v. Olguin*, 643 F.3d 384 (5<sup>th</sup> Cir. 2011); *United States v. Alaniz*, 726 F.3d 586 (5<sup>th</sup> Cir. 2013). *See also United States v. King*, 541 F.3d 1143 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 2010) (statements made by a coconspirator “by their nature are not testimonial”) *United States v. Tragas*, 727 F.3d 610 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> Cir. 2004); *United States v. Singh*, 494 F.3d 653 (8<sup>th</sup> Cir. 2007); and *United States v. Hyles*, 521 F.3d 946 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2013) (“co-conspirator statements in furtherance of a conspiracy are not testimonial”); *United States v. Cazares*, 788 F.3d 956 (9<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); *United States v. Patterson*, 713 F.3d 1237 (10<sup>th</sup> Cir. 2013) (same); *United States v. Morgan*, 748 F.3d 1024 (10<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (3<sup>rd</sup> 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 (5<sup>th</sup> 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.”

**Cross-examination at a deposition was adequate to satisfy the right to confrontation: *United States v. Mallory*, 902 F.3d. 584 (6<sup>th</sup> Cir. 2018):** The defendant was charged with a scheme to pilfer money from an old person, by forging a will. One of his accomplices, with whom he had fallen out, testified against him at a deposition, and was unavailable to testify at trial, due to dementia. The trial court admitted the deposition transcript, and the defendant argued that this violated his right to confrontation. The court held that the defendant had a meaningful opportunity

to cross-examine the witness at the deposition. The defendant argued that he had insufficient time to prepare for the deposition given voluminous discovery; but the court found that the defendant had failed to specify what his counsel could have reviewed but did not, and concluded that “counsel’s preparation, even if hurried, was not so rushed as to significantly limit his ability to cross-examine.” The defendant next argued that he received discovery after the deposition, but the court found that none of this information was pertinent to cross-examining the witness. The defendant next argued that he did not know that the witness had been diagnosed with dementia at the time of the deposition, and would have like to cross-examine the witness on that. But the court responded that the defendant had information that the witness was confused, and actually asked him if he had been diagnosed with Alzheimer’s; and moreover, the defendant was allowed to impeach the deposition at trial with information about the witness’s mental condition.

**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 (9<sup>th</sup> 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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 (2<sup>d</sup> 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 (2<sup>nd</sup> 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 (3<sup>rd</sup> 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.” *See also Mitchell v. Superintendent*, 902 F.3d 156 (3<sup>rd</sup> Cir. 2016) (jailhouse conversations among inmates, admissible as declarations against interest, were not testimonial).

**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 (4<sup>th</sup> 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 inculcated 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 (4<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (11<sup>th</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (11<sup>th</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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.

**Testimony by lay witnesses that they had seen lab reports does not violate the Confrontation Clause:** *United States v. Ocean*, 904 f.3d 25 (1<sup>st</sup> Cir. 2018): In a drug prosecution,

police officers testifying as lay witnesses, identified the substance found on the defendant as drugs. The government did not introduce lab reports and the witnesses did not refer to them on direct examination. On cross, the officers testified that they had seen lab reports. The court found no confrontation violation because the government never sought to offer the reports into evidence and the witnesses did not rely on the reports.

**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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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. Lombardozzi*, 491 F.3d 61 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (3<sup>rd</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (6<sup>th</sup> 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 (5<sup>th</sup> 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.”

**Expert testimony by technical reviewer, rather than the case analyst, does not clearly violate the Confrontation Clause:** *Jenkins v. Hall*, 910 F.3d 828 (5<sup>th</sup> Cir. 2018): In a drug prosecution, the case analyst weighed the drug and the supervisor testified to the weight on the basis of reviewing the case analyst’s technical data. The court found no confrontation violation under the AEDPA standard of review. The court found *Bullcoming* to be distinguishable because in that case the supervisor who testified did not review the technical data and come to his own conclusion. **Accord *Grim v. Fisher***, 816 F.3d 296 (5<sup>th</sup> Cir. 2016) (no clear confrontation violation where the supervisor “examined the analyst’s report and all of the data, including everything the analyst did to the item of evidence; ensured that the analyst did the proper tests and that the analyst’s interpretation of the test results was correct; agreed . . . with the examinations and results of the report; and signed the report.”)

**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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 testimony. 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 (7<sup>th</sup> Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 NCMCEC 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (10<sup>th</sup> Cir. 2010), *on remand for reconsideration under Williams*, 696 F.3d 1280 (10<sup>th</sup> 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. Kamahale*, 748 F.3d 984 (10<sup>th</sup> 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 (10<sup>th</sup> 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. Ponzo*, 853 F.3d 558 (1<sup>st</sup> 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 Ponzio 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, Ponzio effectively schemed to silence Hildonen's testimony against him. And Hildonen's subsequent unavailability signifies the success of that scheming. So Ponzio forfeited his confrontation rights. To hold otherwise would allow Ponzio to profit from his own wrong and would undermine the integrity of the criminal-trial system --- which we cannot allow."

**Forfeiture through veiled threats and prior history of violence: *United States v. Pratt*, 915 F.3d 266 (4<sup>th</sup> Cir. 2019):** Appealing convictions for sex trafficking and child pornography, the defendant argued that it was error to admit a hearsay statement made by one of the trafficking victims to a police officer. The court found no error in the trial court's determination that the defendant had forfeited his hearsay objection and also his right to confrontation. The defendant called the victim three times while he was in jail --- in violation of the magistrate judge's order not to contact her. The court noted that "[a]s an ineffective ruse, Pratt would pretend to be talking to someone other than" the victim; in each of the calls he urged her to deny any knowledge, and his instructions sounded like "veiled threats." This was particularly so "against the backdrop of several women at trial who detailed how Pratt would beat prostitutes --- including [the declarant] --- whom he considered disobedient." The court concluded that these threats, in the context of a history of violence toward the victim, caused the victim not to testify. It recognized that the victim might have had another motivation for refusing to testify: her feelings for the defendant, whom she considered to be her boyfriend. But the court noted that "those feelings were tied up in the same abusive relationship."

**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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (6<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (4<sup>th</sup> 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 (9<sup>th</sup> 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 allocation statement are both testimonial:** *United States v. Bruno*, 383 F.3d 65 (2<sup>nd</sup> Cir. 2004): The court held that a plea allocation 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 (2<sup>nd</sup> Cir. 2007) (plea allocation 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 (2<sup>nd</sup> Cir. 2006) (plea allocation 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort’s plea allocation 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (5<sup>th</sup> 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." **Compare** *United States v. Sosa*, 897 F.3d 615 (5<sup>th</sup> Cir. 2018): Appealing a conviction for bringing methamphetamine into the United States, the defendant argued that his right to confrontation was violated when an officer was allowed to testify that an undercover agent told him that the defendant's mother was recruiting drug couriers. The court found no error because the statement was not offered for its truth. Rather it was offered to

explain why the officer took investigative steps regarding the defendant's mother. The court stated that "there is not a hearsay or a confrontation problem when the evidence is not offered for the truth of the matter asserted." The court emphasized, citing *Kizzee*, that "courts must be vigilant in ensuring that these attempts to 'explain the officer's actions' with out-of-court statements do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for its truth." In this case, the court found no such danger, because the undercover officer's statement was probative in explaining the police investigation, and the prejudicial effect was not high because the statement only implicated the defendant's mother, who was an acknowledged participant in the drug activity.

**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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (4<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (10<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (1<sup>st</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (9<sup>th</sup> 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 (10<sup>th</sup> 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 (11<sup>th</sup> 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 (3<sup>rd</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (7<sup>th</sup> 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 (11<sup>th</sup> 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 of victim to her therapist, discussing the effect of defendants' actions on her emotional condition, were not testimonial: *United States v. Gonzalez*, 905 F.3d 165 (3<sup>rd</sup> Cir. 2018):** The defendants were charged with stalking and cyberstalking causing death. The victim made statements to her therapist (and others) about the anxiety and depression caused by the defendant's activities. The statements to the therapist were admitted under Rule 803(4), and the appellate court found no error in that ruling. The defendant argued that the statements were testimonial but the court disagreed. The court stated that "the purpose of a visit to a therapist is not to create a record in a criminal case." *See also United States v. Gonzalez*, 905 F.3d 165 (3<sup>rd</sup> Cir. 2018) (Cyberstalking prosecution: "Belford's statements to her therapist are not testimonial in nature. As her therapist testified, the purpose of Belford's visits were to receive therapy to treat her anxiety and depression. The purpose of a visit to a therapist is not to create a record for a future criminal case. \* \* \* Accordingly, the admission of Belford's statements as evidence did not violate the Confrontation Clause.")

**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 (4<sup>th</sup> 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 (5<sup>th</sup> 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 (8<sup>th</sup> 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 (6<sup>th</sup> 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 (9<sup>th</sup> 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 *Bochtig*) 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 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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.**

**Admission of statement to police officers offered for “context” violated the right to confrontation, given the limited probative value for context: *Orlando v. Nassau County Dist. Attorney’s Office*, 915 F.3d 113 (2<sup>nd</sup> Cir. 2019):** In a habeas proceeding challenging a murder conviction, the court found that Orlando’s right to confrontation was clearly violated. Orlando and his accomplice, Jeannot, were arrested and questioned separately. Jeannot confessed, and the confession was offered at Orlando’s trial purportedly not for its truth, but only to explain why Orlando changed his confession after hearing what Jeannot had said. The court rejected this “context” argument and found that the statement was offered for its truth. It found that at trial, the government explicitly argued that what Jeannot had told the police was true. Moreover, Jeannot’s statement “went far beyond any limited value in showing why Orlando changed his account of what happened that night.” The court noted that “Orlando’s changing his account of the homicide was no different than many investigations when suspects make a series of statements; absent the substance of Jeannot’s statement, the jury still could have learned that after several hours of interrogation, Orlando revised his story and placed himself at the scene of the murder and admitted to lying about his original account. That approach would have significantly advanced the prosecution’s case without a critical narrative gap.”

**Note: The court reviews the case under *Bruton*. But *Bruton* was not applicable here because the defendant and the accomplice were not tried together. Rather, this is simply a *Crawford* case, where testimonial hearsay was offered against a criminal defendant. There is no reason to complicate things by adding *Bruton* to it.**

**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 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 35<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup>**

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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (10<sup>th</sup> 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 (9<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (5<sup>th</sup> 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 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (1<sup>st</sup> 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 (5<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (11<sup>th</sup> 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 (9<sup>th</sup> 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 (1<sup>st</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (10<sup>th</sup> Cir. 2011), *United States v. Johnson*, 688 F.3d 494 (8<sup>th</sup> Cir. 2012), and *United States v. Anekwu*, 695 F.3d 967 (9<sup>th</sup> Cir. 2012) all *infra*. See also *Washington v. Griffin*, 876 F.3d 395 (2<sup>nd</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (10<sup>th</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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 11<sup>th</sup> 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 (3<sup>rd</sup> 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 (4<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 2010), amended 636 F.3d 687 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 10<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 11<sup>th</sup> 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 (1<sup>st</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (10<sup>th</sup> 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 (11<sup>th</sup> 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 violated the defendant's right to confrontation because the government did not sufficiently establish unavailability: *United States v. Foster*, 910 F.2d 813 (5<sup>th</sup> Cir. 2018):** Reversing a conviction for transporting aliens, the court found that admitting the videotaped depositions of the deported aliens violated the defendant's right to confrontation. Had the defendant's been unavailable, there would have been no confrontation violation, but the court found that the government had not made a "good faith and reasonable" effort to procure their presence for trial. The government deported the aliens, and while that may nevertheless consistent with good faith, the government "made no attempt to verify or confirm the authenticity or workability of the witnesses' contact information, or offer the option of remaining in the United States pending Foster's trial." More importantly "the government made no attempt to remain in contact with either witness."

**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 (6<sup>th</sup> 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 he 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 (10<sup>th</sup> 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 (5<sup>th</sup> 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 (6<sup>th</sup> 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").

## Materials Submitted at Meeting

**To: Judge Debra A. Livingston, Chair  
Advisory Committee on the Federal Rules of Evidence**

**Judge Thomas D. Schroeder, Chair  
Subcommittee on Rule 702**

**Daniel J. Capra, Reporter  
Advisory Committee on the Federal Rules of Evidence**

**From: Ted R. Hunt, Senior Advisor on Forensic Science  
U.S. Department of Justice**

**Elizabeth J. Shapiro  
U.S. Department of Justice**

**Date: April 29, 2019**

**Re: Agenda Materials on ‘Overstatement’ in Forensic Science**

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At the outset, we thank you and the Committee for the substantial work you have performed gathering case materials and seeking out a wide range of diverse views — including those of the Department — in connection with the proposed amendment to Rule 702 to address perceived ‘overstatement’ by forensic examiners. We hope that the addition of our written perspective on these matters will be helpful to the Committee in its forthcoming deliberations.

After careful consideration of all the materials, including the proposed amendment and the accompanying Note, the Department believes that the current proposal on ‘overstatements’ should be postponed in order to permit the Department’s initiatives on Uniform Language for Testimony and Reports (‘ULTRs’) and testimony monitoring to take full effect. The issue can be monitored in future meetings, and an amendment re-visited in the future if deemed necessary. This memorandum explains why we believe that the current materials do not demonstrate the need for an amendment at this juncture, and explains in greater detail why opinion testimony regarding ‘source identification’ is not a testimonial overstatement.

We also respond to Joe Cecil’s views that the Department’s ULTRs are insufficient to address the perceived problem, as well as Professor’s Garrett’s comments on error rates included in the agenda book. In addition, we address the basis on which experts in two commonly-used pattern matching disciplines, latent print and firearms/toolmarks examinations, form their opinions. Finally, attached to this memorandum is some analysis

of the facts underlying the cases included in the case digest identified as instances of testimonial ‘overstatement.’

### **Memorandum Summary**

- A ‘source identification’ conclusion is not a testimonial ‘overstatement.’ When a pattern comparison examiner offers a ‘source identification’ conclusion, he or she is not making an empirical or statistically-based claim about nature. A ‘source identification’ inference makes no claim about any *other* impressions or marks that may or may not exist. Furthermore, when offering this conclusion, an examiner is *not* claiming that the questioned mark or impression is unique, or that he or she can individualize it to the exclusion of all other marks or impressions.

- Instead, an examiner’s ‘source identification’ conclusion is a knowledge, skill, and experience-based decision that the evidence provides sufficiently strong support to conclude that, in his or her expert opinion, the questioned mark or impression came from the same source as the known mark or impression. That opinion is a logical inference that inductively proceeds from the observed facts and data to the ‘source identification’ conclusion. Inferences such as these are based on technical and specialized knowledge, skill, and experience – *not* statistical methods or empirical measurements.

- The logical warrant for the inference to a ‘source identification’ conclusion is that qualified forensic examiners authorized to perform casework in accredited laboratories have consistently demonstrated their ability to accurately make these determinations. Throughout a typical training program, examiner trainees compare hundreds to thousands of questioned (but known ground truth) impressions to known source exemplars. These comparisons increase in difficulty as examiner trainees learn how to reliably identify and exclude questioned marks and patterns. In short, before pattern comparison examiners are deemed competent and authorized to perform casework, they must demonstrate that they *can, and consistently do*, make correct ‘source identification’ conclusions.

- An expert’s opinion may — but need not — be empirically derived, verified by measurement, or statistical in nature. However, as the Supreme Court made clear in *Daubert* and *Kumho Tire*, experience — either operating alone or in conjunction with knowledge, skill, training, or education — provides an equally legitimate legal foundation for expert testimony. As such, although an expert’s opinion must be based on “sufficient facts or data” and supported by “reliable principles and methods,” those facts/data and principles/methods need not be empirical or statistical in nature or based on measurement of the phenomena under consideration. Rather, an expert may provide a knowledge-skill-and-experience-based opinion. That opinion, although necessarily inductive — and thereby potentially fallible — may be stated in categorical form as an expert opinion on an ultimate issue in the case.

- The spring 2019 meeting materials suggest that testimony by forensic examiners include ‘black box’ study-derived error rates for the method used. The current consensus of scientific thought does not support this view. The American Association for the Advancement of Science (AAAS) recently cautioned against extrapolating study-derived error rates to case-specific scenarios. It found that error rates cannot be reduced to a single number or set of numbers. Instead, the AAAS found that error rates derived from ‘black box’ studies do not necessarily reflect the rate of error in actual forensic practice.

- Rather than study-derived error *rates*, the focus should be on the *risk* of error in an individual case. In its recent draft document, *Validation and Performance Testing in Forensic Science: Perspectives of the OSAC Human Factors Committee*, the Human Factors Committee of the Organization of Scientific Area Committees (OSAC) (a group composed of non-forensic scientists and academics) stated: “Lawyers often want to know ‘the error rate’ of a forensic method or procedure. It is a naïve question because the error rate of a given procedure is likely to vary based on a variety of factors that affect the difficulty of the analysis in a particular case.”

- We do not believe that the case digest that accompanies the agenda materials supports the need for the proposed amendment or the draft committee Note. Most of the cases included in the digest are five or more years old and prior to the Department’s work on uniform language and testimony monitoring. In addition, many of the cases either involve instances where the court — not the witness — used the term ‘match,’ or the court ordered the witness to use a term or phrase described as an ‘overstatement.’

### **I. ‘Source Identification’ and Claims of ‘Overstatement’**

The meeting materials include a response from Joe Cecil to a question posed by the Reporter regarding the Department’s Uniform Language for Testimony and Reports (ULTRs).<sup>1</sup> Specifically, the Reporter asked Mr. Cecil, “If the DOJ standards on what forensic experts say is perfectly executed, are there still concerns about overstatement?” Mr. Cecil answered “yes,” arguing that — in his opinion — concerns remain about the latent print and firearms/toolmarks disciplines.

Mr. Cecil acknowledged that the Department’s ULTRs “will resolve some of the most important problems that arise in forensic science testimony.”<sup>2</sup> These include improving practice by eliminating the use of the phrase “reasonable degree of scientific certainty” and similar expressions; prohibiting claims that forensic techniques are error-free; disallowing forensic examiners from citing the number of examinations they have performed as a direct measure for the accuracy of the examination in question; and not offering statistical estimates without relevant and appropriate data. Mr. Cecil also

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<sup>1</sup> Federal Advisory Committee Fall 2018 Meeting Materials, *memo to subcommittee on forensics and overstatement September 2018*, correspondence of Joe Cecil to Federal Rules Advisory Committee Reporter, Professor Dan Capra, pp. 5-9.

<sup>2</sup> *Id.* at 5.

acknowledged that the Department’s testimony monitoring program will “bring about greater consistency and allow early identification of emerging problems.”<sup>3</sup> In his view, “These are important steps in strengthening the accuracy of forensic science testimony.”<sup>4</sup>

Mr. Cecil was nevertheless concerned that “overstatement” of findings will persist because “distinguished members of the scientific community will conclude that current research does not provide a sufficient factual foundation to support a forensic examiner’s conclusion that ‘two or more specific patterns indicate that they originated from the same source’ --- a conclusion that is permitted under the DOJ standards.”<sup>5</sup> Focusing on the provisions of the Department’s Uniform Language for Latent Print Examinations, Mr. Cecil observed that “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.”<sup>6</sup> He argued that a “[f]orensic examiner’s untethered opinion testimony that declares a match with no empirical basis is exactly what raised the ire of the scientific community,” noting that “PCAST questioned whether a subjective conclusion would meet the FRE 702(c) standard of reliable principles and methods.” Mr. Cecil concluded his critique by claiming that the “core of the 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).”

Mr. Cecil’s critique, however, is based on a flawed premise. He incorrectly assumes that ‘source identification’ opinions must be necessarily based on “empirical research” and “scientific” methodology. That is simply not the case, as the Supreme Court made abundantly clear in *Daubert* and *Kumho Tire*. Those cases stressed that judges “cannot administer evidentiary rules under which a gatekeeping obligation depend[s] upon a distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge’ . . . .” See *Kumho Tire*, 526 U.S. 137, 148 (1999). Rather than endorsing impractical efforts at ‘binning’ separate categories of knowledge, the Court made clear that the touchstone for the admissibility of expert knowledge under FRE 702 — whatever its epistemic underpinning — is relevance and reliability.<sup>7</sup>

Reliable evidence must be grounded in *knowledge*, whether scientific, technical, or specialized in nature.<sup>8</sup> The term knowledge “‘applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.’”<sup>9</sup> The Court was quick to stress that no body of knowledge — including scientific knowledge — can or must be “known” to a certainty.<sup>10</sup> In addition, the *Kumho* Court made clear that the

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

<sup>8</sup> *Id.* at 590.

<sup>9</sup> *Id.* (citing Webster’s Third New International Dictionary 1252 (1986)) (emphasis added).

<sup>10</sup> *Daubert*, 509 U.S. at 590.

assessment of reliability may appropriately focus on the personal knowledge, skill, or experience of the expert witness.<sup>11</sup> That fact is reflected in the current Comment to FRE 702, which states:

Nothing in this amendment is intended to suggest that *experience alone*—or experience in conjunction with other knowledge, skill, training, or education—may not provide a *sufficient foundation* for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. *In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.*<sup>12</sup>

Thus, when a fingerprint or toolmark examiner provides a ‘source identification’ conclusion, he or she is not making an empirical or statistically-based claim about nature. In other words, a ‘source identification’ inference makes no claim about any *other* marks or impressions that may, or may not, exist. Furthermore, an examiner is not claiming that the questioned mark or impression is unique or that he or she can individualize it to the exclusion of all *other* questioned marks or impressions. Instead, an examiner’s ‘source identification’ conclusion is a knowledge, skill, and experience-based decision<sup>13</sup> that the evidence provides sufficiently strong support<sup>14</sup> in favor of the same-source proposition to conclude that, in his or her expert opinion, the questioned mark or impression came from the same source as the known mark or impression.<sup>15</sup> That opinion is an inference that

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<sup>11</sup> 526 U.S. at 150 (“[T]he relevant reliability concerns may focus upon personal knowledge or experience.”)

<sup>12</sup> Advisory Committee Comment to FRE 702 (emphasis added).

<sup>13</sup> “Probability can be ‘objective’ (a logical measure of chance, where everyone would be expected to agree to the value of the relevant probability) or ‘subjective,’ in the sense that it measures the strength of a person’s belief in a particular proposition.” Colin Aitken, Paul Roberts, Graham Jackson, *Communicating and Interpreting Statistical Evidence in the Administration of Criminal Justice, 1. Fundamentals of Probability and Statistical Evidence in Criminal Proceedings, Guidance for Judges, Lawyers, Forensic Scientists and Expert Witnesses*, Royal Statistical Society, at 14 (November 2010) available at:

<http://www.rss.org.uk/Images/PDF/influencing-change/rss-fundamentals-probability-statistical-evidence.Pdf>.

<sup>14</sup>

Because ridge features have been demonstrated to be highly variable, an examiner may well be justified in asserting that a particular feature set is rare, even though there is no basis for determining exactly how rare. And an examiner may well be justified in saying that a comparison provides “strong evidence” that the prints have a common source, even though there is no basis for determining exactly how strong.

WILLIAM THOMPSON ET AL., *FORENSIC SCIENCE ASSESSMENTS: A QUALITY AND GAP ANALYSIS* (2017), at 66 (2017) available at: [https://mcmprodaaas.s3.amazonaws.com/s3fs-public/reports/Latent%20Fingerprint%20Report%20FINAL%209\\_14.pdf?i9xGS\\_EyMHnIPLG6INIUYzB66L5cLdlb](https://mcmprodaaas.s3.amazonaws.com/s3fs-public/reports/Latent%20Fingerprint%20Report%20FINAL%209_14.pdf?i9xGS_EyMHnIPLG6INIUYzB66L5cLdlb).

<sup>15</sup>

Events or parameters of interest, in a wide range of academic fields (such as history, theology, law, forensic science), are usually not the result of repetitive or replicable processes. These events are singular, unique, or one of a kind. It is not possible to repeat the events under identical conditions and tabulate the number of occasions on which some past event actually occurred. The use of subjective probabilities allows us to consider probability for events in situations such as these.

inductively proceeds from the observed facts and data to a ‘source identification’ conclusion.<sup>16</sup> Inferences such as these are based on technical and specialized knowledge, training, skill, and experience — *not* statistical methods or empirical measurements.

## **II. The Factual Basis and Logical Warrant for a Forensic Examiner’s Knowledge, Skill, and Experience-Based ‘Source Identification’ Opinion**

### ***a. Latent Print Examination***

FBI friction ridge examiners must demonstrate their ability to accurately make ‘source identifications’ and ‘source exclusions’ before they are deemed competent and authorized to perform casework. To establish competency, latent print examiners who work in accredited laboratories must satisfy minimum education requirements, complete comparison skills exercises, and successfully pass a final qualification exam.

Throughout a typical 12 to 18 month training program, examiner trainees conduct thousands of comparisons of latent (but known source) impressions to known source exemplars. These comparisons increase in difficulty as trainees learn how to identify and exclude latent and known prints.

Throughout their training, examiners learn to apply their knowledge of the biological basis of friction ridge skin, studies measuring the frequency of friction ridge features, and statistical models attempting to quantify the rarity of feature configurations to their comparisons. Once qualified, examiners continue to use a combination of education, training, experience, and skill to inform their expert decisions on the discriminability and source of friction ridge impressions.

At the completion of their training program, examiner trainees must successfully complete a final qualification exam that tests both foundational knowledge (through a written exam) as well as technical skill (through a comparison skills test). Only then may an accredited laboratory authorize an examiner to conduct casework. Once qualified, examiner

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COLIN AITKEN & FRANCO TARONI, STATISTICS AND THE EVALUATION OF EVIDENCE FOR FORENSIC SCIENTISTS 22-23 (Wiley 2<sup>nd</sup> Ed. 2004).

<sup>16</sup>

Most inferential reasoning in forensic contexts is inductive. It relies on evidential propositions in the form of empirical generalisations . . . and it gives rise to inferential conclusions that are ampliative, probabilistic and inherently defeasible. This is, roughly, what legal tests referring to “logic and common sense” presuppose to be the lay fact-finder’s characteristic mode of reasoning. Defeasible, ampliative induction typifies the eternal human epistemic predicament, of reasoning under uncertainty to conclusions that are never entirely free from rational doubt.

Paul Roberts & Colin Aitken, *Communicating and Interpreting Statistical Evidence in the Administration of Criminal Justice*, 3. *The Logic of Forensic Proof – Inferential Reasoning in Criminal Evidence and Forensic Science, Guidance for Judges, Lawyers, Forensic Scientists and Expert Witnesses*, Royal Statistical Society, at 43 (March 2014) available at: <https://www.maths.ed.ac.uk/~cgga/Guide-3-WEB.pdf>.

competence is continually assessed through proficiency testing, latent print verifications, technical reviews, and case file audits. In short, examiners must demonstrate that they can, and consistently do, form accurate ‘source identification’ conclusions before being authorized to perform casework.

A qualified examiner’s skill and ability to correctly source identify questioned prints to known exemplars is not empirical speculation — it is a demonstrable fact. Latent print examiners must correctly source identify thousands of questioned impressions before they are cleared to begin forensic casework.

In May 2011, the results of a large-scale independent ‘black box’ study of latent print examiners was published. It evaluated the accuracy of conclusions offered by those examiners.<sup>17</sup> In the study, 169 examiners were each presented with approximately 100 pairs of prints. The study found that the ‘source identification’ conclusions offered by these examiners were correct 99.8% of the time. The study also found that their ‘source exclusion’ decisions were correct 88.9% of the time. These results demonstrate that trained examiners can produce largely accurate and reliable ‘source identification’ conclusions.

In 2014, the results of a second large-scale ‘black box’ study of latent print examiners conducted by the Miami-Dade County Crime Laboratory were released.<sup>18</sup> The study consisted of three phases. In Phase I, examiner performance regarding Analysis, Comparison, and Evaluation (ACE) accuracy was evaluated. A total of 4,536 ACE examinations were reported by the participants. There were 42 erroneous identifications reported during these examinations. Although many of the errors appear to have been clerical rather than interpretive in nature, the authors could not determine this fact with certainty. The false positive rate in the study was 3.0%, and the false negative rate was 7.5% for all examinations.

In Phase II, participant performance for Analysis, Comparison, Evaluation, and Verification by a second examiner (ACE-V), which is how latent print casework examinations in accredited laboratories are *actually performed*, was evaluated. The results were informative. A total of 532 ACE-V examinations were reported by the participants, with **a false positive rate of 0%** and a false negative rate of 2.9%. With the added step of Verification — which always occurs during actual casework — there were *no* false positive conclusions.

In Phase III of the study, 17 of the 42 erroneous identifications reported during ACE examinations were sent for verification to 14 participants. None of the participants who acted as verifiers reported agreement with the prior erroneous identifications. During the verification stage, the 14 participants either reported findings that disagreed with, or were inconclusive regarding, the original incorrect conclusion.

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<sup>17</sup> Ulery, B.T., Hicklin, R.A., Buscaglia, J., and M.A. Roberts. *Accuracy and Reliability of Forensic Latent Fingerprint Decisions - Proceedings of the National Academy of Sciences*, Vol. 108, No. 19 (2011).

<sup>18</sup> Pacheco, I., Cerchiai, B., and S. Stoiloff. *Miami-Dade Research Study for the Reliability of the ACE-V Process: Accuracy & Precision in Latent Fingerprint Examinations*. (2014) available at: [www.ncjrs.gov/pdffiles1/nij/grants/248534.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/248534.pdf).

Collectively, this research suggests that latent print examinations performed by trained and qualified examiners result in exceedingly few false positive conclusions. Importantly, these studies demonstrate the ability of qualified examiners to make correct ‘source identification’ conclusions with a high degree of accuracy.

### ***b. Firearms/Toolmarks Examination***

Training in the firearms/toolmarks discipline at the FBI Crime Laboratory lasts approximately 3 years. A trainee will spend nearly 1,000 hours learning how to recognize similar and dissimilar microscopic characteristics and patterns. The trainee learns how tools produce and reproduce patterns composed of individual characteristics, and develops the basis for determining sufficient agreement when comparing toolmark patterns for similarity.

A trainee must perform several thousand microscopic comparisons using tool and tool-marked items, including fired bullets and cartridge cases. The trainee is required to produce known corresponding and known non-corresponding samples for comparison. Additionally, the trainee is required to conduct multiple microscopic comparison exercises involving best known non-match comparisons for toolmarks produced by consecutively manufactured tools (the worst case scenario).

Because of the potential for microscopic similarities between patterns that originated from best known non-match sources, the trainee develops an understanding of the level of similarity found in both microscopic patterns known to have come from different sources and microscopic patterns known to have come from the same source.

Competency testing is used to determine whether a trainee has acquired the expertise needed to conduct casework examinations. The trainee must demonstrate that he or she can consistently make correct ‘source identification’ decisions during a training program that involves *hundreds* of microscopic comparisons in the following areas: firearms, toolmarks, bullets, and cartridge casings. Once qualified, an examiner’s competence is continually evaluated through verifications, technical reviews, proficiency testing, and case file audits.

A firearms/toolmarks examiner’s skill and ability to correctly source identify questioned marks to known exemplars is not empirical speculation — it is a demonstrable fact. Firearms/toolmarks examiners must make correct ‘source identification’ conclusions regarding hundreds of questioned marks before they are authorized to begin forensic casework.

In 2011, a large-scale independent ‘black box’ study of firearms/toolmarks examiners was performed.<sup>19</sup> This study involved 218 examiners who were presented with 15 separate comparison problems. Each problem consisted of one questioned sample and three known test fires that originated from the same gun. Unbeknownst to the examiners, there were 5 same-source and 10 different-source comparisons. Among the 2,178 different-

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<sup>19</sup> Baldwin, D.P., Bajic, S.J., Morris, M., and D. Zamzow. *A study of false-positive and false-negative error rates in cartridge case comparisons*. Ames Laboratory, USDOE, Technical Report #IS-5207 (2014) available at: [afte.org/uploads/documents/swggun-false-positive-false-negative-usdoe.pdf](https://afte.org/uploads/documents/swggun-false-positive-false-negative-usdoe.pdf).

source comparisons, there were 1,421 eliminations, 735 inconclusive results, and 22 false positives. The false positive rate was only 1.5%. In addition, 20 of the 22 false positives were made by *only 5* of the 218 examiners.

This research shows that firearms/toolmarks examinations performed by trained and qualified examiners result in very few false positive conclusions. Importantly, it establishes the ability of qualified examiners to make correct ‘source identification’ conclusions with a high degree of accuracy.

### **III. Contemporary Forensic Documents That Describe the Basis for ‘Source Identification’ Conclusions**

#### ***a. DOJ Uniform Language for Testimony and Reports (ULTRs)***

The Department’s ULTRs for latent print and firearms/toolmarks pattern examinations clearly state that a ‘source identification’ conclusion is an examiner’s *decision* that the evidence provides extremely strong support for the same-source proposition such that the examiner has come to the *opinion* that the two impressions or marks came from the same source.<sup>20</sup> These documents also make clear that a ‘source identification’ conclusion is an examiner’s inference that inductively proceeds from observed facts and data to his or her conclusion about those facts and data regarding the origin of a questioned mark.<sup>21</sup> Induction involves “predictions about new situations that are inferred or induced from the existing body of knowledge.”<sup>22</sup>

The ULTRs make clear that “[a] source identification is not based upon a statistically-derived or verified measurement or an actual comparison of all [impressions/marks] in the world.”<sup>23</sup> Moreover, both documents clearly state that “an examiner shall not assert that two [marks or impressions] originated from the same source to the exclusion of all other sources.”<sup>24</sup>

The Qualifications and Limitations section of the Latent Print ULTR states:

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<sup>20</sup> *Department of Justice Uniform Language for Testimony and Reports for the Forensic Latent Print Discipline*, at 2; and *Uniform Language for Testimony and Reports for the Firearms and Toolmarks Discipline – Pattern Match Examination*, at 2. Available at: <https://www.justice.gov/olp/forensic-science#ultr>.

<sup>21</sup> *Id.* at 2 (both).

<sup>22</sup> *Id.* at 2, n.2:

Inductive reasoning (inferential reasoning): A mode or process of thinking that is part of the scientific method and complements deductive reasoning and logic. Inductive reasoning starts with a large body of evidence or data obtained by experiment or observation and extrapolates it to new situations. By the process of induction or inference, predictions about new situations are inferred or induced from the existing body of knowledge. In other words, an inference is a generalization, but one that is made in a logical and scientifically defensible manner.

OXFORD DICTIONARY OF FORENSIC SCIENCE 130 (Oxford Univ. Press 2012).

<sup>23</sup> *Id.* at 3 (both).

<sup>24</sup> DOJ Latent Print and Firearms/Toolmarks-Pattern ULTRs, *supra*, note 20 at 3.

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 in the world’s population, rather than an examiner’s expert opinion.<sup>25</sup>

Similarly, the Department’s Firearms/Toolmarks Pattern Match ULTR states:

An examiner shall not assert that two toolmarks originated from the same source to the exclusion of all other sources. This may wrongly imply that a ‘source identification’ conclusion is based upon a statistically-derived or verified measurement or an actual comparison of all other toolmarks in the world, rather than an examiner’s expert opinion.<sup>26</sup>

These qualifications and limitations clearly state that an examiner’s ‘source identification’ conclusion is not a scientific, empirical, or statistical claim about the individuality of a print, mark or pattern in nature, and makes no claim to exclude all other prints, marks, or patterns. These limitations also make it clear that a ‘source identification’ conclusion is not an empirical or statistical claim about the uniqueness of print, mark, or pattern. The concept of uniqueness is both irrelevant and unnecessary to the formation of a ‘source identification’ conclusion, which is grounded in the examiner’s technical and specialized knowledge, skill, and experience.

***b. The Organization of Scientific Area Committees (OSAC)***

The Organization of Scientific Area Committees (OSAC) is a forensic science standards organization administered by the National Institute of Standards and Technology (NIST).<sup>27</sup> OSAC has over 550 members from government agencies, academic institutions, and the private sector. In addition to forensic scientists, it includes judges, prosecutors, defense attorneys, innocence advocates, and law professors. OSAC members work in a collaborative manner to develop and evaluate forensic science standards through a transparent, consensus-based process that allows for participation and comment by all stakeholders.

The OSAC Friction Ridge Subcommittee is one of the 25 subject matter-specific groups in the organization.<sup>28</sup> It is composed of 20 members who represent academia, private industry, crime laboratories, and the scientific community. The subcommittee is a diverse group of experts and stakeholders that have a variety of interests and perspectives.

To date, the OSAC Friction Ridge Subcommittee has approved two draft standards for latent print examination. These documents are currently under consideration as national

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<sup>25</sup> DOJ Latent Print ULTR, *supra*, note 20 at 3.

<sup>26</sup> DOJ Firearms/Toolmarks-Pattern ULTR, *supra*, note 20 at 3.

<sup>27</sup> See generally, <https://www.nist.gov/topics/organization-scientific-area-committees-forensic-science>.

<sup>28</sup> See <https://www.nist.gov/topics/forensic-science/friction-ridge-subcommittee>.

standards by the American Standards Board.<sup>29</sup> They are the *Guideline for the Articulation of the Decision-Making Process Leading to an Expert Opinion of Source Identification in Friction Ridge Examinations*<sup>30</sup> (‘Articulation document’) and the *Standard for Friction Ridge Examination Conclusions*.<sup>31</sup>

The Articulation document “explains the process leading to the expert opinion of source identification and provides guidance on articulating the process, the conclusion, and the limitations of that conclusion in testimony or discussion with relevant stakeholders.”<sup>32</sup> Regarding the uniqueness of latent prints, the document states:

While the highly discriminating nature of friction ridge skin is often expressed as “uniqueness,” this claim has not been empirically proven. Additionally, it has been suggested that the concept of uniqueness is neither a guarantee of an examiner’s ability to make an accurate source identification, nor a necessary precondition to reaching a reliable forensic conclusion.<sup>33</sup>

The document further notes, “Uniqueness is unproven and unnecessary.”<sup>34</sup>

Similar to the Latent Print ULTR, the Articulation document states, “Use of the term ‘individualization’ implies the global exclusion of all others. To individualize is to attribute a friction ridge skin impression to a single source. This determination de facto excludes all other possibilities.”<sup>35</sup> Consistent with language included in the Latent Print ULTR, the Articulation document cautions that “exclusion of all others,” “individualization,” “100% certainty,” and “zero error rate/infallible method” are problematic phrases to be avoided.<sup>36</sup>

Finally, the document states, “Reported conclusions shall be expressed as the opinion of the examiner. The examiner has a level of personal confidence associated with the accuracy and reliability of this conclusion. However, this personal level of confidence cannot be objectively measured. For this reason, certainty shall not be reported in absolute terms and should not be reported numerically.”<sup>37</sup>

The second OSAC document is the Standard for Friction Ridge Examination Conclusions.<sup>38</sup> It also endorses “source identification” conclusions, which it defines as follows:

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<sup>29</sup> See <https://www.asbstandardsboard.org/>.

<sup>30</sup> See

[https://www.nist.gov/sites/default/files/documents/2017/10/17/guideline\\_for\\_the\\_articulation\\_of\\_the\\_decision\\_making\\_process\\_leading\\_to\\_an\\_expert\\_opinion\\_of\\_source\\_identification\\_in\\_friction\\_ridge\\_examinations.pdf](https://www.nist.gov/sites/default/files/documents/2017/10/17/guideline_for_the_articulation_of_the_decision_making_process_leading_to_an_expert_opinion_of_source_identification_in_friction_ridge_examinations.pdf). (Unpublished).

<sup>31</sup> See [https://www.nist.gov/sites/default/files/documents/2018/07/17/standard\\_for\\_friction\\_ridge\\_examination\\_conclusions.pdf](https://www.nist.gov/sites/default/files/documents/2018/07/17/standard_for_friction_ridge_examination_conclusions.pdf). (Unpublished).

<sup>32</sup> Articulation document, at 1.

<sup>33</sup> *Id.* at 5, § 3.1.2.3.

<sup>34</sup> *Id.* at 6, § 3.1.3.5.

<sup>35</sup> *Id.* at 10, § 3.8.2.2 b.

<sup>36</sup> *Id.* at 10, § 3.8.2.2.

<sup>37</sup> *Id.* at 10, § 3.8.2.1.

<sup>38</sup> *Supra*, note 20.

*Source identification* is the strongest degree of association between two friction ridge impressions. It is the conclusion that the observations provide extremely strong support for the proposition that the impressions originated from the same source and extremely weak support for the proposition that the impressions originated from different sources.

Source identification is reached when the friction ridge impressions have corresponding ridge detail and the examiner would not expect to see the same arrangement of details repeated in an impression that came from a different source.<sup>39</sup>

This document cautions, “A conclusion shall not be communicated as a fact. It is an interpretation of observations made by the examiner and shall be expressed as an expert opinion.”<sup>40</sup> The Qualifications and Limitations section of this document contains nearly identical language to that set forth in the Department’s Latent Print ULTR.<sup>41</sup>

Neither the Latent Print ULTR nor the OSAC document claim that a ‘source identification’ is an individualization of a latent print impression to the exclusion of all other latent prints in the world, or is based on the uniqueness of either the known or the latent print.

#### **IV. Error Rates**

The Advisory Committee’s spring 2019 meeting materials address the topic of forensic science error rates. The comments submitted by Professor Brandon Garrett include a discussion of this topic (pp. 10-13), as does the Draft Committee Note (pp. 26, 28).

In his comments, Professor Garrett opined, “Perhaps most important is what the Committee Note says regarding failure to mention error rates. No conclusion can be reached about a method without qualification or discussion of error rates, because there is no type of expertise that does not have some kind of error.” (p. 11). He also writes, “Not only should experts be barred from claiming infallibility, but they must disclose the actual error rates, if they have been adequately measured. If error rates for a method have not been adequately measured using sound ‘black box’ studies under realistic conditions, then the experts must disclose that their technique is of unknown validity and reliability. . . .” (p. 11). Moreover, Professor Garrett asserts that “[e]xpert evidence should never be presented in court without evidence of its error rates and of the proficiency or reliability of not just the method, but the particular examiner using the method.” (p. 11).

Similarly, the Draft Committee Note states, “Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, based where appropriate on empirical studies of how often the method produces correct results, as well as other relevant limits inherent in the methodology.” (pp. 26, 29-30). These views — which

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<sup>39</sup> *Standard for Friction Ridge Source Conclusions*, at 5.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 6.

seem to advocate for testimonial disclosure of ‘black box’ study-based error rates as a relevant measure of case-specific rates — are out of step with the current consensus of scientific thought.

**a. American Association for the Advancement of Science**

In its recent report, *Forensic Science Assessments: A Quality and Gap Analysis – Latent Fingerprint Examination*,<sup>42</sup> the American Association for the Advancement of Science (AAAS) cautioned against extrapolating composite error rate figures derived from empirical studies to case-specific scenarios. The report stated, “[I]t is unreasonable to think that the ‘error rate’ of latent fingerprint examination can meaningfully be reduced to a single number or even a single set of numbers.”<sup>43</sup> The AAAS found that “[t]he probability of error in a particular case may vary considerably depending on the difficulty of the comparison. Factors such as the quality of the prints, the amount of detail present, and whether the known print was selected based on its similarity to the latent will all be important.”<sup>44</sup>

The AAAS also noted that ‘black box’ studies “can in principle determine the relative strength of different analysts and the relative difficulty of different comparisons, however the relationship of such findings to the error rate in a specific case is problematic.”<sup>45</sup> One concern was that study participants know they are being tested, which may affect their performance. Another concern was that decision thresholds used by examiners in controlled studies may differ from those employed during actual casework. As a result, the report concluded that “the existing studies generally do not fully replicate the conditions that examiners face when performing casework.”<sup>46</sup> Consequently, ‘the error rates observed in these studies *do not necessarily reflect the rate of error in actual practice*’ (citing Haber and Haber, 2014; Koehler, 2017; Thompson et al., 2014).<sup>47</sup>

**b. Other Scientific Authorities on Forensic Error Rates**

The 1996 National Research Council (NRC) report, *The Evaluation of Forensic DNA Evidence*,<sup>48</sup> recognized the importance of focusing on the case-specific *risk* of error, rather than an overall *rate* of error. On this point, the NRC observed, “The question to be decided is not the general error rate for a laboratory or laboratories over time but rather whether the laboratory doing DNA testing in this particular case made a critical error.”<sup>49</sup>

The NRC specifically rejected the proposal that laboratories use proficiency tests as the exclusive means for error rate determination — a proposal offered by a prior NRC

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<sup>42</sup> THOMPSON ET AL., *FORENSIC SCIENCE ASSESSMENTS: A QUALITY AND GAP ANALYSIS* (2017), *supra* note 14 at 45.

<sup>43</sup> *Id.* at 45.

<sup>44</sup> *Id.* at 58.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 46.

<sup>47</sup> *Id.* (Emphasis added).

<sup>48</sup> NAT’L RESEARCH COUNCIL, NAT’L ACADS., *THE EVALUATION OF FORENSIC DNA EVIDENCE* 85–88 (1996) (suggesting that retesting/duplicate tests should be used to determine error rates).

<sup>49</sup> *Id.* at 85.

committee on DNA (NRC I, 1992), co-chaired by PCAST Co-Chair, Dr. Eric Lander. The NRC committee stated:

Estimating rates at which nonmatching samples are declared to match from *historical performance* on proficiency tests is *almost certain to yield wrong values*. When errors are discovered, they are investigated thoroughly so that corrections can be made. A laboratory is not likely to make the same error again, so the error probability is correspondingly reduced.<sup>50</sup>

The NRC also observed, “The risk of error is properly considered case by case, taking into account the record of the laboratory performing the tests, the extent of redundancy, and the overall quality of the results.”<sup>51</sup> Moreover, the NRC found it unnecessary to debate differing estimates of false positive error when concerns about a false match can be easily resolved by retesting the evidence.<sup>52</sup> The NRC’s view that the focus should be on the case-specific *risk* of error, rather than the *rate* of error, is shared by many eminent scientists, statisticians, and forensic practitioners.<sup>53</sup>

In their recent response to the PCAST Report, Dr. Ian Evett and colleagues wrote, “The notion of an error rate to be presented to courts is misconceived because it fails to recognise that the science moves on as a result of proficiency tests. . . . [O]ur vision is not of the black-box/error rate but of continuous development through calibration and feedback of opinions.”<sup>54</sup>

There is no current scientific consensus on how, or whether, error rates can, or should, be determined for forensic pattern comparison methods. The notion of a single ‘rate’ wrongly assumes the existence of a consensus set of assumptions, choices, and criteria that can be used to measure and generate a valid and generally-applicable metric. The absence of external validity for ‘black box’ study-derived error rates, a scientific necessity, — and a factor that necessarily limits the applicability of those rates to case-specific circumstances — cautions against their application to casework scenarios.<sup>55</sup>

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<sup>50</sup> *Id.* at 86 (emphasis added).

<sup>51</sup> *Id.* at 87.

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., JOHN S. BUCKLETON ET AL., FORENSIC DNA EVIDENCE INTERPRETATION 76–77 (2d ed. 2016) (noting that error and error rates should be examined on a per-case basis) (“Our view is that the possibility of error should be examined on a per-case basis and is always a legitimate defence explanation for the DNA result. . . . The answer lies, in our mind, in a rational examination of errors and the constant search to eliminate them.”); BERNARD ROBERTSON ET AL., INTERPRETING EVIDENCE: EVALUATING FORENSIC SCIENCE IN THE COURTROOM 138 (2d ed. 2016) (“It is correct . . . to say that the possibility of error by a laboratory is a relevant consideration. It is wrong, however, to assume that the probability of error in a given case is measured by the past error rate. The question is what the chance of error was on this occasion.”); I.W. Evett et al., *Finding a Way Forward for Forensic Science in the US—A Commentary on the PCAST Report*, 278 FORENSIC SCI. INT’L 16, 22–23 (2017) (suggesting that proficiency tests should be used to determine error rates and rejecting the use of ‘black box’ studies in their calculation and courtroom presentation).

<sup>54</sup> Evett et al., *supra* note 53 at 22.

<sup>55</sup> GEOFFREY MARCZYK ET AL., ESSENTIALS OF RESEARCH DESIGN AND METHODOLOGY 180 (2005) (“Every study operates under a unique set of conditions and circumstances related to the experimental arrangement. The most commonly cited examples include the research setting and the researchers involved in the study. The major concern with this threat to external validity is that the findings from one study are influenced by a set of

In addition, ‘black box’ studies (PCAST’s proposed solution to measuring pattern comparison error rates) are merely “input-output research designs where *what happens in between is impossible to study or is ignored.*”<sup>56</sup> As such, the inputs “to” and outputs “from” these studies — e.g., true positives, false positives, true negatives, false negatives — are what is measured, *not the method* by which those outputs were generated. Therefore, black-box studies — by definition — *cannot* be used to calculate a valid error rate for a forensic method.

Finally, the Human Factors Committee of the Organization of Scientific Area Committees (a group composed of non-forensic scientists and academics) in its recent draft document, *Validation and Performance Testing in Forensic Science: Perspectives of the OSAC Human Factors Committee*, bluntly stated: “Lawyers often want to know ‘the error rate’ of a forensic method or procedure. It is a naïve question because the error rate of a given procedure is likely to vary based on a variety of factors that affect the difficulty of the analysis in a particular case.”<sup>57</sup>

Ironically, as the foregoing authorities make clear, if forensic examiners were required to provide general, ‘black box’ study-derived error rates during case-specific testimonial presentations, this would actually *increase* the risk of injecting erroneous information into the case, rather than providing the factfinder with a valid estimate of the *relevant* question — the case-specific *risk* of error.

## V. Conclusion

The ULTRs and the draft OSAC standards explain that a ‘source identification’ conclusion is an expert’s opinion that the observed features are in sufficient correspondence to provide extremely strong support for the same-source proposition and extremely weak support for the different source proposition.<sup>58</sup> This correspondence is such that the examiner would not expect to see the same arrangement of features or marks that originated from a different source.

A ‘source identification’ opinion is a knowledge-skill- and experience-based inductive inference grounded in the examiner’s technical and specialized knowledge. The logical warrant for that inference is the examiner’s skill, experience, established competency, and ongoing proficiency at accurately identifying latent, but *known source* (ground truth) prints, marks, or patterns to *known source* exemplars. In other words, the examiner has an established history of making accurate ‘source identification’ conclusions. As with *all* inductive inferences — whether grounded in science, statistical methods, measurement, or human skill and experience — there is *always* a non-zero chance that the

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unique conditions, and thus may not necessarily generalize to another study, even if the other study uses a similar sample.”).

<sup>56</sup> W. PAUL VOGT, *DICTIONARY OF STATISTICS AND METHODOLOGY* 24 (1993) (emphasis added).

<sup>57</sup> ORGANIZATION OF SCIENTIFIC AREA COMMITTEES, *HUMAN FACTORS COMMITTEE, VALIDATION AND PERFORMANCE TESTING IN FORENSIC SCIENCE: PERSPECTIVES OF THE OSAC HUMAN FACTORS COMMITTEE* 10 (unpublished technical paper) (2018).

<sup>58</sup> See THOMPSON ET AL, *supra*, note 14 at 66.

answer provided might be wrong. Both the ULTRs and the OSAC documents explicitly recognize and acknowledge that fact.<sup>59</sup>

Perfection, however, is neither claimed nor legally required of an expert witness.<sup>60</sup> The Advisory Committee Note to Rule 702, which quotes *In re Paoli*, states that “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 the evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.’”<sup>61</sup>

In sum, a ‘source identification’ conclusion is not an *overstated* claim. Both its logical and legal bases fall squarely within the requirements of *Daubert*, *Kumho Tire*, the plain language of Rule 702, and the Advisory Committee Note. Therefore, with an adequate foundational showing, a ‘source identification’ conclusion is a relevant and reliable inductive inference that stems from knowledge that has “‘good grounds,’ based on what is known”<sup>62</sup> — an expert’s technical and specialized knowledge, skill, and experience.

It is the Department’s position that the Committee should postpone the proposed ‘overstatement’ amendment to Rule 702. This will allow the Department’s ULTRs, testimony monitoring, and other work in the field of forensic science to take effect and gain acceptance in state and local jurisdictions. The Committee can re-visit this subject in the future and then evaluate whether it believes an amendment is warranted.

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<sup>59</sup> See DOJ Latent Print ULTR, *supra*, note 20 at 3; OSAC Standard for Friction Ridge Examination Conclusions, *supra*, note 31 at 5; OSAC Articulation Standard, *supra*, note 30 at 10.

<sup>60</sup> This is true for any type of knowledge, whether scientific, technical, or specialized. “[I]t would be unreasonable to conclude that the subject of scientific testimony must be ‘known’ to a certainty; arguably, there are no certainties in science.” *Daubert*, 509 U.S. at 590.

<sup>61</sup> Federal Rules Advisory Committee Note on Rule 702—2000 Amendment.

<sup>62</sup> *Daubert*, 509 U.S. at 590.

## Observations on the Case Digest

The materials provided to the Federal Advisory Committee on the Rules of Evidence for the fall 2018 meeting provided a summary of 15 appellate cases and 26 district court decisions as examples of testimonial ‘overstatements’ by forensic examiners. The spring 2019 materials include one additional district court example of alleged ‘overstatement.’<sup>1</sup> We make a number of observations regarding these cases:

(1) Forensic examiners employed by the Department of Justice testified in only 9 of these cases. The balance of the challenged testimony was provided by state or local examiners or those engaged in private practice.

(2) The majority of the cited decisions predate recent work that has improved and advanced forensic science at the national level. Eleven of the 15 appellate decisions were 5 or more years old. Seventeen of the 26 district court decisions were 5 or more years old, and one was 10 years old. In many of cited cases, the underlying testimony would not be permitted under current Departmental policy.

(3) The cases are often described as involving overstatements because a forensic examiner used the term “match” to describe a concordance between a known and a questioned sample. The term “match,” however, is not a recognized forensic conclusion in any of the disciplines discussed in the summarized decisions<sup>2</sup>, and the word “match” only rarely appears in quotation marks in these opinions. In many cases, the court appears to be using the word “match” as a colloquial way of referring to a source identification. But the actual words used by the witness matter, and in the majority of the cited cases it is unknown from the face of the opinion what those words are.

(4) In some cases the court ordered the examiner to use the term or phrase that the materials characterize as an ‘overstatement.’ Other cases do not involve particular testimony, but were instead challenges to the reliability of the feature comparison discipline overall.

We have no doubt there are numerous examples of examiners who in prior years testified in a fashion inconsistent with today’s standards. As a whole, however, collecting samples of these prior cases does not justify an immediate amendment to Rule 702, before the Department’s testimony guidelines have been given an opportunity to take effect.

### Appellate Cases

**Ballistics --- Overstatement Problem—testimony to a match: *United States v. Williams*, 506 F.3d 151 (2<sup>nd</sup> Cir. 2007)**

This case is eleven years old, and comes from the Allegheny County Coroner’s Office in Pennsylvania. The firearms/toolmarks expert testified that there was a “match” between shell

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<sup>1</sup> *United States v. Hylton*, 2018 WL 5795799 (D. Nev. Nov. 5, 2018).

<sup>2</sup> The forensic term is “identification”

casings, bullets, and a recovered gun. Under current guidelines, however, that testimony would not be permitted, as “match” is not a word used in this discipline.

**Ballistics --- some limitation on overstatement: *United States v. Parker*, 871 F.3d 590 (8<sup>th</sup> Cir. 2017)**

This case is described as an example where the court placed “some limitation on overstatement” on a toolmarks examiner from the Hennepin County Sheriff’s Office. Before trial, the district court judge had prohibited the witness from testifying that she was ‘100% sure’ or ‘certain’ that the relevant guns matched the relevant shell casings. On appeal, the defendant claimed that the witness violated that restriction. The court, however, found that “Reynolds testimony stayed within the bounds set by the district court.”

The opinion provides no indication that the witness actually planned to testify to 100% certainty in her conclusion. Rather, the discussion appears to have been prompted by a preemptive defense motion seeking exclusion of such testimony should it be offered. In any event, testimony to a 100% certainty is not permitted under current Departmental policy.

**Ballistics --- Overstatement--- reasonable degree of ballistics certainty: *United States v. Johnson*, 875 F.3d 1265 (9<sup>th</sup> Cir. 2017)**

This case is an example of a municipal toolmarks expert from the San Francisco Police Department testifying to “a reasonable degree of ballistics certainty.”

Use of the phrase “reasonable degree of scientific certainty” is now prohibited by DOJ policy, unless required by a Court.

**Drug identification: Overstatement, infinitesimal error rate --- *United States v. Mire*, 725 F.3d 665 (7<sup>th</sup> Cir. 2013)**

In this case, a DEA chemist, described the rate of error for GC-MS testing as “infinitesimal.” In a recent scientific paper titled, *Assessing the Quality and Reliability of the DEA Drug Identification Process*, published in the peer reviewed journal, ‘Forensic Chemistry,’ authors Rodriguez-Cruz and Montreuil report that a historical study of the DEA’s drug identification process found it to be extremely accurate and reliable. The paper described ‘an assessment of laboratory error rates within the DEA laboratory system . . . using historical proficiency test laboratory data generated during the years 2003-2016.’

Results of that study indicate that the DEA drug identification process is characterized by high sensitivity (99.90%) and specificity (99.12%) with very low type I (false positive 0.87%) and type II (false negative 0.092%) error rates. Given this study, the expert’s testimony may well be supported by empirical evidence. Nevertheless, using words to express a zero error rate is not permitted under current Departmental policy.

**Fingerprint identification: Overstatement --- zero rate of error --- *United States v. Straker*, 800 F.3d 570 (D.C. Cir. 2015)**

In this case, an FBI fingerprint examiner testified that her methodology, ACE-V, did not have an inherent rate of error. The witness did, however, acknowledge the potential for human error during the performance of that methodology.

In any event, such claims (whether related to a methodology or its execution) are not permitted by the Department's Uniform Language for Testimony and Reports (ULTRs) for the Latent Print Discipline. Thus, fine distinctions like these are no longer made by Department examiners.

**Fingerprint Identification: Overstatement – infinitesimal error rate --- *United States v. Casanova*, 886 F.3d 55 (1<sup>st</sup> Cir. 2018)**

The witness in this case, a fingerprint examiner from the Boston Police Department, is said to have 'overstated' his testimony by claiming an 'infinitesimal error rate.'

The questioned testimony occurred during cross-examination. The opinion provides the following description of the relevant exchange:

“On cross-examination, Truta testified, ‘[a]s far as I know, in the United States the[re] are not more than maybe 50 erroneous identification[s], which comparing with identification[s] that are made daily, thousands of identification[s], the error rate will be very small.’ Truta had previously cautioned that it would be inappropriate to claim that the rate of false positive identifications is zero. \* \* \* But Casanova's argument mischaracterizes what happened. Truta never testified that the error rate for fingerprint examinations was ‘effectively zero,’ ‘virtually zero,’ or ‘functionally indistinguishable from 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.” (pp. 61-62)

The court held that this witness did not overstate his opinion, nor testify to an infinitesimal error rate. When the witness was challenged on cross-examination, he recounted the number of false identifications with which he was familiar.

**Fingerprint identification: Overstatement --- testimony of a match --- *United States v. Pena*, 586 F.3d 105 (1<sup>st</sup> Cir. 2009)**

The digest describes the witness in this case, a fingerprint examiner from the Massachusetts Highway Patrol, as having overstated his opinion by testifying that his comparison revealed a match between the questioned mark and the defendant's left thumb.

But there is no indication in the opinion that the witness used the term “match” during his testimony. The exact terminology used by the witness is not described. Because the term “match” is not a recognized conclusion in the latent print discipline, it is likely that different language was used by the examiner, not recounted in the opinion.

**Fingerprint identification: Overstatement --- testimony of a match ---*United States v. John*, 597 F.3d 263 (5<sup>th</sup> Cir. 2010)**

The fingerprint examiner in this case allegedly overstated his or her conclusion by testifying to a “match.”

But when the term ‘match’ is used in this opinion, it appears to be the court’s characterization of the witness’ testimony – rather than what the witness said. In fact, the court recounts the witness’ description of the “identification methodology” that he used.

**Fingerprint testimony: Overstatement --- testimony that the methodology was error-free: *United States v. Watkins*, 450 Fed. Appx. 511 (6<sup>th</sup> Cir. 2011)**

In this case, a fingerprint examiner from an unidentified agency claimed that “the methodology was error free.” The witness apparently testified that the ACE-V method, when “used properly by a competent examiner,” had a zero error rate. The witness did not claim that any use of this methodology by latent print examiners was error free. Nevertheless, claims such as this are not permitted by the Department’s ULTRs.

**Fingerprint identification: Overstatement, testimony of a match and an infinitesimal error rate: *United States v. Herrera*, 704 F.3d 480 (7<sup>th</sup> Cir. 2013)**

The court in this case stated (pp. 486-87) that “errors in fingerprint matching by expert examiners appear to be very rare.” There is no evidence that the witness made such a statement.

**Fingerprint identification: Overstatement, testimony of a match: *United States v. Scott*, 403 Fed. Appx. 392 (11<sup>th</sup> Cir. 2010)**

The witness in this case is described as overstating her opinion by testifying to a “match.” The opinion states that the witness “had matched five of those latent prints to Scott’s known fingerprints.” The word “match,” however, appears to be the court’s characterization of what the witness said, rather than direct quotation from the witness’ testimony. There is no indication that the witness used the term “match, however, and as previously noted, “match” is not a conclusion used in the latent print community.

**Footwear-impression testimony allowed --- Overstatement, zero error rate: *United States v. Mahone*, 453 F.3d 68 (1<sup>st</sup> Cir. 2006)**

In this case from the Maine State Police Crime Laboratory, the witness overstated her testimony when she offered “a potential rate of error of zero for the method, stating that any error is attributable to the examiners.”

This case is dated (more than twelve years old), and claims such as this (error free methodology) are not permitted by Department policy.

**Footwear-impression testimony --- Overstatement---testimony of a match: *United States v. Smith*, 697 F.3d 625 (7th Cir. 2012)**

The digest describes the witness in this case as overstating his conclusion by testifying to a footwear impression “match.” The opinion states:

“FBI Examiner Smith then testified that based on his examination, the left Nike shoe worn by defendant Smith 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.” (pp. 633-34)

The witness here did not testify to a match. Rather, he testified to *correspondence* and *consistency* between the questioned and known patterns.

**District Court Cases**

**Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Cerna*, 2010 WL 3448528 (N.D. Cal.)**

The digest states that the witness in this case, a firearms and toolmarks examiner from the San Francisco Police Crime Laboratory, overstated his opinion by testifying (or proposing to testify) to a “reasonable degree of ballistics certainty.” The relevant passage from the opinion states:

“Instead, 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’ — will be used in this case.” (p. 15).

Accordingly, it was the court (not the witness) that ordered the witness to use the offending phrase, one that is not permitted under current Departmental policy, unless ordered by a court.

**Ballistics – NAS Report – Overstatement – testimony of a match: *Jackson v. Vannoy*, 2018 U.S. Dist. LEXIS 46297 (E.D. La.)**

This case referenced is likely *Jackson v. Vannoy*, 2018 U.S. Dist. LEXIS 47331 (E.D. La.), a §2254 claim of ineffective assistance of trial counsel.

There was no testimony of a match offered by the firearms and toolmarks examiner who testified in the underlying criminal case. The examiner from the New Orleans Police Department Crime Lab concluded that the casings and bullets were each fired from the same weapon – a justifiable (but not statistically derived or verified) statement of source identification (an inductive inference).

**Ballistics: Overstatement---testimony of a match: *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.)**

The digest describes the witness in this case as having provided testimony of a “match.” But the court is not actually quoting the examiner, but instead describing firearms and toolmarks examinations in general: “matching shell casings to a weapon that fired them is a recognized method of ballistics testing,” (pp. 26-27), and “Pugh contends that there is no reliable statistical or

scientific methodology which would permit an expert to testify that a match is certain or scientifically certain.” (p. 25).

**Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Ashburn***, 88 F. Supp. 3d 239 (E.D.N.Y. 2015)

In this case, the court required the witness to use the offending term, “a reasonable degree of ballistics certainty.” It was not the choice of the testifying witness.

**Ballistics --- Overstatement --- 100% Certainty: *United States v. Casey***, 928 F. Supp. 2d 397 (D.P.R. 2013)

It is unclear from the underlying facts in this case whether the firearms/toolmarks witness in this case overstated his testimony by claiming 100% certainty in his conclusion. In any event, such testimony is not permitted under current Department guidelines.

**Ballistics: Overstatement --- testimony of a match: *United States v. Wrensford***, 2014 WL 3715036 (D.V.I.)

This case address the testimony of a firearms/toolmarks examiner with the Virgin Islands Police Department, described in the digest as having overstated his conclusion by testifying to a “match.” The witness, however, did not use the word “match.” Rather, the witness testified that “the three conclusions a firearms examiner may reach are: identification, inconclusive, and elimination.” (p. 11).

**Fingerprints: Overstatement --- testimony of a match --- *United States v. Love***, 2011 WL 2173644 (S.D. Cal.)

In this case an FBI fingerprint examiner is said to have overstated her conclusion by testifying to a “match.” That term, however, was used by the court, not the witness. The court had borrowed the term “match” from a 2004 Third Circuit Court of Appeals case, *U.S. v. Mitchell*.

**Fingerprints: Overstatement --- testimony of a match --- *United States v. Campbell***, 2012 WL 2373037 (N.D. Ga.)

In this case, the court – not the witness used the word “match” to describe the witness’ conclusion.

**Fingerprints – Overstatement --- Testimony of a Match; PCAST and NAS Reports: *United States v. Kimble***, 2018 U.S. Dist. LEXIS 138988 (S.D. Ga.)

In this case, a fingerprint examiner is described as having overstated his or her conclusion by “testimony of a match.” It appears, however, the court used this term. The word match appears in the opinion in the following passage:

“After nabbing Robert Kimble on suspicion of bank robbery, police investigators determined that a latent fingerprint lifted from the getaway vehicle matched Kimble's right middle fingerprint.” (p. 3).

It is unknown from the opinion what words the witness actually used.

**Fingerprints --- after PCAST --- Overstatement --- testimony to a match: *United States v. Bonds*, 2017 WL 4511061 (N.D. Ill.)**

This case, involving an FBI fingerprint examiner, is described as the witness testifying to a match. The only reference to a match, however, was as follows:

“She [the examiner] is expected to testify that four latent prints recovered from the Joliet demand note and two latent prints recovered from the Carpentersville demand note match the known print standard for Bonds.”

This appears to be the court’s paraphrased characterization of what it believes the witness would say, rather than a description of her actual testimony. In any event, the focus of the court’s opinion was on a motion to prevent any fingerprint testimony based on it being an allegedly unreliable discipline.

**Fingerprints—Overstatement --- testimony to a match: *United States v. Rose*, 672 F. Supp. 2d 723 (D. Md. 2009)**

The word “match” does not appear in this opinion. Rather, there is a source identification made from two latent prints recovered from one car, and another latent print recovered from another car. The words used by the examiner matter, and here there is no evidence that the examiner testified to a “match.”

**Fingerprints: Overstatement --- testimony to a match --- *United States v. Stone*, 848 F. Supp. 2d 714 (E.D. Mich. 2012)**

This case does not involve specific testimony, and the word “match” does not appear in the decision. Rather, the defense in this case brought a motion in limine to challenge the admissibility of fingerprint identification in general as unreliable under *Daubert*. In the decision, the court described in the factual background that the prints “belonged to” the defendants. But the motion was filed prior to the testimony and the challenge was to the fingerprint discipline overall.

**Fingerprints: Overstatement --- error rate of 30 out of a zillion --- *United States v. Gutierrez-Castro*, 805 F. Supp. 2d 1218 (D.N.M. 2011)**

This case pertains to testimony from a fingerprint examiner with the Southwest Regional Science Center in Texas, who is said to have overstated his testimony when he claimed a latent print discipline “error rate of 30 out of a zillion.” The witness’ actual testimony was different:

“McNutt testified that error rates for fingerprint analysis exist, but it is hard to determine an error rate; he testified, however, that the general consensus is that the error rate is very low. See Aug. 11, 2011 Tr. at 149:19-150:1 (Sapien, McNutt). He stated that there have been approximately thirty documented misidentifications in the last thirty or forty years out of millions of fingerprints. See Aug. 11, 2011 Tr. at 150:3-10 (McNutt).”

This witness here was not offering an error rate for latent print examinations; to the contrary, he said an error rate was “hard to determine.” The latest fingerprint study to date confirms the

witness' testimony that the general error rate for latent print comparison is very low. In May 2011, a large-scale ('black box') study testing friction ridge examiners' accuracy was published. In the study, 169 latent print examiners were each presented with approximately 100 pairs of prints. When examiners reached an identification decision in the study, they were correct 99.8% of the time. When examiners reached an exclusion decision for prints determined to be of value for identification, they were correct 88.9% of the time. These results demonstrate that trained examiners can produce largely accurate and reliable source identification conclusions.

**Footprint identification --- Overstatement --- testimony to a match: *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.)**

This case is described as a shoeprint pattern examiner overstating testimony by testifying to a match. But the opinion says nothing about testifying to a match:

“Footprint analysis is not a new concept and expert testimony on footwear comparisons has been admitted in courts in the United States. Reid 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 Court found that 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. The Court finds no reason to grant a new trial based on the *Daubert* challenge to Reid's testimony.”

**Handwriting: Overstatement --- testimony to a match --- *United States v. Yass*, 2008 WL 5377827 (D. Kan.)**

In this case, a handwriting expert is said to have overstated her testimony by testifying to a “match.” But the opinion does not say how the witness testified. The following came from the defendants' motion in limine:

“Blechman moves to exclude from evidence the anticipated testimony of Debra Campbell, the government's forensic document examiner, identifying certain handwriting as having been made by him.”

**Handwriting: Overstatement --- testimony of no match --- *Boomj.com v. Pursglove*, 2011 WL 2174966 (D. Nev.)**

The word match does not appear in this decision. Here is what the witness said: “After examining the above documents I have reached the professional opinion the signature on the ... Executive Agreement, was not signed by ... George Pursglove. Using the principles of questioned document examination the evidence is strong and compelling as to this determination as there are 6 major dissimilarities between the questioned signature and the known samples.”

**Handwriting: Overstatement – testimony to a match --- *United States v. Brooks*, 2010 WL 291769 (E.D.N.Y.)**

This case appears to have been included by mistake. It does not involve expert witness testimony, but rather addresses a habeas petition based on conditions of confinement.

**Paint Identification: Overstatement --- testimony to a match --- *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.)**

This case involves an expert who had worked at the FBI chemistry unit for over 10 years, and who is said to have overstated his opinion by testifying to a match. But the only time the term ‘match’ is used in reference to the court’s description of witness’ anticipated testimony:

“All of Bradley's proposed testimony relates to the facts at issue in the case regarding the matching of paint chips found in an area off LaRue Road and connecting those paint chips to the SUV containing McCoy's body. The Court finds that Bradley qualifies to render expert testimony in the area of forensic chemistry.”

**Ballistics – generally accepted, testimony to a reasonable degree of certainty: *United States v. Hylton*, 2018 WL 5795799 (D. Nev. Nov. 5, 2018):**

This case involves a firearms expert from the Las Vegas Metropolitan Police Department who testified to a “reasonable degree of certainty phrase.” This testimony would not be permitted under current Departmental policy, unless ordered by a court.