

**ADVISORY COMMITTEE  
ON  
RULES OF EVIDENCE**

**Nashville, TN  
October 25, 2019**

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# ADVISORY COMMITTEE ON EVIDENCE RULES

## AGENDA FOR COMMITTEE MEETING

Nashville, Tennessee

October 25, 2019

### I. Miniconference on Best Practices in Managing *Daubert* Questions

The Committee has invited six experienced federal judges and a distinguished Evidence professor to share ideas about “Best Practices” in managing *Daubert* questions and in conducting *Daubert* hearings. This discussion will take place before the formal Committee meeting. A transcript of the discussion will be reproduced in the Fordham Law Review and will be sent to every federal judge --- in furtherance of the Committee’s objective to provide education on the proper management of expert testimony as an addition to (or an alternative to) an amendment to Rule 702. A background memo regarding the roundtable discussion, with bios for the participants, is included behind Tab 1.

### II. Committee Meeting --- Opening Business

Opening business includes:

- Approval of the minutes of the Spring, 2019 meeting.
- Report on the June, 2019 meeting of the Standing Committee.

### III. Rule 702

The Committee has been considering two possible changes to Rule 702: 1) an amendment regulating overstatement of expert conclusions (directed toward, but not only toward, forensic experts); and 2) an amendment (or Committee Note) that the admissibility requirements set forth in the rule --- most especially sufficiency of basis and reliability of application --- are matters that must be decided by the court a preponderance of the evidence under Rule 104(a). The Reporter’s memorandum on these possible changes is behind Tab 3.

Immediately behind the Reporter’s memo are two attachments:

1. A case digest prepared by the Reporter on forensic expert testimony; and
2. A proposed amendment to Criminal Rule 16 and a Committee Note, which is being considered by the Criminal Rules Committee.

#### **IV. Rule 106**

The Committee has been considering a proposal to amend Rule 106, the rule of completeness, for two purposes: 1. to specify that completing evidence is not barred by the hearsay rule; and 2. to extend its coverage to oral statements. The Reporter's memorandum on the subject is behind Tab 4.

Immediately behind the Reporter's memo is a report prepared by Professor Richter on case law in the states that allow completion with unrecorded oral statements.

#### **V. Rule 615**

The Committee is considering whether the Rule should be amended to provide that a Rule 615 order extends to prohibiting excluded witnesses from obtaining or from being provided trial testimony while they are excluded from the courtroom. The Reporter's memorandum on Rule 615 is behind Tab 5.

#### **VI. *Crawford* Outline**

The Reporter's updated outline on cases applying the Supreme Court's Confrontation Clause jurisprudence is behind Tab 6.

## RULES COMMITTEES — CHAIRS AND REPORTERS

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## Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End Date
			Member: 2013	----
Debra Ann Livingston	C	Second Circuit	Chair: 2017	2020
James P. Bassett	JUST	New Hampshire	2016	2022
Shelly D. Dick	D	Louisiana (Middle)	2017	2020
Traci L. Lovitt	ESQ	Massachusetts	2016	2022
John Thomas Marten	D	Kansas	2014	2020
Kathryn Nester	FPD	California (Southern)	2018	2021
Edward O'Callaghan*	DOJ	Washington, DC	----	Open
Thomas D. Schroeder	D	North Carolina (Middle)	2017	2020
Daniel J. Capra Reporter	ACAD	New York	1996	Open
Principal Staff: <a href="#">Rebecca Womeldorf</a> 202-502-1820				

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**Effective December 1, 2018**

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
AP 8, 11, 39	Conformed the Appellate Rules to an amendment to Civil Rule 62(b) that eliminated the term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	Technical, conforming changes.	AP 25
AP 28.1, 31	Amendments respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	An exception added to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	Deleted the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	Technical, conforming change.	AP 25
BK 3002.1	Amendments (1) created flexibility regarding a notice of payment change for home equity lines of credit; (2) created a procedure for objecting to a notice of payment change; and (3) expanded the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	Technical, conforming change to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	Amendments to conform with amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”	CV 62, 65.1
BK 8002(a)(5)	Adds a provision to Rule 8002(a) similar to one in FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	Conforms Rule 8002(b) to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4

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<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	Amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing).	FRAP 4, 25
BK 8006	Adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	Amendments to conform with the 2016 length limit amendments to FRAP 5, 21, 27, 35, and 40 (generally converting page limits to word limits).	FRAP 5, 21, 27, 35, and 40
BK 8017	Amendments to conform with the 2016 amendment to FRAP 29 that provided guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorized the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	Authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	Reissued Director's Forms 4011A and 4011B as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). (Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session.)	
CV 5	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

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<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
CV 23	Amendments (1) require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; (2) clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); (3) clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; (4) updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and (6) incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Amendments (1) extended the period of the automatic stay to 30 days; (2) clarified that a party may obtain a stay by posting a bond or other security; (3) eliminated reference to “supersedeas bond”; and (4) rearranged subsections.	AP 8, 11, 39
CV 65.1	Amendments made to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	Amendments to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements – provides that disclosures must be made within 28 days after the defendant’s initial appearance; revised the rule to refer to “later” rather than “supplemental” filings; and revised the text for clarity and to parallel Civil Rule 7.1(b)(2).	

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REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

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Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2019)

REA History: transmitted to Supreme Court (Oct 2018); approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by the relevant advisory committee (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Published in 2016-17. Eliminates unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Unpublished. Technical amendments to remove the term "proof of service."	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsection (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Proposed subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	

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Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2019)

REA History: transmitted to Supreme Court (Oct 2018); approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by the relevant advisory committee (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised August 2019

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

Current Step in REA Process: approved by the Standing Committee (June 2019)

REA History: approved by the relevant advisory committee (Spring 2019); published for public comment (unless otherwise noted, Aug 2018-Feb 2019); approved by Standing Committee for publication (unless otherwise noted, June 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference 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 2005	Unpublished. Replaces updates references to the Criminal Code that have been repealed.	
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted 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 August 2019

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Current Step in REA Process: published for public comment (Aug 2019-Feb 2020)

REA History: unless otherwise noted, approved for publication (June 2019)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	The proposed amendments to Rule 3 address the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendments change the structure of the rule and provide greater clarity, expressly rejecting the <i>expressio unius</i> approach, and adding a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendments to the proposed amendments to Rule 3.	AP 3, Forms 1 and 2
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. The proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word “may” to “must” in new Rule 42(b)(1) for stipulated dismissals. The phrase “no mandate or other process may issue without a court order” is replaced in new (b)(3) with “[a] court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.” A new subsection (C) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	
AP Forms 1 and 2	Conforming amendments to the proposed amendments to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b), (which was repealed in 1984) with a reference to 18 U.S.C. § 3142 .	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012, and Appellate Rule 26.1.	CV 7.1
BK 9036	The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Revised August 2019

**Effective (no earlier than) December 1, 2021**

Current Step in REA Process: published for public comment (Aug 2019-Feb 2020)

REA History: unless otherwise noted, approved for publication (June 2019)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
CV 7.1	Proposed amendment would: (1) conform Civil Rule 7.1 with pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012; and (2) require disclosure of the name and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.	AP 26.1, BK 8012

Revised August 2019

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

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 35 and 40 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-3
2. a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and  
b. Approve effective December 1, 2019, Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 6-10
3. Approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 13-15
4. Approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 20-21

The remainder of this report is submitted for the record and includes the following for the information of the Judicial Conference:

§	Federal Rules of Appellate Procedure .....	pp. 3-6
§	Federal Rules of Bankruptcy Procedure .....	pp. 10-13
§	Federal Rules of Civil Procedure.....	pp. 15-18
§	Federal Rules of Criminal Procedure.....	pp. 18-20
§	Federal Rules of Evidence .....	pp. 21-24
§	Other Items .....	pp. 24-25

<b>NOTICE</b> <b>NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE</b> <b>UNLESS APPROVED BY THE CONFERENCE ITSELF.</b>
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**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 June 25, 2019. All members participated.

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, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; and Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

<p><b>NOTICE</b> NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

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 discussed four information items.

## **FEDERAL RULES OF APPELLATE PROCEDURE**

### ***Rules Recommended for Approval and Transmission***

The Advisory Committee submitted proposed amendments to Rules 35 and 40. The amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) would create length limits for responses to petitions for rehearing. The existing rules limit the length of petitions for rehearing, but do not restrict the length of responses to those petitions. The proposed amendments would also change the term “answer” in Rule 40(a)(3) to the term “response,” making it consistent with Rule 35.

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that “it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology.” The Advisory Committee sought final approval for the proposed amendments as published.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure

and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee's report.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 35 and 40 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

### *Rules and Forms Approved for Publication and Comment*

The Advisory Committee submitted proposed amendments to Rules 3, 6, and 42, and Forms 1 and 2, with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 3 (Appeal as of Right – How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendments address the effect on the scope of an appeal of designating a specific interlocutory order in a notice of appeal. The initial suggestion pointed to a line of cases in one circuit applying 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 rather than treating a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment. Research conducted after receiving the suggestion revealed that the problem is not confined to a single circuit, but that there is substantial confusion both across and within circuits.

Rule 3(c)(1)(B) currently requires that a notice of appeal “designate the judgment, order, or part thereof being appealed.” The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated. However, some interpret this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal – the one

serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated – and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal.

The Advisory Committee considered various ways to make this point clearer. It settled on four interrelated changes to Rule 3(c)(1)(B). First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the term “judgment” and the term “order” are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court’s appellate jurisdiction, the word “appealable” is added before the word “order.” Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court’s appellate jurisdiction, the phrase “from which the appeal is taken” replaces the phrase “being appealed.” Finally, the phrase “part thereof” is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result would require the appellant to designate the judgment – or the appealable order – from which the appeal is taken. Additional new subsections of Rule 3(c) would call attention to the merger principle.

The proposed amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court). Having different suggested forms for appeals from final judgments and appeals from other orders clarifies what should be designated in a notice of appeal. In addition, the Advisory Committee recommended conforming amendments to Rule 6 to change the reference to “Form 1” to “Forms 1A and 1B,” and to Form 2 to reflect the deletion of “part thereof” from Rule 3(c)(1)(B).

## Rule 42 (Voluntary Dismissal)

Current Rule 42(b) 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 are due.” Prior to the 1998 restyling of the rules, Rule 42(b) used the word “shall” instead of “may” dismiss. Although the 1998 amendment to Rule 42 was intended to be stylistic only, some courts have concluded that there is now discretion to decline to dismiss. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word “may” to “must” in new Rule 42(b)(1) for stipulated dismissals.

In addition, current Rule 42(b) provides that “no mandate or other process may issue without a court order.” This language has created some difficulty for circuit clerks who have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court.

The issues with the language “no mandate or other process may issue without a court order” are avoided – and the purpose of that language served – by deleting it and instead stating directly in new subsection (b)(3): “A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.” A new subsection (c) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

### ***Information Items***

The Advisory Committee on Appellate Rules met on April 5, 2019. Discussion items included undertaking a comprehensive review of Rules 35 and 40, as well as a suggestion to

limit remote access to electronic files in actions for benefits under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v.

Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

As detailed above, the proposed amendments to Rules 35 and 40 published for public comment in August 2018 create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider discrepancies between Rules 35 and 40. The discrepancies 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 determined not to make the rules more parallel but continues to consider possible ways to clarify practice under the two rules.

Privacy in Railroad Retirement Act Benefit Cases

The Advisory Committee was forwarded a suggestion directed to the Advisory Committee on Civil Rules. The suggestion requested that Civil Rule 5.2(c), the rule that limits remote access to electronic files in certain types of cases, be amended to include actions for benefits under the Railroad Retirement Act because of the similarities between actions under the Act and the types of cases included in Civil Rule 5.2(c). But review of Railroad Retirement Act decisions lies in the courts of appeals. For this reason, the Advisory Committee on Appellate Rules will take the lead in considering the suggestion.

**FEDERAL RULES OF BANKRUPTCY PROCEDURE**

***Rules and Official Forms Recommended for Approval and Transmission***

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 2004, 8012, 8013, 8015, and 8021, and Official Form 122A-1, with a recommendation that they be approved and transmitted to the Judicial Conference. Three of the

rules were published for comment in August 2018 and are recommended for final approval after consideration of the comments. The proposed amendments to the remaining three rules and the official form are technical or conforming in nature and are recommended for final approval without publication.

Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee)

The published amendment to Rule 2002: (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Six comments were submitted. Four of the comments included brief statements of support for the amendment. Another comment suggested extending the clerk's noticing duties 30 days beyond the creditor proof of claim deadline because a case trustee or the debtor can still file a claim on behalf of a creditor for 30 days after the deadline. Because the creditor would receive notice of the claim filed on its behalf, the Advisory Committee saw no need for further amendment to the rule. The comment also argued that certain notices should be sent to creditors irrespective of whether they file a proof of claim, but the Advisory Committee disagreed with carving out certain notices. Another comment opposed the change that would require notice of entry of the confirmation order because some courts already have a local practice of sending the confirmation order itself to creditors. The Advisory Committee rejected this suggestion because not all courts send out confirmation orders.

After considering the comments, the Advisory Committee voted unanimously to approve the amendment to Rule 2002 as published.

### Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c), the attendance of a witness and the production of documents may be compelled by means of a subpoena. The proposed amendment would add explicit authorization to compel production of electronically stored information (ESI). The proposed amendment further provides that a subpoena for a Rule 2004 examination is properly issued from the court where the bankruptcy case is pending by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Three comments were submitted. Two of the comments were generally supportive of the proposed amendments as published, while one comment from the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan urged that the rule should state that the bankruptcy judge has discretion to consider proportionality in ruling on a request for production of documents and ESI. Prior to publishing proposed Rule 2004, the Advisory Committee carefully considered whether to reference proportionality explicitly in the rule and declined to do so, in part because debtor examinations under Rule 2004 are intended to be broad-ranging. It instead proposed an amendment that would refer specifically to ESI and would harmonize Rule 2004(c)'s subpoena provisions with the subpoena provisions of Civil Rule 45. After consideration of the comments, the Advisory Committee unanimously approved the amendment to Rule 2004(c) as published.

### Rule 8012 (Corporate Disclosure Statement)

Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a

statement that there is no such corporation). It is modeled on Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019).

At its spring 2018 meeting, the Advisory Committee considered and approved for publication an amendment to Rule 8012 to track the pending amendment to Appellate Rule 26.1 that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019. The amendment to Rule 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors. New Rule 8012(b) requires disclosure of debtors' names and requires disclosures by nongovernmental corporate debtors. Three comments were submitted, all of which were supportive. The amendment was approved as published.

Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs)

An amendment to Appellate Rule 25(d) that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019, will eliminate the requirement of proof of service for documents served through the court's electronic-filing system. Corresponding amendments to Appellate Rules 5, 21, 26, 32, and 39 will reflect this change by either eliminating or qualifying references to "proof of service" so as not to suggest that such a document is always required. Because the provisions in Part VIII of the Bankruptcy Rules in large part track the language of their Appellate Rules counterparts, the Advisory Committee recommended conforming technical changes to Bankruptcy Rules 8013(a)(1), 8015(g), and 8021(d). The recommendation was approved.

Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income)

The Advisory Committee received a suggestion from an attorney who assists pro se debtors in the Bankruptcy Court of the Central District of California. He noted that Official Form 122A-1 contains an instruction at the end of the form, after the debtor's signature line, explaining that the debtor should *not* complete and file a second form (Official Form 122A-2) if

the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. He suggested that the instruction not to file also be added at the end of line 14a of Form 122A-1, where the debtor's current monthly income is calculated. The Advisory Committee agreed that repeating the instruction as suggested would add clarity to the form and recommended the change. The Standing Committee approved the change.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revision of Official Bankruptcy Form 122A-1 and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

**Recommendation:** That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
- b. Approve effective December 1, 2019, Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

***Rules Approved for Publication and Comment***

The Advisory Committee submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036 with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

**Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)**

Judge Brian Fenimore of the Western District of Missouri noted that Rule 2005(c) – a provision that deals with conditions to assure attendance or appearance – refers to now-repealed provisions of the Criminal Code. The Advisory Committee agreed that the current reference to 18 U.S.C. § 3146 is no longer accurate and recommended replacing it with a reference to 18 U.S.C. § 3142, where the topic of conditions is now located. Because 18 U.S.C. § 3142 also

addresses matters beyond conditions to assure attendance or appearance, the proposed rule amendment will state that only “relevant” provisions and policies of the statute should be considered.

#### Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007 clarifies that only an insurance depository institution as defined by section 3 of the Federal Deposit Insurance Act (FDIA) is entitled to heightened service of a claim objection, and that an objection to a claim filed by a credit union may be served on the person designated on the proof of claim.

Rule 3007 provides, in general, that a claim objection is not required to be served in the manner provided by Rule 7004, but instead can be served by mailing it to the person designated on a creditor’s proof of claim. The rule includes exceptions to this general procedure, one of which is that “if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h).” The purpose of this exception is to comply with a legislative mandate in the Bankruptcy Reform Act of 1994, set forth in Rule 7004(h), providing that an “insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)” is entitled to a heightened level of service in adversary proceedings and contested matters.

The current language in Rule 3007(a)(2)(A)(ii) is arguably too broad in that it does not qualify the term “insured depository institution” as being defined by the FDIA. Because the more expansive Bankruptcy Code definition of “insured depository institution” set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under the rule. The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in

Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

#### Rule 7007.1 (Corporate Ownership Statement)

Continuing the advisory committees' efforts to conform the various disclosure statement rules to the pending amendment to Appellate Rule 26.1, the Advisory Committee proposed for publication conforming amendments to Rule 7007.1.

#### Rule 9036 (Notice by Electronic Transmission)

The proposed amendment would implement a suggestion from the Committee on Court Administration and Case Management requiring high-volume-paper-notice recipients to sign up for electronic service, subject to exceptions required by statute.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. However, only courts may serve or give notice to an entity at an electronic address registered with the Bankruptcy Noticing Center as part of the Electronic Bankruptcy Noticing program.

Finally, the title of Rule 9036 will change to "Notice and Service by Electronic Transmission" to better reflect its applicability to both electronic noticing and service. The rule does not preclude noticing and service by other means authorized by the court or rules.

### ***Information Items***

The Advisory Committee met on April 4, 2019. The agenda for that meeting included a report on the work of the Restyling Subcommittee on the process of restyling the Bankruptcy Rules. The Advisory Committee anticipates this project will take several years to complete.

The Advisory Committee also reviewed a proposed draft Director’s Bankruptcy Form for an application for withdrawal of unclaimed funds in closed bankruptcy cases, along with proposed instructions and proposed orders. The initial draft was the product of the Unclaimed Funds Task Force of the Committee on the Administration of the Bankruptcy System. The Advisory Committee supported the idea of a nationally available form to aid in processing unclaimed funds, made minor modifications, and recommended that the Director adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of [uscourts.gov](http://uscourts.gov) and will be relocated to the list of Official and Director’s Bankruptcy Forms on December 1, 2019.

## **FEDERAL RULES OF CIVIL PROCEDURE**

### ***Rule Recommended for Approval and Transmission***

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 30(b)(6), with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, appears regularly on the Advisory Committee’s agenda. Counsel for both plaintiffs and defendants complain about problematic practices of opposing counsel under the current rule, but judges report that they are rarely asked to intervene in these disputes. In the past, the Advisory Committee studied the issue extensively but identified no rule amendment that would effectively address the identified problems. The Advisory Committee added the issue to its agenda once again in 2016 and has concluded, through the exhaustive efforts of its Rule 30(b)(6) Subcommittee, that discrete rule changes could address certain of the problems identified by practitioners.

In assessing the utility of rule amendments, the subcommittee began its work by drafting more than a dozen possible amendments and then narrowing down that list. In the summer of 2017, the subcommittee invited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;
2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;
3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;
4. Forbidding contention questions in Rule 30(b)(6) depositions;
5. Adding a provision to Rule 30(b)(6) for objections; and
6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

More than 100 comments were received. The focus eventually narrowed to imposing a duty on the parties to confer. The Advisory Committee agreed that such a requirement was the most promising way to improve practice under the rule.

The proposed amendment that was published for public comment required that the parties confer about the number and description of matters for examination and the identity of each witness the organization will designate to testify. As published, the duty to confer requirement was meant to be iterative and included language that the conferral must "continu[e] as necessary."

During the comment period, the Advisory Committee received approximately 1,780 written comments and heard testimony from 80 witnesses at two public hearings. There was

strong opposition to the proposed requirement that the parties confer about the identity of each witness, as well as to the directive that the parties confer about the “number and description of” the matters for examination. However, many commenters supported a requirement that the parties confer about the matters for examination.

After carefully reviewing the comments and testimony, as well as the subcommittee’s report, the Advisory Committee modified the proposed amendment by: (1) deleting the requirement to confer about the identity of the witness; (2) deleting the “continuing as necessary” language; (3) deleting the “number and description of” language; and (4) adding to the committee note a paragraph explaining that the duty to confer does not apply to a deposition under Rule 31(a)(4) (Questions Directed to an Organization). The proposed amendment approved by the Advisory Committee therefore retains a requirement that the parties confer about the matters for examination. The duty adds to the rule what is considered a best practice – conferring about the matters for examination will certainly improve the focus of the examination and preparation of the witness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix C, with an excerpt from the Advisory Committee’s report.

**Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

#### ***Rule Approved for Publication and Comment***

The Advisory Committee submitted a proposed amendment to Rule 7.1, the rule that addresses disclosure statements, with a request that it be published for comment in August 2019. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

The proposed amendment to Rule 7.1 would do two things. First, it would require a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to proposed amendments to Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019) and Bankruptcy Rule 8012 (to be considered by the Conference at its September 2019 session). Second, the proposal would amend the rule to require a party in a diversity case to disclose the citizenship of every individual or entity whose citizenship is attributed to that party.

The latter change aims to facilitate the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of an individual or entity attributed to a party. For example, a limited liability company takes on the citizenship of each of its owners. If one of the owners is a limited liability company, the citizenships of all the owners of that limited liability company pass through to the limited liability company that is a party in the action. Requiring disclosure of “every individual or entity whose citizenship is attributed” to a party will ensure early determination that jurisdiction is proper.

### ***Information Items***

The Advisory Committee met on April 2-3, 2019. Among the topics for discussion was the work of two subcommittees tasked with long-term projects, and the creation of a joint Appellate-Civil subcommittee.

#### **Multidistrict Litigation Subcommittee**

As previously reported, since November 2017, this subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Since its inception, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC.

Subcommittee members have also participated in several conferences hosted by different constituencies, including MDL transferee judges.

At the Advisory Committee's April 2019 meeting, there was extensive discussion of the various issues on which the subcommittee has determined to focus its work. The Advisory Committee agreed with the subcommittee's inclination to focus primarily on four issues: (1) use of plaintiff fact sheets and defendant fact sheets to organize large personal injury MDL proceedings and to "jump start" discovery; (2) providing an additional avenue for interlocutory appellate review of some district court orders in MDL proceedings; (3) addressing the court's role in relation to global settlement of multiple claims; and (4) third-party litigation funding. It is still too early to know whether this work will result in any recommendation for amendments to the Civil Rules.

#### Social Security Disability Review Subcommittee

The Social Security Disability Review Subcommittee continues its work considering a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference develop uniform procedural rules for cases 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).

The subcommittee developed a preliminary draft rule for discussion purposes, including for discussion at the Advisory Committee's April 2019 meeting. On June 20, 2019, the subcommittee convened a meeting to obtain feedback on its draft rule. Invited participants included claimants' representatives, a magistrate judge, as well as representatives of ACUS, the Social Security Administration, and the DOJ. One of the authors of the study that forms the basis of the ACUS suggestion also attended. Each participant provided his or her perspective on the draft rule, followed by a roundtable discussion.

The subcommittee will continue to gather feedback on the draft rule, including from magistrate judges. The subcommittee hopes to come to a decision as to whether pursuit of a rule is advisable in time for the Advisory Committee’s October 2019 meeting.

#### Subcommittee on Final Judgment in Consolidated Cases

The Civil and Appellate Rules Advisory Committees have formed a joint subcommittee to consider whether either rule set should be amended to address the effect on the “final judgment rule” of consolidating initially separate cases.

The impetus for this project is *Hall v. Hall*, 138 S. Ct. 1118 (2018). In *Hall*, the petitioner argued that two individual cases consolidated under Civil Rule 42(a) should be regarded as one case, with the result that one case would not be considered “final” until all of the consolidated cases are resolved. *Id.* at 1124. The Court disagreed, holding that individual cases consolidated under Civil Rule 42(a) for some or all purposes at the trial level retain their separate identities for purposes of final judgment appeals. *Id.* at 1131. The Court concluded by suggesting that if “our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly.” *Id.*

Given the invitation from the Court, the subcommittee was formed to gather information as to whether any “practical problems” have arisen post-*Hall*. If so, the subcommittee will determine the value of any rules amendments to address those problems.

### **FEDERAL RULES OF CRIMINAL PROCEDURE**

The Advisory Committee on Criminal Rules presented no action items.

#### ***Information Item***

The Advisory Committee met on May 7, 2019. The bulk of the meeting focused on work of the Rule 16 Subcommittee, formed to consider suggestions from two district judges that

pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the robust expert disclosure requirements in Civil Rule 26. The Advisory Committee charged the subcommittee with studying the issue, including the threshold desirability of an amendment, as well as the features any recommended amendment should contain.

Early on, the subcommittee determined that it would be useful to hold a mini-conference to explore the contours of the issue with all stakeholders. At its October 2018 meeting (in anticipation of the mini-conference), the Advisory Committee heard a presentation by the DOJ on its development and implementation of policies governing disclosure of forensic and non-forensic evidence.

Participants in the May 6, 2019 mini-conference included defense attorneys, as well as prosecutors and representatives from the DOJ, each of whom has extensive personal experience with pretrial disclosures and the use of experts in criminal cases. The discussion proceeded in two parts. First, participants were asked to identify any concerns or problems with the current rule. Second, they were asked to provide suggestions on how to improve the rule.

The defense attorneys identified two problems with Rule 16 in its current form: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors. Defense practitioners reported they sometimes receive summaries of expert testimony a week or the night before trial, which significantly impairs their ability to prepare for trial. They also reported that they often do not receive sufficiently detailed disclosures to allow them to prepare to cross examine the expert witness. In stark contrast, the DOJ representatives reported no problems with the current rule.

As to the subcommittee's second inquiry concerning ways to improve the rule, participants discussed possible solutions on the issues of timing and completeness of expert

discovery. Significant progress was made in identifying common ground; the discussion produced concrete suggestions for language that would address the timing and sufficiency issues identified by defense practitioners. The subcommittee plans to present its report and a proposed amendment to Rule 16 at the Advisory Committee's September 2019 meeting.

## **FEDERAL RULES OF EVIDENCE**

### ***Rule Recommended for Approval and Transmission***

The Advisory Committee submitted a proposed amendment to Rule 404, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 404(b) is the rule that governs the admissibility of evidence of other crimes, wrongs, or acts. Several courts of appeal have suggested that the rule needs to be more carefully applied and have set forth criteria for more careful application. In its ongoing review of the developing case law, the Advisory Committee determined that it would not propose substantive amendment of Rule 404(b) because any such amendment would make the rule more complex without rendering substantial improvement.

However, the Advisory Committee did recognize that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under the rule. The DOJ proffered language that would require the prosecutor to describe in the notice "the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted considering the prosecution's expanded notice obligations under the DOJ proposal, and that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the Advisory Committee determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “other crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to crimes, wrongs, and acts other than those charged.

The comments received were generally favorable. The Advisory Committee considered those comments, as well as discussion at the June 2018 Standing Committee meeting, and made minor changes to the proposed amendment, including changing the term “non-propensity purpose” to “permitted purpose.”

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee’s report.

**Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

### *Information Items*

The Advisory Committee met on May 3, 2019. The agenda included discussion of possible amendments to Rules 106, 615, and 702. The Advisory Committee also continues to monitor the development of the law following the decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

#### Possible Amendments to Rule 702 (Testimony by Expert Witnesses)

A subcommittee on Rule 702 has been considering questions that arise in the application of the rule, including treatment of forensic expert evidence. The subcommittee, after extensive discussion, made three recommendations with which the Advisory Committee agreed: (1) it would be difficult to draft a freestanding rule on forensic expert testimony because any such amendment would have an inevitable and problematic overlap with Rule 702; (2) it would not be advisable to set forth detailed requirements for forensic evidence either in text or committee note

because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and (3) it would not be advisable to publish a “best practices manual” for forensic evidence.

The subcommittee expressed interest in considering an amendment to Rule 702 that would focus on the important problem of overstating results in forensic and other expert testimony. One example: an expert stating an opinion as having a “zero error rate” where that conclusion is not supportable by the methodology. The Advisory Committee has heard extensively from the DOJ on its efforts to regulate the testimony of its forensic experts. The Advisory Committee continues to consider a possible amendment on overstatement of expert opinions.

In addition, the Advisory Committee is considering other ways to aid courts and litigants in meeting the challenges of forensic evidence, including assisting the FJC in judicial education. In this regard, the Advisory Committee is holding a mini-conference on October 25, 2019 at Vanderbilt Law School. The goal of the mini-conference is to determine “best practices” for managing *Daubert* issues. A transcript of the mini-conference will be published in the *Fordham Law Review*.

#### Possible Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements)

The Advisory Committee continues to consider 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 create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. A suggestion from a district judge noted two possible amendments: (1) to provide that a completing statement is admissible over a hearsay objection; and (2) to provide that the rule covers oral as well as written or recorded statements.

Several alternatives for an amendment to Rule 106 are under consideration. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

#### Possible Amendments to Rule 615 (Excluding Witnesses)

The Advisory Committee is considering problems raised in the case law and in practice regarding 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 if it can extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony. Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Advisory Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Advisory Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the scope of the order is desirable. The investigation of this problem is consistent with the Advisory Committee's ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given increasing witness access to information about testimony through news, social media, or daily transcripts.

At its May 2019 meeting, the Advisory Committee resolved that any amendment to Rule 615 should allow, but not mandate, orders that extend beyond the courtroom. One issue that the Advisory Committee must work through is how an amendment will treat preparation of excluded witnesses by trial counsel.

### **OTHER ITEMS**

The Standing Committee's agenda included four information items. First, the Committee discussed a suggestion from the Chair of the Advisory Committee on Appellate Rules that a study be conducted to determine whether the Appellate, Bankruptcy, Civil, and Criminal Rules should be amended to change the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone.

The Chair authorized the creation of a joint subcommittee comprised of representatives of the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules, and delegated to Judge Chagares the task of coordinating the subcommittee's work. The subcommittee plans to present its report to the Committee at its January 2020 meeting.

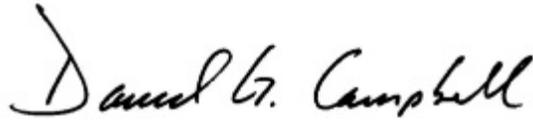
Second, the Committee was briefed on the status of legislation introduced in the 116<sup>th</sup> Congress that would directly or effectively amend a federal rule of procedure.

Third, based on feedback received at the Committee's January 2019 meeting, the Reporter to the Committee drafted revised proposed 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. The Committee discussed and approved those procedures.

Fourth, at the request of the Judiciary Planning Coordinator, Committee members discussed the extent to which the Committee's current strategic initiatives have achieved their desired outcomes and the proposed approach for the 2020 update to the *Strategic Plan for the*

*Federal Judiciary*, and authorized Judge Campbell to convey the Committee's views to the Judiciary Planning Coordinator.

Respectfully submitted,



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	Jeffrey A. Rosen
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Form (proposed amendments and supporting report excerpt)

Appendix C – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

Appendix D – Federal Rules of Evidence (proposed amendment and supporting report excerpt)

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

Name	Sponsor(s)/ Co- Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
<b>Protect the Gig Economy Act of 2019</b>	<b>H.R. 76</b>  <i>Sponsor:</i> Biggs (R-AZ)	CV 23	<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>  <b>Summary (authored by CRS):</b> 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.  <b>Report:</b> None.	<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>  <i>Sponsor:</i> Biggs (R-AZ)	CV	<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>  <b>Summary (authored by CRS):</b> 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.  <b>Report:</b> None.	<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>  <i>Sponsor:</i> Grassley (R-IA)  <i>Co-Sponsors:</i> Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	<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>  <b>Summary:</b> Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."  <b>Report:</b> None.	<ul style="list-style-type: none"> <li>2/13/19: Introduced in the Senate; referred to Judiciary Committee</li> </ul>

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

<p><b>Due Process Protections Act</b></p>	<p><b>S. 1380</b>  <i>Sponsor:</i> Sullivan (R-AK)  <i>Co-Sponsor:</i> Durbin (D-IL)</p>	<p>CR 5</p>	<p><b>Bill Text:</b> <a href="https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.pdf">https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.pdf</a></p> <p><b>Summary:</b> This bill would amend Criminal Rule 5 (Initial Appearance) by:</p> <ol style="list-style-type: none"> <li>1. redesignating subsection (f) as subsection (g); and</li> <li>2. inserting after subsection (e) the following: “(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate.”</li> </ol> <p><b>Report:</b> None.</p>	<ul style="list-style-type: none"> <li>• 5/8/19: Introduced in the Senate; referred to Judiciary Committee</li> </ul>
<p><b>Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)</b></p>	<p><b>S. 1411</b>  <i>Sponsor:</i> Whitehouse (D-RI)  <i>Co-Sponsors:</i> Blumenthal (D-CT) Hirono (D-HI)</p>	<p>AP 29</p>	<p><b>Bill Text:</b> <a href="https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf">https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf</a></p> <p><b>Summary:</b> In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief.</p> <p><b>Report:</b> None.</p>	<ul style="list-style-type: none"> <li>• 5/9/19: Introduced in the Senate; referred to Judiciary Committee</li> </ul>

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

<p><b>Back the Blue Act of 2019</b></p>	<p><b>S. 1480</b></p> <p><i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Co-Sponsors:</i> Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)</p>	<p>§ 2254 Rule 11</p>	<p><b>Bill Text:</b> <a href="https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf">https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf</a></p> <p><b>Summary:</b> Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p><b>Report:</b> None.</p>	<ul style="list-style-type: none"> <li>• 5/15/19: Introduced in the Senate; referred to Judiciary Committee</li> </ul>
<p><b>HAVEN Act (Honoring American Veterans in Extreme Need Act of 2019)</b></p>	<p><b>H.R. 2938</b></p> <p><i>Sponsor:</i> McBath (D-GA-6)</p> <p><i>Co-Sponsors:</i> 38 (D-35, R-3)</p> <p><b>S. 679</b></p> <p><i>Sponsor:</i> Baldwin (D-WI)</p> <p><i>Co-Sponsors:</i> 41 (D-19, R-21, I-1)</p>	<p>Official Forms 122A-1, 122B, and 122C-1 lines 9 &amp; 10.</p>	<p><b>Bill Text:</b> <a href="https://www.congress.gov/bill/116th-congress/house-bill/2938/all-actions?loclr=cga-bill">https://www.congress.gov/bill/116th-congress/house-bill/2938/all-actions?loclr=cga-bill</a></p> <p><b>Summary:</b> Not posted. The bill introduction states: “<b>A BILL</b> To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.”</p> <p><b>Report:</b> None.</p>	<ul style="list-style-type: none"> <li>• 8/26/19: became P.L. No. 116-52</li> <li>• 7/23/19: Passed/agreed to in House.</li> <li>• 3/06/19: Introduced into the Senate, referred to the Committee on the Judiciary.</li> </ul>

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

<p><b>Small Business Reorganization Act of 2019</b></p>	<p><b>H.R. 3311</b> <i>Sponsor:</i> Cline (R-VA)  <i>Co-Sponsors:</i> 3 (D-2, R-1)  <b>S 1091</b>  <i>Sponsor:</i> Baldwin (D-WI)  <i>Co-Sponsors:</i> 41 (D-19, R-21, I-1)</p>	<p>Rules 1020, 2007.1, 2009, 2012, 2015, Official Form 201.</p>	<p><b>Bill Text:</b> <a href="https://www.congress.gov/bill/116th-congress/house-bill/3311/all-actions?loclr=cga-bill">https://www.congress.gov/bill/116th-congress/house-bill/3311/all-actions?loclr=cga-bill</a>  <b>Summary:</b> Not posted. The bill introduction states: “<b>A BILL</b> To amend <a href="#">chapter 11</a> of title 11, United States Code, to address reorganization of small businesses, and for other purposes.”  <b>Report:</b> None.</p>	<ul style="list-style-type: none"> <li>• 8/26/19: Became P.L. No. 116-54.</li> <li>• 7/23/19: Passed/agreed to in House.</li> <li>• 6/16/19: Introduced in House</li> <li>• 4/09/19: Introduced into the Senate, referred to the Committee on the Judiciary.</li> </ul>
<p><b>National Guard and Reservists Debt Relief Extension Act of 2019</b></p>	<p><b>H.R. 3304</b> <i>Sponsor:</i> Cohen (D-TN)  <i>Co-Sponsors:</i> 3 (D-1, R-2)</p>	<p>None. However, Official Form 122A-1Supp. Line 3 will need to be amended if the legislation does not pass by 12/18/19.</p>	<p><b>Bill Text:</b> <a href="https://www.congress.gov/116/bills/hr3304/BILLS-116hr3304rh.pdf">https://www.congress.gov/116/bills/hr3304/BILLS-116hr3304rh.pdf</a>  <b>Summary:</b> Not posted. The bill introduction states: “A bill to exempt for an additional 4-year period, from the application of the means-test presumption of abuse under chapter 7, qualifying members of reserve components of the Armed Forces and members of the National Guard who, after September 11, 2001, are called to active duty or to perform a homeland defense activity for not less than 90 days.”  <b>Report:</b> None.</p>	<ul style="list-style-type: none"> <li>• Became P.L. No. 116-53</li> <li>• 7/23/19: Passed/agreed to in House.</li> <li>• 6/18/19: Introduced in House</li> </ul>
<p>N/A</p>	<p>N/A</p>	<p>CV 26</p>	<p>N/A</p>	<ul style="list-style-type: none"> <li>• 9/26/19: House Judiciary Committee hearing on the topics of PACER, cameras in the courtroom, and sealing court filings</li> </ul>

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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  
e-mail: dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Miniconference on Best Practices for Managing *Daubert* Questions, before the Fall Meeting  
Date: October 1, 2019

The Committee has invited six experienced federal judges and a distinguished professor to share ideas about “Best Practices” in managing *Daubert* questions and in conducting *Daubert* hearings. The judges all have extensive experience in managing *Daubert* issues, and each has written extensive and influential *Daubert* opinions.

The miniconference is designed to further the Committee’s objective to provide education on proper management of expert testimony as an addition to (or an alternative to) an amendment to Rule 702

The miniconference will take place on the morning of the Fall meeting. The proceedings will be transcribed and published in the Fordham Law Review. There are also plans to send the transcript to all federal judges.

**Here is a list of questions that we have prepared, in order to spur discussion among the participants and Committee members:<sup>1</sup>**

***A. General questions about the gatekeeper role:***

1. Are the *Daubert* factors helpful? How and when do you go beyond them?
2. What *Daubert* matters do you most commonly encounter?

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<sup>1</sup> The list is not intended to be exclusive. And it is more than possible that we won’t get to all the questions on the list.

3. How do you handle experience-based experts under *Daubert*, e.g., car mechanics, electricians, etc.?
4. How confident are you in the gatekeeper role?
5. In figuring out a scientific or other complex issue, is the information supplied by the adversaries usually sufficient, or do you need to do independent inquiry?
6. When both sides' experts pass through *Daubert*, how do you think juries process the information?
7. Do you apply the standards of qualification as strictly as the standards for reliable methodology? What about the questions of sufficiency of basis? (Trying to get a handle on where the weight/admissibility line is drawn as to the various issues that must be decided under *Daubert*).
8. How do you deal with the fact that *Daubert* and Rule 702 instruct on the one hand that the admissibility requirements are to be determined by the preponderance of the evidence and on the other hand the language in *Daubert* that the solution is generally to be cross-examination and argument?
9. In examining how courts apply *Daubert* principles, the Committee has observed that it is often difficult to ascertain from written opinions the specific factors and analysis courts employ. In other areas in which courts exercise discretion to weigh factors (such as in criminal sentencing), appellate courts have required an explicit discussion of applicable factors and an explanation for the outcome on the record. What best practices should courts employ when applying FRE 702 to make clear what factors are being considered and how those factors are being analyzed in order to ensure a more consistent and uniform adherence to the Rule's standards?
10. What best practices can help ensure that expert witnesses use the same level of intellectual rigor in the courtroom that characterizes the standards in the expert's field? How do you sense when the expert is being result-oriented?
11. What do you do when the dispute is that the expert's conclusion is contrary to the findings of a particular study?
12. Does your *Daubert* practice/experience differ in criminal cases? If so, how? What would help to improve *Daubert* consideration in criminal cases?
13. In multidistrict litigation and other cases that follow a pattern, trials to be conducted in different jurisdictions can involve the same expert witnesses, the same lawyers, and the same issues as to admissibility of expert testimony. Do you take the possibility of uniformity into account and how so?

***Proposed amendment to Rule 702:***

The Committee is working on an amendment that would prohibit an expert from overstating the conclusions that can be drawn from a reliable application of the expert's method (e.g., claims to certainty, zero rate of error, etc.). The amendment would add to the list of admissibility factors in Rule 702 the following requirement:

the expert does not claim a degree of confidence that is unsupported by a reliable application of the principles and methods.

- a. Would such an amendment help you handle *Daubert* questions?
- b. How do you draw the line between regulating and nitpicking what an expert will say?
- c. Do you see any downsides to an express prohibition on overstatement?
- d. The driving force of the amendment was concern about overstatement of results by forensic experts. Is there any cause for concern about overstatement by non-forensic experts?
- e. Is the possibility of overstatement sufficiently regulated by cross-examination, and so the gatekeeper function is unnecessary?

***Procedural devices to manage Daubert questions:***

1. What about appointing a panel of experts, or a single expert, under Rule 706? Or a technical advisor or special master? Are these realistic remedies? (E.g., how do you find one who is truly independent and does not have a view on the issues? How do you prevent the expert/adviser from taking over the case? Would the parties disapprove? Is it worth the procedural effort?).
2. What about having a "science day" tutorial by experts for the parties? Would this just turn into another *Daubert* hearing?
3. Could the Australian practice of hot-tubbing experts be useful?

### ***Judicial Education:***

1. The Committee is working with the FJC on developing judicial education programs on *Daubert*, particularly with regard to scientific evidence. If you could attend such a program, what would you want to hear about? Are there particular subject matter areas that should a focus of such a program?
2. What kind of written instruction or guide, if any, has been helpful to you in managing *Daubert* questions? Are there any written materials that should be developed to help judges manage *Daubert* questions?

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

## **Bios of Roundtable Participants**

### **Hon. Vince Chhabria**

Vince Chhabria is a federal district judge in the Northern District of California based in San Francisco. He was nominated by Barack Obama on July 25, 2013 and confirmed by the Senate on March 5, 2014.

Before taking the bench, Judge Chhabria was chief of appellate litigation for the San Francisco City Attorney's Office, as well as a deputy on the Government Litigation Team for that office. He successfully defended a challenge to San Francisco's universal health care program, and was part of the legal team that successfully challenged California's ban on same-sex marriage.

Judge Chhabria also defended the city in: a First Amendment challenge to an ordinance requiring cell phone retailers to warn customers about possible health risks from radiofrequency energy exposure from cell phones; an establishment clause challenge to a resolution passed by the San Francisco Board of Supervisors criticizing Vatican statements and policies regarding adoption by same-sex couples; separate First Amendment and equal protection challenges to an ordinance banning tobacco sales in drug stores; a state law preemption challenge to an ordinance requiring landlords to pay relocation assistance to evicted tenants; and a due process challenge to the city's red light camera program.

Judge Chhabria was also a member of the City Attorney's Affirmative Litigation Task Force, where he served as lead counsel in several matters involving the failure of businesses to pay employees the minimum wages and benefits required by San Francisco law.

Prior to joining the San Francisco City Attorney's Office, Chhabria worked in the San Francisco office of Covington & Burling, where he focused primarily on criminal defense litigation.

Judge Chhabria served as a law clerk to Supreme Court Justice Stephen Breyer during the 2001-2002 term. Before that, he clerked for James R. Browning on the ninth circuit and Charles Breyer on the Northern District of California.

Prior to attending law school, he spent three years working as a legislative assistant to Congresswoman Lynn Woolsey in Washington, D.C.

Judge Chhabria received his B.A. from the University of California, Santa Cruz, and his J.D. from the University of California, Berkeley, School of Law.

### **Hon. Keith P. Ellison**

Keith Ellison received his undergraduate degree, *summa cum laude*, from Harvard, where he was also elected to Phi Beta Kappa. During his senior year at Harvard, he was one of 32 Americans selected as Rhodes Scholars to study at Oxford University in England. At Oxford, Ellison was a member of Magdalen College and received First Class Honors in Jurisprudence.

From Oxford, Ellison returned to the United States and earned his juris doctor at Yale, serving as an editor of the *Yale Law Journal*. Following law school, Ellison clerked for Judge J. Skelly Wright on the D.C. Circuit Court of Appeals and then for Justice Blackmun.

While in private practice, Ellison was active in many pro bono efforts, including the representation of aliens seeking political asylum in the United States. He was a longtime member of the Board of Directors of the American-South African Scholarship Association, which funded and awarded scholarships to deserving South African college students. At the time of his confirmation to the bench in 1999, Ellison was president-elect of the Gulf Coast Legal Foundation which provided legal services to the disadvantaged, and was active in Planned Parenthood. Currently, he is a director of the Houston Achievement Place, which offers housing, counseling, and other services to at-risk children. Ellison also is the regional secretary for the selection of Rhodes Scholars and active in EMERGE, which pairs Houston professionals with promising high school students.

Judge Ellison has been a member of the Council on Foreign Relations and the American Law Institute, the Yale Law School Executive Committee, the Executive Committee of the Order of the Coif and is a director of the Harry A. Blackmun Scholarship Association. Judge Ellison sat for five-and-one-half years in Laredo before returning to Houston in 2005.

He has twice been named “Trial Judge of the Year” by the Texas Association of Civil Trial and Appellate Specialists. He also received the Samuel Pessara Award, which the Texas Bar Foundation awards each year to a state or federal judge for outstanding service on the bench. The local chapter of Phi Beta Kappa honored him as “Alumnus of the Year,” the first time the award was given to a judge. He has also received awards from the Association of Women Attorneys and the Hispanic Bar Association.

He and his wife, Kathleen, a partner in Norton Rose Fulbright, have been married for 34 years.

### **Hon. John Z. Lee**

John Z. Lee is a federal judge for the United States District Court for the Northern District of Illinois. He was nominated to the court by President Barack Obama in 2011. Judge Lee is a graduate of Harvard University and Harvard Law School. From 1992-94, Judge Lee served as a trial attorney for the Environmental and Natural Resources Division of the United States Department of Justice. He went on to work for Mayer Brown, LLP from 1994 through 1996 and at Grippo & Elden, LLC from 1996 until 1999. He then became a partner in the firm Freeborn & Peters, LLP in Chicago in 1999, where he worked until his appointment to the judiciary.

### **Hon. William H. Orrick, III**

William Orrick is a United States District Judge in the Northern District of California; his courthouse is in San Francisco. He began his legal career in 1979 as a civil rights and poverty law attorney with Georgia Legal Services Programs in Savannah, Georgia from 1979-1984. Then he returned to San Francisco and worked with a firm now known as Coblenz, Patch, Duffy & Bass LLP, where he practiced until 2009. A litigation partner handling primarily complex commercial and employment cases, he also was co-chair of the firm’s Pro Bono and Diversity Committees, became Chancellor of the Episcopal Diocese of California, and was involved in a number civic organizations.

Judge Orrick left San Francisco in 2009 to work in the United States Department of Justice in Washington DC, first as Counselor to the Assistant Attorney General for Civil Division and later as the Deputy Assistant Attorney General in charge of Office of Immigration Litigation. President Obama nominated him to become a federal district judge in 2012 and he was confirmed the following year. Judge Orrick is a graduate of Yale University and Boston College Law School.

### **Hon. Edmund A. Sargus, Jr.**

Judge Edmond Sargus is Chief Judge of the United States District Court for the Southern District of Ohio. He received his commission on August 1, 1996. He was in private practice in

Bellaire and St. Clairsville, Ohio, from 1978-93. He served as Special Counsel to the Ohio Attorney General from 1979-93. He served as City councilman for St. Clairsville, Ohio, from 1988-91. And he was the United States Attorney for the Southern District of Ohio from 1993-96. Judge Sargus is a graduate of Brown University and Case Western Reserve University School of Law.

### **Hon. Sarah S. Vance**

The Honorable Sarah Vance was appointed to the United States District Court for the Eastern District of Louisiana in 1994. She served as Chief Judge of the Eastern District from 2008 to 2015. Judge Vance was chair of the seven-member Judicial Panel on Multidistrict Litigation from 2014 to 2019. She was the first woman to chair the Panel in its 50-year history. Judge Vance also served on the seven-member Executive Committee of the Judicial Conference of the United States from 2010 to 2013, and on the Board of Directors of the Federal Judicial Center. She was recently appointed by the Chief Justice to the Judicial Conference Committee on Judicial Conduct and Disability. She also serves on the Federal Judiciary Workplace Conduct Working Group, which was charged to evaluate and make recommendation to the Judicial Conference on the sufficiency of safeguards within the Judiciary to protect employees from wrongful conduct, and to monitor progress on those recommendations. Judge Vance has been a member of the American Law Institute since 1996, and currently serves on its Council and its Executive Committee, as well as an Adviser on the Restatement of the Law Third, Torts: Remedies. Judge Vance is a member of the American Bar Association Antitrust Section and served on its Council from 1993 to 1996. She has written a number of articles and given numerous presentations on antitrust law issues. She is also a frequent lecturer on multidistrict and complex litigation. Judge Vance serves on the Advisory Board of Tulane University Law School and of the Tulane Law Review. She has served on the adjunct faculty of Tulane Law School, where she taught in the areas of civil procedure and alternative dispute resolution. Before joining the bench, Judge was a partner at the New Orleans law firm Stone Pigman, where she practiced antitrust law and commercial litigation. Judge Vance is a 1978 graduate of Tulane Law School, where she was first in her class and managing editor of the law review.

### **Professor Ed Cheng**

Ed Cheng is the Hess Chair in Law at Vanderbilt Law School. His scholarship focuses on scientific and expert evidence, and the interaction of law and statistics. He is co-author of the five-volume treatise *Modern Scientific Evidence* (with Faigman, Mnookin, Murphy, Sanders, and Slobogin), and his scholarship has appeared in the *Journal of Legal Studies*, *Yale Law Journal*, *Stanford Law Review*, and *Columbia Law Review*, among other places. He teaches Evidence, Torts, and a seminar on Scientific Evidence, and is a seven-time winner of the Hall-Hartman Outstanding Professor Award for excellence in teaching at Vanderbilt. He is a former chair of the Section on Evidence of the Association of American Law Schools, and is the host of *Excited Utterance*, a podcast on scholarship in evidence and proof ([www.excitedutterancepodcast.com](http://www.excitedutterancepodcast.com)).

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**Advisory Committee on Evidence Rules**  
Minutes of the Meeting of May 3, 2019  
Thurgood Marshall Federal Judiciary Building  
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on May 3, 2019 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

*The following members of the Committee were present:*

Hon. Debra A. Livingston, Chair  
Hon. James P. Bassett  
Hon. Shelly D. Dick (by phone)  
Hon. J. Thomas Marten  
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. Carolyn B. Kuhl, Liaison from the Standing Committee  
Hon. James C. Dever III, Liaison from the Criminal Rules Committee  
Professor Daniel R. Coquillette, Consultant to the Standing Committee  
Professor Catherine T. Struve, Reporter to the Standing Committee (by phone)  
Professor Daniel J. Capra, Reporter to the Committee  
Professor Liesa L. Richter, Academic Consultant to the Committee  
Timothy Lau, Esq., Federal Judicial Center  
Joe Cecil, Esq., Federal Judicial Center  
Ted Hunt, Esq., Department of Justice  
Andrew Goldsmith, Esq., Department of Justice  
Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel  
Bridget M. Healy, Esq., Counsel, Rules Committee Staff  
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure  
Ahmad M. Al Dajani, Esq., Rules Committee Law Clerk  
Lieutenant Colonel Adam Kazin, Joint Service Committee on Military Justice  
Sri Kuehnlenz, Esq., American College of Trial Lawyers  
Mark Cohen, Esq. American College of Trial Lawyers  
Richard Cavanaugh, National Institute of Standards & Technology  
Amy Brogioli, American Association for Justice  
Abigail Dodd, Shell Oil Company  
Caroline Nester

## **I. Opening Business**

### *Announcements*

The Chair opened the meeting by welcoming Judge Kuhl, who is the new liaison from the Standing Committee. The Chair noted Judge Kuhl's extensive service both on the bench and in the private sector and thanked her for providing invaluable assistance to the Committee. The Chair also congratulated Kathy Nester on her appointment as Executive Director of the Federal Defender's office in San Diego, and welcomed both Ted Hunt and Andrew Goldsmith from the Department of Justice.

### *Approval of Minutes*

A motion was made to approve the minutes of the October 19, 2018 Advisory Committee meeting at the University of Denver Sturm College of Law. The motion was seconded and approved by the full Committee.

## **II. Proposed Amendment to Rule 404(b)**

The Chair first directed the Committee's attention to the proposed amendment to Rule 404(b). The proposed amendment was approved by the Committee at its spring, 2018 meeting and recommended for publication for public comment. At its June, 2018 meeting, the Standing Committee unanimously adopted the Committee's recommendation and the proposed amendments were issued for public comment on August 15, 2018. The public comment period closed on February 15, 2019. The Chair asked the Reporter to walk the Committee through the public comment and final considerations with respect to the proposed amendment to Rule 404(b).

The Reporter explained that the proposed amendment would alter the notice requirement applicable to criminal cases in Rule 404(b) and that it would return the modifier "other" to its pre-restyling position before the language "crimes, wrongs or acts" in the heading and subheading of the Rule. He noted that the public comment on the proposed changes was sparse, but affirmative. He outlined three possible alterations to the proposed amendment and Committee Note in light of the public comment and comments received concerning the amendment at the Standing Committee.

First, the Reporter informed the Committee that a Standing Committee member had questioned the use of the terminology "non-propensity purpose" in the text of proposed Rule 404(b)(3)(B) and suggested the use of the term "non-character purpose" instead. Although non-propensity terminology is regularly used by the courts in describing the prosecution's obligations in admitting Rule 404(b) evidence, the Reporter explained that the terms "propensity" and "non-propensity" do not appear in Rules 404 or 405. Because of this and because "non-character" would

appear to be a non-substantive change, the Reporter recommended making a change to the term “non-propensity” in the amended provision.

The Committee then discussed the optimal terminology for the articulation requirement contained in Rule 404(b)(3)(B), debating the merits of the terms “non-character purpose,” “proper purpose,” and “permitted purpose” as alternatives to “non-propensity purpose.” Some Committee members were concerned that the term “non-character purpose” failed to capture the intent of the rule to forbid proof of *conduct* through character. Others were concerned that the term “proper” could be interpreted expansively. The Committee agreed that some modifier of the term “purpose” was necessary in the text of the Rule and ultimately voted unanimously to change “non-propensity purpose” in proposed Rule 404(b)(3)(B) to “permitted purpose.” The term “permitted purpose” is contained in the heading of existing Rule 404(b)(2) and captures the intent of the amended provision to require the prosecution to articulate a purpose for evidence of a criminal defendant’s other crimes, wrongs, or acts that does not run afoul of Rule 404(b)(1) and that complies with Rule 404(b)(2).

In light of its decision to change the text of subsection (b)(3)(B) from “non-propensity purpose” to “permitted purpose,” the Committee also discussed whether to change the references to a “non-propensity purpose” in the first bullet point of the proposed Committee Note discussing Rule 404(b)(3)(B) to conform to the textual change. The Committee unanimously voted to retain the term “non-propensity purpose” in the first bullet to the Committee Note notwithstanding the decision to remove the term from the rule text because the term “non-propensity” conforms to the cases and captures the intent of the amendment to avoid an inference of conduct from character.

Second, the Reporter summarized a public comment by Ann Paiewonsky, Esq. expressing concern that the amended rule fails to create a right for a criminal defendant to receive a fair opportunity to meet Rule 404(b) evidence when it is first presented at trial (upon a showing of good cause). The fair opportunity language in the text of the amendment as issued for public comment is tied to notice *before* trial and not to notice given during trial pursuant to the good cause exception. The Reporter noted two potential options the Committee could consider to address this concern and that either or both could quite easily be implemented. The Reporter first noted that the language in the text of proposed Rule 404(b)(3) regarding the need to provide a defendant with a fair opportunity to meet Rule 404(b) evidence could be moved up from subsection (b)(3)(C) of the Rule to subsection (b)(3)(A) so that it explicitly applies to all notice (pre-trial and during trial). In addition to that textual change, or as an alternative to it, the Reporter explained that the Committee could add language to the Committee Note regarding the need for a court to consider protective measures designed to allow a fair opportunity to respond to evidence presented at trial without pre-trial notice for good cause. The Reporter reminded the Committee that similar language was recently included in the Committee Note to amended Rule 807 that could be utilized in the note to amended Rule 404(b).

Members of the Committee expressed a preference for moving the “fair opportunity” language up to subsection (b)(3)(A) of the amended Rule to clarify in the operative text that the right applies to all notice. In addition, Committee members supported including language in the Committee Note (consistent with the language employed in the note to amended Rule 807) regarding protective measures to allow defendants to respond to Rule 404(b) evidence first

presented during trial. Judge Campbell suggested eliminating the specific reference to a continuance in the Committee Note with respect to protective measures to avoid any implication that a continuance is always necessary as a protective measure. The Department of Justice representative questioned whether adding any language to the Committee note regarding protective measures for the defendant was necessary given that courts are already taking steps to protect defendants in good cause circumstances.

The Chair questioned the citation of cases in the proposed Committee Note regarding protective measures for the defendant and queried whether this citation of case law represented a departure from prior Committee policy or practice prohibiting or discouraging citations. The Reporter suggested that there was no Committee policy prohibiting the citation of cases and noted that a member of the Standing Committee at its last meeting had inquired as to why there weren't *more* case citations in the Committee notes. Although concerns have been expressed in the past about citation to cases that have the potential to be overturned, the Reporter suggested that cases used in the notes to illustrate the intended operation of an amended rule are appropriate because the amended rule essentially codifies the case and ameliorates any concern about overruling. The Reporter suggested that citations to the cases regarding protective measures for a defendant faced with Rule 404(b) evidence for the first time at trial are necessary to clarify that the amendment to the notice provision is not intended to change the existing law in this respect. The former Reporter for the Standing Committee agreed with the Reporter that there is no existing ban on the citation of cases. He opined that it is problematic for a Committee Note to rely on a case for the authority supporting a rule due to the risk of overruling, but that a citation that illustrates the intended operation of a rule is acceptable.

Following this discussion, the Committee unanimously voted to move the “fair opportunity” language from subsection (b)(3)(C) of amended Rule 404 to subsection (b)(3)(A) and to include language in the Committee Note regarding a court's need to consider protective measures for a defendant when pre-trial notice is excused for good cause. The Committee also unanimously agreed that the express reference to a continuance should be omitted from the Committee Note regarding protective measures accompanying the amendment.

Finally, the Reporter noted a suggestion for a minor adjustment to language of the bullet point in the proposed Committee Note with respect to excusing the pretrial obligation to articulate the reasoning supporting the admissibility of Rule 404(b) evidence. The change would clarify that the duty to articulate such reasoning *at trial* when the evidence is proffered is not excused. The Committee agreed that a clarification would be helpful and unanimously voted to change the bullet point to read:

- The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. 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.

**With these minor changes, the Committee voted unanimously to recommend to the Standing Committee that it give final approval to the proposed amendments to Rule 404(b) and the accompanying Committee Note.**

### **III. Rule 106**

The Chair next opened up the discussion of a potential amendment to Federal Rule of Evidence 106, noting that the Committee had explored several possible amendment alternatives at its recent meetings. Specifically, the Committee had explored whether to amend Rule 106 to eliminate a hearsay objection to a completing statement (either by making the completing portion admissible for its truth or for context). In addition, the Committee had looked at the possibility of including oral statements within Rule 106, which currently covers only written or recorded statements. Finally, the Committee had considered the idea of changing the standard for completion under Rule 106 from “fairness” to require completion only when the initial presentation was found to be “misleading” --- at the suggestion of the Department of Justice. The Chair noted that the Reporter had prepared in the agenda materials several potential alternative draft amendments to Rule 106 dealing with all the possible permutations that were available to the Committee.

To start the discussion, the Chair explained that DOJ had, the day before the meeting, withdrawn its suggestion of adding language to the text of Rule 106 that would allow completion only if the statement offered by the proponent is “misleading”. The DOJ representative explained that the Department had proposed the “misleading” standard as a means of avoiding a potential overcorrection that would allow completion under Rule 106 too often – the intent behind the “misleading” language was to clarify that completion should be necessary only in rare cases. The problem with utilizing “misleading” language as a predicate for Rule 106 completion, however, is that there are ethical reporting obligations for DOJ lawyers. A finding by a judge that a DOJ lawyer had introduced “misleading” evidence would trigger formal reporting of misconduct every time the rule was invoked. Therefore, although DOJ had no formal proposal about new terminology for an amended Rule 106, DOJ no longer supported a change from “fairness” to “misleading” in any amendment proposal.

The Chair also noted that she had provided three sets of Advisory Committee Minutes from meetings in 2002-2003 in which potential amendments to Rule 106 were discussed. She noted that the Committee had voted unanimously against adding oral statements to Rule 106 at those meetings and had considered, but rejected, the possibility of amending Rule 106 to make clear that it trumps all other evidentiary objections (not only hearsay objections). She stated that the Committee in 2003 had considered potential amendments to Rule 106 as part of a broader review of all evidentiary rules and had determined that an amendment was not justified at that time. She emphasized that some recent cases, including those brought to the Committee’s attention by Judge Grimm, had suggested some contemporary issues in the application of the Rule and that the Committee was not bound by the determinations of the 2002-2003 Committee. She, therefore, suggested that there was reason for the Committee to continue its consideration of Rule 106.

The Chair next noted that New Hampshire had recently amended its counterpart to Rule 106 to include oral statements and that the Reporter had asked Judge Bassett for any guidance he might

have with respect to the New Hampshire experience with completion of oral statements. Judge Bassett reported that the New Hampshire provision was amended in 2017 and that it gives parties a right to introduce completing oral statements when fairness so requires. Judge Bassett sent emails to all New Hampshire trial judges, as well as to Supreme Court Justices who had been trial judges and/or practitioners, to solicit their experience with the completion of oral statements at trial. According to Judge Bassett, the common response was that the issue of completing with oral statements does not come up often and presents no trial difficulties. One of Judge Bassett's colleagues prosecuted the New Hampshire case from which the completion right emanates. He noted that completion of oral statements had been available in New Hampshire for 20-30 years and was only recently codified in the 2017 amendment to the New Hampshire Evidence Rules. He stated that judges overwhelmingly reported that the rule caused no issues, that completion of oral statements created a credibility issue, not an admissibility concern, and that the rule was considered very workable and non-contentious.

Judge Kuhl also reported on the California experience with completion, having consulted colleagues and trial judges in California. She noted that California has adopted the common law version of completeness, which deals with the hearsay issue by allowing completing hearsay – not so much as an exception to the hearsay rule, but rather on an “opening the door,” fairness basis. She noted that oral statements are included in the completion right. According to Judge Kuhl's California colleagues, the completion issue does arise with regularity, but there has been no difficulty in applying the completion doctrine at the trial level. She noted that the California rule is phrased very broadly and does not limit completion to statements made by the same person. She contended that there are many circumstances where the context for one person's statement is very important and it may be necessary to admit statements of another to which a declarant was responding. The Reporter noted a case in a memorandum by Professor Richter, in which the statement of an attorney was necessary to fairly complete a statement by a deponent. Judge Kuhl concluded that the California rule trusts trial judges to regulate such uses and has posed no difficulties.

The Chair informed the Committee that she had taken a deep dive into the Rule 106 case law and had found the topic sufficiently complicated that she had one of her clerks conduct some research, and had made notes on the subject --- which she circulated to the Committee, and to the Reporter, at the meeting. The Chair noted that California had codified the rule of completion in its full common law form. According to the United States Supreme Court in the *Beech Aircraft* case, Rule 106 only partially codified the common law. She noted that federal courts and academics had determined that the common law of completion persists in the face of the partial codification in Rule 106. The Chair explained that the Supreme Court in the *Beech* case had not found it necessary to apply Rule 106 on the facts of that case because the common law of completeness required completion in that circumstance. She pointed out a footnote in *Beech* suggesting that the completing letter could be admitted notwithstanding the hearsay rule, but that also indicated that the remainder could be admitted for context (and not for its truth). She further noted that the bulk of the federal courts have applied Rule 611(a) to admit oral statements when found necessary to complete. According to the Chair, there would be no need to consider an amendment to Rule 106 without the question about hearsay use of completing statements. She expressed two principal worries about adding oral statements to Rule 106: 1) most states follow the Federal Rules of Evidence and would have to decide whether and how to react to an amendment to Rule 106 that

added oral statements; and 2) the bulk of the federal courts use Rule 611(a) to accomplish completion of oral statements already, making a potentially disruptive amendment largely unnecessary. The Chair also noted that efforts to narrow the completion of oral statements within an amended rule, perhaps by limiting completion to statements by the “same speaker,” could be unduly restrictive and could limit the flexibility of trial judges in dealing with oral statements. She opined that it might be best to find a way to address the hearsay issue without adding oral statements to Rule 106.

The Reporter noted real problems with the current use of Rule 611(a) and the common law to govern the completion of oral statements. He contended that a trial lawyer’s first move might not be to look to Rule 611(a) (which deals with the trial court’s authority to control the “mode and order” of examining witnesses and presenting evidence) or to consult the “common law.” The fundamental point of the Evidence Rules is to give litigants a uniform set of evidentiary provisions they may consult quickly to determine the admissibility of a particular piece of evidence. *Beech Aircraft* notwithstanding, in theory, there are no “common law rules of evidence” following promulgation of the Federal Rules of Evidence. At best, the absence of express coverage of completion of oral statements within Rule 106 constitutes a trap for the unwary judge or litigant who is not an evidence professor with the necessary knowledge to consult Rule 611(a) or the common law. The current state of affairs – with one rule that covers written/recorded statements, another that does not expressly deal with completion but that has been applied to allow completion of oral statements in some jurisdictions, and governing principles in uncodified common law – presents a messy state of affairs for judges and litigants. Amending Rule 106 could address all outstanding issues and bring governance of them all within a single user-friendly provision.

The Federal Public Defender agreed with the Reporter’s concerns about the existing Rule and added that failure to deal with the hearsay question creates significant pressure for a criminal defendant to take the stand to attempt to rebut an incomplete presentation of his statements by the government. Another Committee member suggested that the Committee may want to treat oral statements separately from written/recorded statements. In particular, he suggested that the Committee might want to consider language that makes the standard for completing oral statements tighter or more restrictive than the standard for completing written/recorded statements. One alternative would be the language in the Texas provision that limits completion to statements “necessary” to explain portions already introduced.

The Reporter noted that the existing “fairness” standard already limits completion and that the case law interpreting the “fairness” standard already applies a quite restrictive approach – requiring that the initial portion of the statement be misleading or distorted without introduction of the remainder. So in his view a different, stricter test for oral statements was unwarranted. The Committee member suggested that he was concerned that protections in the case law may be inadequate and that the textual term “fairness” could be too broad and that the Committee should consider tighter text if it extends the completion right to oral statements. The Academic Consultant interjected that Rules 410(b), 502(a), and Federal Rule of Civil Procedure 32(a)(6) all utilize the same “fairness” language found in Rule 106, so altering the language in Rule 106 could have collateral consequences for the interpretation of those provisions. The Reporter agreed that changing the triggering language in Rule 106 could have collateral effects that the Committee would need to consider. He reiterated that the interpretation of the “fairness” standard was already

very strict and expressed confidence that an amendment dealing with the separate hearsay and oral statement issues would not broaden the well-accepted understanding of that language.

The Chair then noted decisions like the Sixth Circuit *Adams* decision, in which the panel held that the completing statements ought to have been admitted in fairness to the defendant, but that those statements were inadmissible hearsay and could, therefore, not complete. According to the Chair, rulings that completing statements are needed for fairness, but yet are inadmissible, are mistaken. Completing statements necessary for fairness should at least be admissible for context. She opined that it is not entirely clear from a review of the cases that *do* admit otherwise inadmissible completing hearsay whether it is being admitted for its truth or merely for its non-hearsay contextual value. Although some courts are clearly admitting completing statements for their truth, some are not necessarily going that far. The Chair circulated, at the meeting, some hypotheticals she had created in which litigants might not need or be entitled to have completing statements admitted for their truth. She suggested some potential language for an amendment to Rule 106 that would fix the mistaken exclusion of fairly completing statements without directly resolving the question of whether completing statements are admissible for their truth or merely for context. For example, an amendment might provide that “Written or recorded statements need not be independently admissible pursuant to the rule against hearsay when introduced pursuant to this rule.” One Committee member inquired whether such language *would* admit a completing statement for its truth. The Chair responded that the proposed language was one possible option that would purposely remain ambiguous as to the basis for admission. In some cases, the trial court might admit a completing statement for its truth and in others, the court could admit it for non-hearsay context only. Another option would be to draft an amendment that specifically distinguishes when a completing statement is admissible for its truth and when it is not.

A Committee member opined that any amendment should resolve the basis for admitting completing statements, arguing that lawyers need to know whether they can argue the truth of the statement to the jury. That said, the Committee member was concerned that allowing completion to serve as a complete waiver of hearsay rules could extend further than the Committee intends. He questioned why the Committee shouldn’t consider an amendment to Rule 801(d)(2)(A) dealing with party opponent statements, to the extent that the hearsay problem under Rule 106 is driven entirely by the one-way limitation on that hearsay exception that the government is able to use to present partial statements of a criminal defendant. The Reporter noted concerns with tinkering with the Rule 801 hearsay provisions, and also noted that such an amendment would be an incomplete remedy in any event. In cases where the *government* needs to complete an against-interest statement of a third party -- offered by a defendant because it tends to exonerate him --with another statement by the same third party that is *not* against the speaker’s interest because it implicates the defendant, the government would need relief from the hearsay rule to complete pursuant to Rule 106 as well. The Reporter pointed the Committee to the *Woolbright* case cited in the agenda materials as an example of this situation. An amendment limited to Rule 801(d)(2)(A) would not reach situations like this one.

The Reporter for the Advisory Committee queried whether an amendment that simply made clear that the hearsay rule would pose “no obstacle” to completion would be sufficient to inform parties of the operation of the rule, leaving it to trial judge discretion to determine whether the completing statement could be used for its truth on a case by case basis. The Chair reiterated that

if the rule were to specify the effect of the completing statement, she would favor admissibility for non-hearsay context only, but noted that specifying effect would limit the trial judge and that an amendment preserving discretion might be superior. Another Committee member noted that an amendment simply stating that the hearsay rule is no bar to completion would solve the problems presented by courts that deny needed completion on the basis of the hearsay rule.

Judge Campbell queried whether an amendment stating that the hearsay rule posed no obstacle to completion would, by definition, allow admission of completing statements for their truth. The Reporter noted that a drafting alternative expressly providing that a completing statement could be admitted for “context only” might be adopted to avoid that result if the Committee wanted to avoid admissibility for truth. That said, the Reporter noted that there are some circumstances in which the completing statement ought to be admissible for its truth. If, for example, a defendant admits to having owned a gun used in a crime, but claims to have sold it months before the commission of the crime in the same statement, the government should not be able to admit the statement of ownership for its truth to suggest that the defendant admitted owning the weapon, while the completing statement about the sale is admitted only for “context.” Moreover, use for context only would require a difficult-to-follow jury instruction --- a consequence that the Committee has sought to avoid.

The DOJ representative questioned the Reporter about the hypothetical statement of gun ownership, positing that the government might have a witness who can testify that the defendant still owned the gun at the time of the crime and perhaps a Facebook post of a picture of the defendant with the gun near in time. She questioned why the defendant’s false exculpatory claim that he sold the gun should be admitted for its truth when the government’s suggestion that he owned the gun at the time was not misleading or unfair based on this other evidence. She questioned why the defendant should be free to create a misimpression about his gun ownership and suggested that allowing use of his own statement for its truth would admit unreliable self-serving hearsay. Judge Campbell responded that the government would, of course, be free to present the witness and the Facebook post showing the defendant’s gun ownership, but that Rule 106 prevents the government from creating a false impression *about the defendant’s statement* – not about his gun ownership in general, but about the fact that he admitted it (which the government suggests he did by introducing his partial statement). The introduction of the rest of the statement would be designed to prevent the misimpression about what exactly the defendant admitted.

Another Committee member suggested that allowing use of the completing statement for context only, with an appropriate limiting instruction, would be perfectly suited to this type of circumstance. Although limiting instructions may seem difficult to articulate, he opined that in practice they work well and that juries can comprehend and follow them. Another member of the Committee agreed, noting that trial judges routinely allow completion with an appropriate limiting instruction and that the issue causes few problems and never makes its way to the appellate level.

Another Committee member suggested that an amendment to Rule 106 might provide that the completing statement could “be admitted for context unless the court rules otherwise.” The Chair offered the possibility of an amendment allowing completing statements to be admitted for context only “unless another hearsay doctrine permits otherwise.” The Reporter expressed concern that a “for context only” amendment would be too limiting, particularly in a situation where one party

has offered a partial statement for its truth in a misleading way. Admitting a completing statement also for its truth would be necessary to level the playing field and right the wrong. He also noted that allowing for context admission “unless otherwise permitted by the hearsay rule” would be superfluous because that would simply restate the operation of the existing rules to exclude hearsay unless a hearsay exception permits otherwise. Another Committee member suggested that allowing a completing statement to come in “for context or otherwise” might preserve trial judge flexibility on the point.

Judge Kuhl raised the language in one of the draft amendment alternatives limiting completion of oral statements to those in which the “contents are not substantially disputed.” She suggested that this limitation might be ambiguous – it could refer to whether the oral statement was “uttered” at all or to whether the substance or content of the oral statement is considered “true.” In any event, she suggested that the jury should determine such questions and opined that any amendment to Rule 106 should not incorporate that limitation. The Reporter agreed with Judge Kuhl, noting that this limiting language was raised at the Denver symposium last October, but opining that the trial judge should retain discretion about proper completion of oral statements if the Committee decided to add them to Rule 106’s coverage. If the Committee votes to exclude oral statements altogether, that issue will be moot, but if oral statements are included, the Reporter suggested dropping that language. Committee members unanimously agreed that the proposed language about the contents of oral statements not being substantially in dispute should be dropped in the event that the Committee proceeds with an amendment to Rule 106 that includes oral statements.

Another Committee member suggested that the Committee should do as little to Rule 106 as possible. He suggested that the big problem with the rule is the hearsay issue and that it comes up a lot at trial, particularly with regard to statements in depositions. Rather than rewriting the rule and tinkering with the language, he suggested that the Committee should fix this targeted problem.

The Chair then suggested that it might simplify the drafting process to make a decision with respect to the inclusion of oral statements in Rule 106, and she asked for a straw vote of Committee members who would rather *not* include oral statements in any potential amendment. Three Committee members voted against including oral statements, but four Committee members voted to continue discussing the possibility of adding oral statements to an amended Rule 106. The Chair then inquired whether the Committee was interested in narrowing the discussion of the completion of oral statements to those made by the same declarant. The Federal Defender expressed concern that such a limitation might be too narrow, particularly in connection with an interrogation where the context of a question asked by one declarant might be necessary to complete and make sense of an answer given by another. She noted that the question might change the entire meaning of the response given. The Reporter noted that Judge O’Malley expressed concern about limiting completion to the statements made by the same declarant at the Denver conference as well. No Committee member spoke in favor of retaining the limitation that the initial statement and the completing statement must be made by the same person.

Another Committee member noted that many federal courts are allowing completion of oral statements and that the same practice seems to be working well in states like New Hampshire that expressly include oral statements in their rule of completion. He expressed a desire to fully understand the concerns of Committee members who have reservations about including oral

statements in Rule 106. The Chair suggested that California and other states had adopted a broad common law approach to completion, but that the Federal Rules had only partially codified the concept. Another Committee member suggested that in states like New Hampshire, where oral statements are expressly included, they have at least arguably tightened the standard for granting completion in the first place. He suggested that the Rule 106 “fairness” language would need tightening if it were extended to oral statements. Another Committee member noted that the New Hampshire rule has a separate subsection (b) applicable to oral statements. The Reporter stated that the Committee could consider a provision drafted like the New Hampshire rule with distinct subsections for written/recorded statements and oral statements, but that to have separate standards for oral statements would be confusing and unworkable. Another Committee member opined that federal practice on completion largely works well, but that it is working well *in spite* of the Rules on the subject. Trial judges consult the rulebook in deciding what to allow and lawyers don’t cite to the common law of evidence. He opined that it is odd that oral statements are regulated between the cracks of the Rules as it were.

The Chair again expressed reservations about codifying the approach to oral statements, suggesting that California’s practice with respect to completion appeared to be narrower than the language of its rule, while the federal practice with respect to completion is broader than the language of Rule 106. Attempting to codify the completion doctrine in its entirety could open a can of worms and may not be worth it because most federal courts utilize Rule 611(a) to deal with oral statements when the need arises. Judge Kuhl confirmed the Chair’s characterization of California law, explaining that the completion rule does not open the door to an opponent’s entire case notwithstanding the broad language of the rule and that California courts treat the concept very much as one of proportionality. Judge Kuhl expressed confusion about the use of the common law to allow completion of oral statements in the federal system in light of the doctrine of *expressio unius est exclusio alterius*. It seems that lawyers would need to refer to case law to determine whether Rule 106 is supplemented by the common law.

The DOJ representative questioned why the Committee would tinker with Rule 106, suggesting that trial judges ably handle these issues regularly under the existing provision. She expressed concern that the addition of oral statements would cause time consuming mini-trials over whether a completing statement was actually made and that expanding the rule could broaden the interpretation of the “fairness” justifying completion. She noted that the Committee should resolve a circuit split if there is one, but that it should not start rewriting the rule and should leave it untouched to the extent possible because lawyers are accustomed to using the rule on their feet in court every day. The Reporter responded that the DOJ’s argument about stability was undermined by the fact that lawyers and judges trying to use the completion “rule” on the fly at trial now need to apply a combination of Rule 106, Rule 611(a) (and the case law applying it to completion of oral statements), and the Supreme Court’s decision in *Beech Aircraft* to fully master the rules on completion. That is hardly a user-friendly system.

The Chair then asked for a straw poll as to whether an amendment adding oral statements should be limited along the lines of the New Hampshire rule to help clarify drafting for the fall Committee meeting. Six Committee members agreed that a rule similar to the New Hampshire provision regarding oral statements should be explored.

The Federal Defender expressed concern about an amendment with varying standards applicable to written/recorded versus oral statements. Simply adding oral statements to existing Rule 106 seems less disruptive because it allows trial judges to continue doing what they are doing now. Creating varying subsections with differing standards becomes a new rule entirely. She disagreed that there is any genuine concern about mini-trials over oral statements, suggesting that it takes about 10 seconds to argue and resolve such an objection in practice. She suggested that the discussions reveal that everyone wants the rule to be administered fairly and that there are some circuits where fairness is being defeated by the interpretation being given to Rule 106. She advocated a unitary approach to drafting an amendment that would simply add oral statements to the current standard.

The Chair responded that trial judges might think we have a completely new rule and let everything in if the Committee were to enact a broad California approach. Conversely, if the Committee adds oral statements and creates limits on their use to complete, that may undermine the flexibility courts currently have in operating under Rule 611(a). If the Committee were to adopt an amendment that seeks to “fully” codify the doctrine of completion, it might fundamentally alter the existing practice in federal court.

Judge Campbell noted that the Chair’s notes on Rule 106 show that oral statements are allowed to complete in seven circuits. He inquired whether there are circuits that do *not* allow completion of oral statements under Rule 611(a). The Chair responded that the Reporter had cited the *Gibson* case that says that there should not be completion of oral statements in dicta only, but that she could not find any other cases holding that there could not be completion with oral statements. The Reporter pointed out that he had cited four circuits on page 17 of his agenda memorandum on Rule 106 that have case law stating broadly that oral statements are not allowed to complete. In particular, he noted cases out of the Fourth, Ninth and Eleventh Circuits refusing to allow completion of oral statements, including a 2005 opinion out of the Eleventh Circuit --- and while there is contrary authority in some of those circuits, that only shows that there is confusion in the courts about the admissibility of oral statements. The Chair suggested that the federal decisions on completion become confused over time and that the Committee should resolve conflicts that are deep and serious. She suggested that there is a real conflict with respect to the issue of completion with otherwise inadmissible hearsay, but that she is not sure that one truly exists with respect to completion of oral statements.

A Committee member asked whether the Committee could propose an amendment simply dropping the modifier “written or recorded” from the existing Rule 106 (or conversely adding the modifier “oral”) and whether that would do violence to the existing completion practice. The Reporter noted that some additional revision would be necessary to address the hearsay issue, but that would be an option with respect to the oral statements issue. The Committee member queried what downside there would be to simply adding oral statements to the language of Rule 106; if courts are already allowing completion of oral statements, what negative impact would there be in having the Rule match the common law practice? The Chair suggested that the original common law approach to completion (as enacted in California) was very broad and that codifying that original common law approach to completion would alter existing federal practice. The Reporter responded that the real question is not whether to codify the original common law practice on completion, but rather whether adding the term “oral” to existing Rule 106 would do violence to

the current federal practice. He suggested it would not and that the Committee has previously acted to codify case law, such as the amendment to Rule 801(d)(2)(E) to capture the holding in *Bourjaily*, to avoid forcing litigants to consult case law to ascertain the proper approach to a particular rule.

The Chair suggested that the discussion had produced two approaches to oral statements for the Committee to consider: 1) a narrowed approach to the completion of oral statements that tightens the standard for their use and 2) a simple addition of the term “oral” to the language of the existing Rule.

The Reporter promised to prepare additional drafting alternatives for the fall meeting based upon the Committee’s discussion. With respect to oral statements, the Committee could consider a draft like the New Hampshire rule with a possibly stricter standard for completion that applies only to oral statements. In the alternative, the Committee could consider the minimalist approach that would simply add the term “oral” (or remove the words “written or recorded”) from the existing Rule. With respect to the hearsay issue, the Committee could consider the “context-only” approach to admissibility, as well as the Chair’s proposal to draft in a way that elides the hearsay issue by providing that the hearsay rule “presents no obstacle” to completion.

The Chair suggested language that would make a statement admissible to complete “whether or not admissible under the hearsay rule if necessary for context.” The Reporter noted that the language of the context-only alternative in the agenda materials was very similar to that, but that he continued to think it was unfair for the proponent to get to use a partial statement in a misleading way *for its truth*, but to limit the adversary to non-hearsay use only for the completing portion of the statement. He stated that he would try to include a drafting alternative that gives the trial judge discretion over whether to allow use of a completing statement for its truth. He noted that the consensus of the Committee was to eliminate the language in some of the existing drafts that would require a completing statement to be made by the “same person” and that would allow completion of oral statements only if they are not “substantially disputed.” The Chair noted that she also sensed agreement to stay with the existing “fairness” language with respect to the completion of written and recorded statements and to tighten the standard, if at all, with respect to oral statements only.

#### **IV. Rule 615**

The Reporter introduced the discussion of Rule 615, noting that Judge Woodcock had originally brought the possibility of an amendment to the Committee’s attention. Judge Woodcock noted concerns about the mandatory nature of sequestration upon request, about the timing of a request for sequestration, and about the application of sequestration to expert witnesses. After carefully considering each of these concerns, the Committee determined that an amendment to Rule 615 was not necessary to address them. In studying Rule 615, however, the Committee encountered a conflict with respect to the scope of a court’s Rule 615 sequestration order that may create important notice issues for lawyers and witnesses. Trial judges frequently invoke “the Rule” in a case without further discussion or explanation. At a minimum, such an order means that trial witnesses (if not exempt from sequestration under Rule 615) must leave the courtroom. But such

an order remains vague with respect to excluded witnesses learning about testimony through other means, such as conversations with other witnesses, daily transcripts, or online or other news outlets. In most circuits, such an order means that witnesses are barred from obtaining or being provided trial testimony; but in the 1<sup>st</sup> Circuit, such an order *only* prevents witnesses from being present in the courtroom. Thus, there is a conflict in the circuits about the scope of a Rule 615 order. Ambiguity concerning the scope of a sequestration order could create a notice problem in the event that a court seeks to impose consequences for the violation of that order.

The Reporter provided two potential approaches to amending Rule 615 to deal with this conflict that were set forth in the Reporter's agenda materials on page 13 of the memo concerning Rule 615. First, the Committee could propose a discretionary rule, expressly noting the trial judge's authority to extend sequestration beyond the courtroom doors to communications and interactions outside the courtroom, but requiring the judge to specify any limits beyond exclusion from the courtroom in a Rule 615 order. Alternatively, the Committee could draft a mandatory amendment that automatically extends sequestration protections beyond the courtroom and defines the scope of a Rule 615 order to provide clear notice of what is prohibited. The Reporter noted that the Committee needed to decide whether the Rule 615 conflict is worth continuing to explore and, if so, whether any potential amendment should be discretionary or mandatory.

In thinking about a mandatory versus discretionary provision, Judge Campbell asked whether there would ever be circumstances where a trial judge would exclude witnesses from the courtroom during testimony, but would *want* to allow them to communicate or read about that testimony outside the courtroom. If there are not circumstances where the judge would want to allow that, there seems to be no reason to draft a discretionary rule. In drafting a mandatory rule, Judge Campbell pointed out that the draft language in the agenda materials on page 15 of the Reporter's memo regarding Rule 615 that would prohibit witnesses from "obtaining or being provided trial testimony" might need to be expanded to capture witnesses who unwittingly go on the internet and encounter information about trial testimony. These witnesses haven't been provided a transcript or "obtained" testimony so to speak, but they have "learned about testimony" in a manner that is incompatible with the principle of sequestration. The Reporter agreed that any amendment should cover both witnesses being provided testimony, such as through a transcript or summary, as well as witnesses learning about testimony through other means, such as through the news.

Another Committee member noted the routine efforts to prevent jurors from consulting information outside the courtroom and jurors' routine, sometimes unwitting, violation of these requests. This Committee member expressed concern about witnesses unwittingly violating any expanded version of Rule 615 and the importance of drafting a provision that is very clear about what is prohibited. The Chair characterized the Rule 615 case law as presenting a tiny circuit conflict, noting that only a single circuit interprets Rule 615 orders literally to prevent witnesses from being physically present in the courtroom *only* and that all other circuits are fairly nebulous about the scope of Rule 615 orders. She noted that commentators have expressed reservations about how far Rule 615 burdens should extend beyond the courtroom. Sometimes, trials are very long, witnesses live in the same house or work in the same place. Forbidding internet access to witnesses for a long period of time in this day and age is quite onerous. She inquired of the trial judges present as to how much they regulate witness conduct outside the courtroom and whether they think that an amendment to Rule 615 would be helpful.

One trial judge suggested that lawyers don't ask for specific protections outside the courtroom and that judges assume that witnesses follow the rule. Judge Campbell noted his longstanding practice of asking lawyers at the pre-trial conference whether they intended to invoke "the rule" without specifying precisely the confines of the limitation beyond the courtroom. In his circuit, invoking "the rule" means that witnesses may not learn about testimony outside the courtroom and he is now more careful in advising lawyers about the conduct that is prohibited. The Reporter suggested that trial judges are all over the map as to how specific they are about conduct that is prohibited, meaning that there is a problem with respect to notice for witnesses who can be brought in for violating "the rule." Another judge questioned whether it would make sense to allow the parties to opt out of a sequestration provision that prevents all witnesses from learning of testimony. For example, if both sides wanted their experts to be acquainted with the trial testimony, it might make sense to allow them the ability to limit the application of "the rule" by consent. A draft amendment might be limited by the words "unless the parties agree otherwise" to accomplish this result.

Rules Committee Chief Counsel, Rebecca Womeldorf, asked whether an amendment that extended sequestration protections beyond the courtroom would prevent a lawyer from prepping a witness with a transcript. The Reporter noted that the Advisory Committee's draft note to Rule 615 cites the *Rhynes* case from the Fourth Circuit holding that the sequestration protections do not apply to lawyers preparing witnesses. The former Reporter to the Standing Committee suggested that the Committee should adopt language in a Committee Note that avoids case citations and instead expressly states that the amended rule "should not be interpreted to prevent witnesses from talking to trial counsel."

A Committee member queried whether trial counsel may reveal the testimony of other witnesses in preparing a witness to take the stand. The Reporter responded that that was what the *Rhynes* case held. The Committee member suggested that it would be ill-advised to draft an amendment to Rule 615 that appears on its face to prohibit lawyers from revealing trial testimony to witnesses, only to take it back in the Committee Note. The Reporter noted the option of incorporating the trial counsel limitation into rule text. The Rule could exempt "conversations with trial counsel" or include a subsection providing that "the Rule does not apply to lawyers preparing witnesses to testify." Another Committee member described the facts involved in the *Rhynes* case in which the trial judge excluded a defense witness in a criminal trial due to counsel's discussion of testimony with him in preparation for his testimony. The *en banc* opinion held that the prohibition on communication of testimony does not extend to lawyers in this context (notwithstanding the fact that Rule 615 doesn't support that limit on the sequestration right). Another Committee member inquired whether that means that witnesses have a right to learn of other witnesses' testimony through counsel. The Reporter explained that the case law supports lawyers' ability to prepare witnesses to testify unhampered by restrictions on what they may communicate. Another Committee member noted that the remedy for such witness preparation should be cross-examination by the adversary about such communications, but that trial counsel rarely ask those questions of a witness.

The DOJ representative questioned the use of the word "learn" in the draft of a mandatory rule included in the agenda materials on page 15 of the Reporter's memo. She expressed concern that

a witness might accidentally violate such a rule by unwittingly “learning” about trial testimony. The Reporter responded that the term “learn” in subsection (a)(i) of the draft would not punish a witness who accidentally learns of testimony outside of court because that subsection only regulates physical exclusion from the courtroom to prevent witnesses from learning of trial testimony. Subsection (a)(ii) would regulate out of court conduct and is not so broadly worded as it prevents witnesses “from obtaining or being provided trial testimony.” The DOJ representative noted that creating airtight exceptions to sequestration rules limits the discretion of the trial judge to craft orders tailored to individual cases. The Reporter pointed out that the “exceptions” to sequestration that are enumerated in the Rule are already in the existing provision and that the Committee is not considering altering those.

The Chair noted that trial judges do possess significant discretion to determine the control necessary beyond the courtroom in a given case under the existing rule. The limits on outside interaction may need to be modest in some cases and more onerous in others. She noted that an amendment might cut back on a trial judge’s ability to exercise that discretion if it attempts to spell out specific prohibitions. She further noted that trial judges report that jurors routinely violate prohibitions on their exposure outside the courtroom and that it would be unwise for the Committee to propose rules so onerous that no one will follow them in practice. The Reporter responded that the critical issue was to make Rule 615 clear about its reach, whatever that reach may be. While a mandatory provision (prohibiting outside exposure to testimony) may be preferable, a discretionary provision that affords flexibility as to scope may also be acceptable as long as it forces trial judges to consider and clarify the meaning and scope of sequestration orders they enter.

Committee members, after this discussion, generally agreed with the proposition that if an amendment to Rule 615 were to be proposed, it should contain a discretionary rather than mandatory provision for regulating prospective witnesses outside the courtroom.

Another Committee member inquired about the importance of the sequestration rule, asking whether there are any studies to support the notion that witnesses will tailor their testimony to one another if they are privy to it. The Reporter responded that Wigmore characterized sequestration as second only to cross-examination as a tool for securing accurate outcomes. Although there are no formal studies of which the Reporter was aware, criminal defendants who are present in the courtroom throughout trial as an exception to sequestration have often been accused of tailoring their testimony and prosecutors routinely point this fact out to juries. Most importantly, the Reporter explained that if the sequestration right is retained in the Rules, it needs to be clear in its scope.

Another Committee member asked whether other Circuits had adopted the lawyer-preparation exception found in *Rhynes* that seems to undermine Rule 615, noting that it would seem troubling to craft an exclusionary rule about outside communication of testimony if the prohibition is undermined by that case law. Another Committee member suggested that the Committee follow up on the reach of the *Rhynes* decision for the next meeting to understand more fully the limits and context of that decision. The Committee’s choice would seem to be to push back on the *Rhynes* holding or to codify it in an amended Rule 615. The Committee member advocated exploring the issue further as part of due diligence on the subject. Another Committee member noted that the *Rhynes* case involved a pretty unique set of facts in which a defense witness was accused by

another witness of being involved in the charged conspiracy shortly before taking the stand. The defense lawyer had to ask the accused witness about his involvement before deciding whether to put him on the stand. The Committee should consider whether the appellate court's holding prohibiting the trial judge from excluding the defense witness on the basis of his preparation in that case necessarily means that *any* lawyer may tell *any* witness about other trial testimony in the course of preparing her to testify. The Reporter agreed that he would research the case law on the issue of lawyers conveying trial testimony in the course of witness preparation for the fall meeting.

The discussion concluded with the Committee deciding to consider a discretionary provision for the fall meeting and resolving to explore in detail the case law surrounding sequestration and lawyer-witness preparation.

## V. Rule 702

The Chair opened the afternoon session by introducing a discussion of Rule 702. She first explained that the Committee would not be asked for any substantive vote on any rule amendment at the meeting, because such a vote was premature. She reminded the Committee that the topic of Rule 702 was brought to the Committee by the PCAST recommendation that the Committee draft a “best practices” manual or adopt a modified Committee Note regarding forensic feature comparison methods. She also reminded the Committee that PCAST was not the first to focus on Rule 702, explaining that the National Academy of Sciences also focused on the Committee Note to Rule 702 in its 2009 report, expressing concern about the application of experience-based expertise to forensic evidence. She also reminded the Committee that it had hosted a symposium on forensic evidence and Rule 702 at Boston College in 2017 and that Judge Schroeder had, thereafter, agreed to chair a subcommittee to study Rule 702 and forensic evidence. After study and recommendations by the subcommittee, the Committee determined that a free-standing evidence rule on “forensic evidence” would be ill-advised and that both an “amendment” to a Committee note and a “best practices manual” were outside the charter of the Committee. Thereafter, the Committee continued to study the possibility of amending Rule 702 itself to clarify the trial judge’s obligation to decide reliability pursuant to Rule 104(a) prior to admitting expert testimony. In addition, the Committee continued to explore the possibility of an amendment to Rule 702 that would require the trial judge to regulate an expert’s “overstatement” of the conclusions that may reliably be drawn from the principles and methods employed by the expert.

At its Denver symposium in fall 2018, the Committee heard from panelists about potential effects on expert testimony outside of the forensic arena were the Committee to pursue amendments to Rule 702, which is an all-purpose rule that controls admissibility of a wide range of expert opinion testimony. The Chair noted that all of the judges at the Denver symposium raised questions about amending Rule 702, suggesting that it was functioning properly in its current form. She reminded the Committee that the discussion at the Denver symposium had been captured in an issue of the *Fordham Law Review* and encouraged everyone to read the transcript and absorb the commentary that the Committee received there. After the symposium, the Committee determined that it would focus on the possibility of an amendment to Rule 702 that would limit “overstatement” by expert witnesses. The Chair noted that the Reporter had prepared two potential alternative drafts of an amendment to Rule 702 to deal with overstatement that were included in

the agenda materials. Finally, the Chair noted that the Committee would hear from additional judges concerning a possible amendment to Rule 702 at its upcoming fall 2019 meeting, at which point the Committee could decide how best to proceed. In the meantime, the Chair noted that the DOJ had circulated additional documentation to the Committee concerning its efforts to regulate overstatement in forensic testimony and that the Department wished to share its position concerning Rule 702 with the Committee.

The DOJ representative first noted that she had circulated a written response to the Reporter's case digest and apologized for pulling a wrong case and characterizing it as not about expert testimony at all. She further noted that her analysis of the case digest reveals a fundamental disagreement between DOJ and the Reporter about what constitutes "overstatement" by an expert in the forensic context. She found that many of the cited cases involved appropriate "source identification" testimony and that the Reporter equates "source identification" with testimony that there is a "match" and on this point they simply do not have a meeting of the minds. She then introduced Ted Hunt, the DOJ's expert in forensic evidence to describe DOJ initiatives with respect to forensic expert testimony.

Mr. Hunt began by telling the Committee that his sole focus is on expert forensic testimony and that he is fully immersed in the issues being considered by the Committee. He has witnessed a complete sea-change in forensics over the past 5-6 years. Forensic analysts have re-conceptualized what they do and DOJ has been collaborating with them to draft standards that reflect accurately what they do. He noted that this process takes time and is still evolving. Accordingly, he suggested that the federal cases in the Reporter's case digest do not fully reflect the progress that has been made in the past few years. He noted that the DOJ has implemented a uniform testimony monitoring program, and has developed testimonial standards for fourteen disciplines, with three more in development to address some of the more controversial methods discussed in the PCAST Report. Mr. Hunt suggested that it was difficult to observe the vast change that had taken place without following the subject on a daily basis but that there had been a steep decline after 2009 in the sometimes injudicious statements made by experts in the past. He also emphasized the efforts of outside expert organizations that are bringing hundreds of experienced professionals together to improve forensic evidence standards. Mr. Hunt suggested that the fruits of all of these labors were just beginning to manifest and that any potential amendment to the evidence rules should be tabled to allow time for these efforts to be fully realized. He suggested that any amendment to Rule 702 would be designed to address problems "that have left the building."

Mr. Hunt further emphasized that significant efforts were being made alongside the National Institute of Standards and Technology (NIST) to build empirical support into many forensic methods. For example, he noted that enormous work was ongoing to create an empirical basis for fingerprint evidence. He explained that most of the time, forensic practitioners are getting their analysis right, with very few false positives or negatives identified in their work. Importantly, these forensic examiners are not providing speculative opinions, but rather are providing reliable source identifications based upon past successful source identifications. He explained that these federal forensic examiners have successfully made thousands of correct source identifications or they would not be qualified to testify. Mr. Hunt conceded that these source identifications are inductive opinions that are not infallible. Still, he emphasized that the recipe for success in the

forensic arena is to allow DOJ, alongside outside groups, to continue making strides and to avoid a rule change to react to testimony that was being given five or six years ago.

One Committee member inquired whether the uniform language requirements apply only to federal expert witnesses. Mr. Hunt responded that they are directed to the federal examiners only, but that federal prosecutors may not make certain statements at trial. For example, prosecutors may not ask any expert witness for an opinion “to a reasonable degree of certainty.” Mr. Hunt noted that the DOJ was making a pitch to get state laboratories to incorporate the DOJ uniform language. There is, of course, no jurisdiction for the DOJ to force state labs to adopt federal requirements, but DOJ does have leverage over the federal prosecutors who may present the testimony of state analysts at trial and many states are voluntarily adopting the protocols.

The Reporter asked Mr. Hunt about recent cases like one in a Pennsylvania state court in which a bitemark examiner was allowed to give expert opinion testimony in a capital case. Mr. Hunt replied that the DOJ does not present bitemark evidence and that he is not aware of any lab with a bitemark examiner on staff. Any experts of this nature are coming out of private practice. Mr. Hunt suggested that even those private examiners could no longer claim infallibility because forensics got into trouble generally with quantitative sounding qualitative statements. He opined that forensic experts are being forced by judges to give testimony that is more modest.

The Federal Defender queried whether the DOJ was tracking and reviewing forensic testimony given in every single federal case nationwide. She expressed concern that some criminal defendants may be adversely impacted in the meantime if this is an edict or initiative that will take time to trickle down to the trial level. Mr. Hunt replied that the DOJ was engaging in “testimony monitoring” in ongoing cases, noting a 2017 case in which the testimony monitoring caught a nuanced defect in the testimony of a new DNA technician with respect to the expressed likelihood ratio. The prosecutor was notified of the error --- after trial but prior to sentencing --- to convey it to the court to allow correction if it was deemed material. Mr. Hunt claimed that the FBI is catching unwarranted claims by forensic experts in “real time,” either in person or by transcript review within 30 days.

The Reporter asked Mr. Hunt how often state lab technicians testify in federal court and how often trial judges direct them to testify “to a reasonable degree of certainty.” Mr. Hunt could not specify how many state examiners testify in federal court, but noted that there were only 9 federal examiners involved in the cases included in the Reporter’s case digest. He reiterated that federal prosecutors may not use the terminology “reasonable degree of certainty” and that it appears that trial judges are insisting on that verbiage when it appears. A Committee member offered that, in 11 years of presiding over criminal trials, the only federal expert witnesses he had seen in his courtroom were cell tower technology experts and that all others came from state laboratories (that would not be governed by DOJ uniform language protocols). Another Committee member agreed that the state laboratories do all the drug identification, although he suggested that there is rarely a dispute about drug identification.

Judge Dever, the Liaison from the Criminal Rules Committee informed the Committee that Criminal Rules was planning to host a mini-conference on May 6, 2019 to explore disclosure obligations for expert reports in criminal cases. He noted the vast difference between disclosure

obligations with respect to expert materials under Rule 16 of the Criminal Rules and under Rule 26 of the Civil Rules. He explained that the Criminal Rules Committee was exploring the possibility of strengthening the disclosure obligations in criminal cases to make them more analogous to disclosure on the civil side. He noted that the discovery issue may intersect with the concern over admissibility and invited Committee members to share any thoughts they might have in anticipation of the mini-conference concerning discovery of expert materials in criminal cases.

Dr. Lau of the FJC asked the DOJ representatives about two sentences in the memo that the DOJ circulated to the Committee prior to the meeting, in which it is stated that:

“[A]n 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 that the evidence provides sufficiently strong support 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.”

Dr. Lau suggested that “source identification” is a term of art and questioned whether it is consistent to say that there is “strong support” for a source identification *without* making a claim about other possible sources. The Reporter noted that the question is whether the jury can understand such a distinction.

Mr. Hunt replied that an examiner’s source identification is not speculative and is supported by an examiner’s training and testing proving that he or she can successfully source identify. This is not to say that the examiner is infallible, but rather that he or she has a proven track record that makes the opinion reliable. Judge Campbell queried how an examiner logically could state that a mark came from a particular defendant without saying it *didn’t* come from another person. Mr. Hunt replied that the examiner’s testimony was based upon an inductive inference that gives us confidence in a certain result and that an examiner’s claim would be made in a qualified way (albeit within the context of testimony about a “source identification”). He explained that feature comparison examiners are akin to the engineer accepted in *Kumho Tire*; they are not improperly claiming to base their opinions on science and instead rely upon a proven track record that shows they are probably right – which is all that Rule 702 requires. Judge Campbell asked whether the DOJ uniform language guidelines tell an expert how to respond to certain cross-examination questions. For example, Judge Campbell queried how a federal feature comparison expert would be required to respond to a cross question such as “Do you admit this print could have been made by any of 200 other people?” Judge Campbell suggested that it would seem very damaging for a forensic expert to answer that question in the affirmative, but suggested that the expert would be purporting to exclude others if they answered in the negative. Mr. Hunt acknowledged that there are not specific cross-examination guidelines, but reiterated that federal examiners may not claim infallibility or suggest a “zero error rate.” Mr. Hunt argued that defense attorneys have access to the DOJ documents on uniform language and may, on cross, force the expert to admit all the limitations on his testimony outlined in those documents.

Another Committee member expressed similar confusion about the DOJ characterization of “source identification.” While this Committee member understood the expert’s inability to claim

infallibility, he expressed confusion about how the DOJ testimony allowed for a “source identification” without “individualizing” the opinion. He emphasized the logical inability to identify one source *without excluding other sources*. Mr. Hunt once again stated that, based upon an examiner’s training and experience, there is sufficient evidence to make a source identification. The Committee member clarified that the question is the nature of the examiner’s claim or proposition during trial testimony (rather than its basis). Mr. Hunt noted that examiners throw out contaminated or degraded evidence and will not draw an inference about source identification without extremely strong compatibility. He stated that DOJ fully admits that its examiners are drawing inferences about feature comparison but that this is acceptable so long as the examiners are clear that this is what they are doing.

Joe Cecil, who arrived during the course of the afternoon session, expressed continuing concerns about the DOJ uniform language. (Dr. Cecil is heading the project for the FJC’s revised manual on scientific evidence.) Consistent with many of the questions by Committee members, Mr. Cecil stated that the source identification language has implications for the exclusion of others. Mr. Cecil explained that the American Association for the Advancement of Science (AAAS) sent a letter to DOJ requesting a change in the source identification language because there is no basis for testimony by an examiner that this particular sample belongs to that individual defendant. Mr. Cecil suggested that the DOJ was engaged in rhetorical chicanery in attempting to distinguish “source identification” and “individualization.” He expressed concern the DOJ was taking common language and assigning it a meaning not used in the everyday common parlance with which jurors are familiar. Mr. Hunt responded that the AAAS report on fingerprint analysis suggested that an examiner may testify that a particular ridge feature is “rare” even if he has no basis for saying *how rare*. Similarly, Mr. Hunt suggested that an examiner may testify that there is strong support for a source identification even if he cannot say exactly *how strong*. Mr. Cecil disagreed, suggesting that examiners are telling juries that a particular fingerprint belongs to a particular defendant. Mr. Hunt contended that examiners may draw an inference about source identification so long as they do not claim it is “scientific.” He emphasized that forensic feature comparison testimony is experience-based. Mr. Cecil responded that when an expert takes the stand and testifies for example that a particular defendant left a particular fingerprint, the examiner is making a scientific claim. Mr. Hunt stated that he and Mr. Cecil simply disagree, noting that Rule 702 “doesn’t play favorites” and places testimony based upon knowledge, skill, and experience on equal footing with scientific testimony.

The Chair remarked that the exchange between Mr. Cecil and Mr. Hunt related directly to the issues the Committee has been wrestling with regarding whether feature comparison methods, like fingerprinting, need black box studies supporting them to justify their presentation in court. She clarified that the PCAST report did not recommend that federal investigators cease relying on fingerprint evidence. Rather, it was concerned with the manner in which such evidence was being presented in court. Mr. Cecil agreed that PCAST was concerned about the way that fingerprint evidence was being presented in court in criminal cases. Mr. Hunt noted that there were black box studies for fingerprint evidence and toolmark evidence that yielded a 1% error rate. A Committee member noted that the low error rate in black box studies shows that there is skill behind these feature comparison methodologies that allows them to distinguish and identify marks and impressions, even if the premise of exclusion is not quantified. Still, the Committee member expressed concern about DOJ language claiming to make a “source identification” without

excluding other sources. Even if the black box studies show that these examiners are likely right, this specific claim seems logically inconsistent.

The Federal Defender expressed appreciation for the DOJ's efforts to fix injustice that has happened in the past and congratulated the Department on its laudable work to self-police with respect to forensic evidence. That said, she suggested that there is an inherent conflict of interest in allowing experts to be regulated by the entity that benefits from their testimony. She noted that Rule 702 makes the trial judge the gatekeeper – not the experts themselves. While she was very supportive of the efforts to perform testimony review, she opined that such review *after the fact* could not serve as an effective safety net without a rule carefully regulating admissibility on the front end. She noted that effective gatekeeping by the trial judge was the key to the *Daubert* standard.

The Chair suggested that the Committee should discuss the drafting options for an amendment to Rule 702 to see if they could facilitate gatekeeping. She pointed the Committee to potential drafting alternatives on pages 25 and 28 of the Reporter's memo on Rule 702 in the agenda materials that both seek to resolve the problem of expert overstatement. She noted that the first alternative would seek to strengthen the relationship between the expert's methodology and opinion by affirmatively requiring that the testimony be "limited to the opinions that may reasonably be drawn from the reliable application of the [expert's] principles and methods." The second would seek to handle the concern with a prohibition, allowing an expert to provide an opinion so long as she "does not overstate the opinions that result from the expert's reliable application of the principles and methods." The Chair raised the question of which formulation might be more effective and easier to comprehend. She questioned whether the prohibition on "overstatement" could have unintended consequences in areas like valuation, favoring or permitting *understatement* of value. The Reporter suggested that this should not be a concern because an "overstatement" amendment would be geared toward an expert's level of confidence in his or her opinion and would not affect valuation opinions per se. The Chair noted a First Circuit opinion in which a mechanical engineer opined that a fuel management system was "defective" based upon a visual inspection of it, the fact that it smoked when the engine was started, and the fact that a removed spark plug was covered in soot. The First Circuit found this opinion admissible based upon the engineer's experience. The Chair questioned how an amendment to Rule 702 to prohibit overstatement would affect cases like this one. The Reporter suggested that such an amendment would prevent an engineer like the one in the First Circuit case from stating that he was "100% positive" the fuel system was defective, but would not otherwise change the result. The Reporter noted that an experience-based opinion like the one described might be subject to attack for lacking sufficient basis under existing requirements of Rule 702.

Another Committee member suggested that he would strongly prefer the drafting alternative that is phrased as a prohibition on overstatement. He expressed concern that the affirmative drafting alternative might suggest that a trial judge should evaluate the correctness of an expert opinion and not only its reliability. Judge Campbell expressed concern that a prohibition on overstatement would require a trial judge to focus too closely on the exact words used by an expert during testimony. It could require judges to start scripting confidence for experts and would be subject to numerous objections. He suggested that the affirmative drafting alternative that focuses more on an expert's basis than his or her word choice would be preferable. Another

Committee member noted that the Supreme Court's *Joiner* opinion sought to regulate the circumstance in which there was too great a gap between an expert's methodology and opinion. The Reporter explained that the 2000 amendment to Rule 702 included subsection (d) to address that problem and that an amendment that simply restated that existing requirement would be duplicative and so ill-advised.

The DOJ representative opined that the overstatement proposals would not add value to the Rule and that Rule 702 already contains everything a trial judge needs to perform effective gatekeeping. She suggested that an amendment would simply be an excuse to add unnecessary language to the Committee Note to address perceived problems with forensic feature comparison testimony. She also expressed concerns about trial judges micromanaging the precise language used by testifying experts and stressed the significance of the DOJ initiatives to strengthen forensic testimony. Another Committee member remarked that an overstatement amendment would not be limited to forensic experts and that it could be used to limit a treating physician's ability to report a diagnosis as "extremely likely."

Another Committee member opined that the solution to the overstatement problem is solid cross-examination during which the adversary calls an expert to task for going too far. This Committee member expressed concern about drafting a rule to deal with an issue that should be handled by competent counsel under existing conditions. He expressed a preference for no amendment to Rule 702, but suggested that the drafting alternative phrased as a prohibition might be superior if it were expressly directed to the expert's "degree of certainty" concerning an opinion. Mr. Hunt expressed concern about attempting to police an expert's degree of confidence, suggesting that there is an important distinction between an expert's personal degree of confidence about an opinion and what science can prove. Another Committee member agreed with the idea that the adversary system should deal with overstatement through cross-examination. He noted that the role of the trial judge is to exercise gatekeeping and to determine whether opinion testimony gets past the threshold of admissibility, but that the form in which it is presented should thereafter be left to the adversary system. He expressed concern that an amendment would put too much responsibility on the Rules and not enough on the lawyers.

The Reporter acknowledged these concerns, but suggested that they proved too much. On the theory that the adversary system should take care of these issues, the Rule could freely admit *all* expert testimony and leave it to the lawyers to discredit it. But the key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place. A Committee member agreed, but opined that Rule 702's existing regulation of reliability was sufficient to address these concerns and reiterated that an amendment to regulate the precise words to be used by expert witnesses would take regulation a step too far.

The Reporter noted some irony in the discussion given that some participants suggested that the existing Rule 702 *already* gives the trial judge sufficient authority to regulate overstatement, while others suggested that overstatement regulation would be a *new* limit that is beyond the reach of the trial judge. He suggested that it would seem impossible to have it both ways. The Chair summarized the concerns of Committee members that the first affirmative drafting alternative could create more work for trial judges without accomplishing anything to the

extent that the reliable application of methodology is already required by Rule 702. She suggested that the second prohibitive drafting alternative could be considered new, but might require a trial judge to micromanage language and may not work effectively outside the arena of forensic expert testimony. The Reporter noted that he had given a recent presentation to the Lawyers for Civil Justice concerning problems with expert testimony on the civil side and that civil defense lawyers also sought additional regulation of overstatement, outside the arena of forensic evidence. He stated that the question for the Committee should be whether the trial judge should be monitoring overstated testimony by experts consistent with their other *Daubert* gatekeeping obligations. He noted the possibility that a lawyer can cross-examine thoroughly without removing the impact of overstatement on lay jurors, as was evidenced by expert testimony on hair identification --- as to which the DOJ has recognized that its experts overstated their conclusions in hundreds of cases of convicted defendants.

The Federal Defender offered that Rule 702 does not currently address the problem of experts overstating their conclusions and that respected scientists are telling the Committee that this is a big problem in connection with forensic feature comparison testimony in particular. She suggested that an amendment to Rule 702 regulating overstatement will not require trial judges to parse words or script testimony; instead, it will alert the trial judge to pay attention to this problem. Without an amendment, trial judges will not be attuned to this concern because the existing provisions of Rule 702 do not cover it. Another Committee member clarified that he was not advocating the abrogation of the gatekeeping role in *Daubert* by any means, but that he remained concerned that an overstatement amendment would lead to trial judges editing expert testimony as a practical matter.

Judge Campbell proposed another potential drafting alternative for an amendment to Rule 702 that would prevent an expert from “claiming a degree of confidence in an opinion that cannot be drawn from the principles and methods.” The Reporter responded that an emphasis on “degree of confidence” was promising and that he would prepare that language as a drafting alternative for the next meeting.

The Chair raised the issue of medical experts’ longstanding practice of testifying to “a reasonable degree of medical certainty” and noted that the draft Committee Note to an amended Rule 702 would suggest the retirement of that verbiage. Judge Schroeder, Chair of the Rule 702 subcommittee, explained that he had a law clerk conduct some research into this issue. He found that the “reasonable degree of certainty” language originated in 1916 in the context of future damages in a medical malpractice case. By 1960, he noted that 22 states had adopted the verbiage. And by 1970, the terminology appeared in the case law of 48 states. He noted that the draft Advisory Committee note to a Rule 702 amendment proscribes such terminology “unless required by applicable law” to account for situations in which federal courts are handling diversity cases arising in states with such terminology. He directed the Committee’s attention to a law review article dealing with such issues entitled *When Daubert Gets Erie* and pointed out the different approaches to the issue taken by courts, depending upon whether they characterize the question as one of witness competency or admissibility. He further noted that states often adopt Federal Evidence Rules and suggested that a change in the federal approach to “reasonable degree of certainty” may have an effect on state practice as well. He concluded that the issue of state law requirements of opinions to a “reasonable degree of certainty” was one the Committee should

investigate more deeply in deciding how to proceed with Rule 702. Judge Kuhl expressed concern about the portion of the draft Advisory Committee note proscribing use of “reasonable degree of certainty” language to the extent that it suggests that some state standards of causation are irrational and to the extent that it might cause litigants to seek federal court in such cases. The Reporter responded that the draft Committee note regarding the “reasonable degree of certainty” language was limited, and should be limited, to the forensics context.

Another Committee member inquired whether any state evidence rules had added provisions to regulate expert overstatement. The Reporter promised to check on any state counterparts that might seek to regulate overstatement and to follow up with the Committee at the next meeting. The Reporter thanked Mr. Hunt for attending the meeting on behalf of the DOJ and thanked the DOJ for being so helpful throughout the process of considering a change to Rule 702. He also thanked Joe Cecil for attending and for offering his valuable perspective on the issue.

The Chair reiterated that there would be no vote taken on the Rule 702 issue at this meeting and promised that the Committee would hear from another round of judges at its fall 2019 meeting. Until then, she suggested that Committee members should think about whether the time is ripe for an amendment or whether postponement to allow forensic standards to develop is the better course.

## **VI. Closing Matters**

The Chair thanked everyone for their contributions and noted that the fall meeting of the Committee will be held on October 25, 2019 at Vanderbilt University in Nashville, TN. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra  
Liesa L. Richter

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**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
Meeting of June 25, 2019 | Washington, DC

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Washington, DC, on June 25, 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  
Elizabeth J. Shapiro, Esq.\*  
Judge Srikanth Srinivasan

\*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew D. Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

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

Advisory Committee on Bankruptcy Rules –  
Judge Dennis R. Dow, Chair  
Professor S. Elizabeth Gibson, Reporter  
Professor Laura Bartell,  
Associate Reporter

Advisory Committee on Evidence Rules –  
Judge Debra Ann Livingston, Chair  
Professor Daniel J. Capra, Reporter

Advisory Committee on Criminal Rules –  
Judge Donald W. Molloy, Chair  
Professor Sara Sun Beale, Reporter  
Professor Nancy J. King,  
Associate Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; and Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

## OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Washington, DC. This meeting is the last for two members, Judge Susan Graber and Judge Amy St. Eve. Judge Campbell thanked Judge Graber for her contributions as a member of the Committee and for her service as liaison to the Advisory Committee on Bankruptcy Rules. Judge Campbell thanked Judge St. Eve for her contributions as a member of the Committee and her leadership on the Task Force on Protecting Cooperators and wished her luck on her new assignment as a member of the Budget Committee. Judge Campbell also noted this would be the last Standing Committee meeting for Judge Donald Molloy, Chair of the Advisory Committee on Criminal Rules, and thanked him for his many years of service to the rules process. Judge Campbell also recognized Scott Myers for twenty years of federal government service, which has included time as a member of the United States Marine Corps, a law clerk, and counsel to the Rules Committees.

Rebecca Womeldorf reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that the rules adopted by the Supreme Court on April 25, 2019 will go into effect on December 1, 2019 provided Congress takes no contrary action.

## 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 January 3, 2019 meeting.**

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules.

### *Action Items*

*Final Approval of Proposed Amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing).* Judge Chagares asked the Committee to recommend final approval of proposed amendments to Rules 35 and 40 which will set length limits applicable to a response filed to a petition for en banc review or for panel rehearing. The proposed amendments were published for public comment in August 2018. The one written comment received was supportive and Judge Chagares reported receiving informal favorable comments from colleagues. No revisions were made after publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 35 and Rule 40 for approval by the Judicial Conference.**

*Publication of Proposed Amendments to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2.* Judge Chagares asked the Committee for approval to publish for public comment proposed amendments to Rule 3(c) regarding contents of the notice of appeal, along with conforming amendments to Rule 6 and Forms 1 and 2. Judge

Chagares noted by way of background the recent Supreme Court decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act.

Judge Chagares explained that this proposal originated in a 2017 suggestion that pointed to a problem in the caselaw concerning the scope of notices of appeal. Some cases, the suggestion noted, apply an *expressio unius* approach to interpreting the notice of appeal. Under that approach, for example, if the notice of appeal designates a particular interlocutory order in addition to the final judgment, such courts might limit the scope of the appeal to the designated order rather than treating the notice as bringing up for review all interlocutory orders that merged into the judgment. Extensive research revealed confusion on the issue both across and within circuits. Professor Hartnett noted another problematic aspect of the caselaw: numerous decisions treat notices of appeal that designate an order that disposed of all remaining claims in a case as limited to the claims disposed of in the designated order. Judge Chagares noted that the Advisory Committee's goal in proposing amendments to Rule 3(c) is to ensure that the filing of a notice of appeal is a simple, non-substantive act that creates no traps for the unwary.

Professor Hartnett reviewed the rationale behind the Advisory Committee's proposed amendments. Professor Hartnett noted that one source of the problem was Rule 3(c)(1)(B)'s current requirement that a notice of appeal "designate the judgment, order, or part thereof being appealed." Some have read this provision to require designation of any order that the appellant wishes to challenge on appeal, rather than simply designation of the judgment or order that serves as the basis of the court's appellate jurisdiction and from which time limits are calculated.

The Advisory Committee proposed four interrelated changes to Rule 3(c)(1)(B) to address the structure of the rule and to provide greater clarity. First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the terms "judgment" and "order" are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed." Finally, the phrase "part thereof" is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result requires the appellant to designate the judgment – or the appealable order – from which the appeal is taken. To underscore the distinction between an appeal from a judgment and an appeal from an appealable order, Professor Hartnett noted, the proposed conforming amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and a Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court).

Other proposed changes address the merger rule. A new paragraph (4) was added to underscore the merger rule, which provides that when a notice of appeal identifies a judgment or order, this includes all orders that merge into the designated judgment or order for purposes of appeal. The Advisory Committee also added to the Committee Note a paragraph discussing the

merger principle. In addition, the Advisory Committee added a fifth paragraph to the rule addressing two kinds of scenarios where an appellant’s designation of an order should be read to encompass the final judgment in a civil case. In one scenario, some pieces of the case are resolved earlier, and others only later; a notice of appeal designating the order that resolves all remaining claims as to all parties should be read as a designation of the final judgment. In the other scenario, a notice of appeal designates the order disposing of a post-judgment motion of a kind that re-started the time to appeal the final judgment; that notice should be read to encompass a designation of the final judgment. In both scenarios, the proposed rule operates whether or not the court has entered judgment on a separate document.

A new sixth paragraph was added providing that “[a]n appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.” The final sentence was added to expressly reject the *expressio unius* approach. The Advisory Committee settled on this approach to avoid the inadvertent loss of appellate rights while empowering litigants to define the scope of their appeal.

Finally, the Advisory Committee recommended conforming changes to Rule 6 to change the reference to “Form 1” to “Forms 1A and 1B,” and conforming changes to Form 2 to reflect the deletion of “part thereof” from Rule 3(c)(1)(B). The Advisory Committee consulted with reporters to the Advisory Committee on Bankruptcy Rules regarding the amendments to Rule 6.

A member asked why the Advisory Committee referenced but did not define the merger rule in the rule text. Professor Hartnett explained that the Advisory Committee did not want to limit the merger principle’s continuing development by codifying it in the rule. The rule’s reference to the merger rule will prompt an inexperienced litigant to review the Committee Note for more information. Judge Campbell observed that an attempt to define the merger rule in the Rule text could change current law by overriding existing nuances. Two judge members expressed concern that the Rule needs to be understandable to pro se litigants and unsophisticated lawyers. One of these members asked why the Rule text could not state in simple terms the outlines of the merger principle – e.g., “an appeal from a final judgment brings up for review any order that can be appealed at that time”? Professor Hartnett responded that the Advisory Committee was concerned that such a formulation in the Rule text might alter current law; he stated that the Advisory Committee wanted to alert litigants to the merger rule in the rule itself and provide additional guidance for litigants in the Committee Note. An attorney member suggested that the proposed draft offered the most elegant solution – using Rule text that serves as a placeholder for the merger doctrine. A judge member expressed agreement with this view.

That judge member next asked why the Advisory Committee proposed to retain, in new subdivision (c)(6), the appellant’s ability to designate only part of a judgment or order. Professor Hartnett suggested that a designation of just part of a judgment might serve the interest of repose by assuring other parties that the scope of the appeal was limited. Professor Cooper offered as an example an instance in which the plaintiff’s claims against both of two defendants have been dismissed but the plaintiff has no wish to challenge the dismissal as to one of the defendants; a

limited notice of appeal, in such a case, would reassure the defendant whom the plaintiff no longer wishes to pursue.

A judge asked about the potential for over-inclusion in notices of appeal as a result of the proposed amendments, and whether there is a benefit to requiring that parties be specific about what they are appealing. Professor Hartnett responded that the notice is not the place to limit the issues on appeal. A notice is just a simple document transferring jurisdiction from the district court to the appellate court. The scope of the appeal can be clarified in the ensuing briefing.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rules 3 and 6 and Forms 1 and 2.**

Professor Struve congratulated the Advisory Committee and Professor Hartnett for a clever solution to a very tough problem. Professor Hartnett thanked Professor Cooper for his assistance.

*Publication of Proposed Amendments to Rule 42(b) (Voluntary Dismissal).* Judge Chagares stated that the Advisory Committee sought publication of proposed amendments to Rule 42(b). Rule 42(b) currently provides that the clerk “may” dismiss an appeal if the parties file a signed dismissal agreement. Prior to the 1998 non-substantive restyling of the Appellate Rules, Rule 42(b) used the word “shall” instead of “may” dismiss. Following the 1998 restyling, some courts have concluded that discretion exists to decline to dismiss. Attorneys cannot advise their clients with confidence that an action will be dismissed upon agreement by the parties. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word “may” to “must” in new Rule 42(b)(1) for stipulated dismissals.

Judge Chagares explained that the phrase “no mandate or other process may issue without a court order” in current Rule 42(b) has caused confusion as well. Some circuit clerks have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court. These issues are avoided – and the purpose of that language served – by deleting the phrase and instead stating directly, in new subsection (b)(3): “A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.”

A member suggested that language from the proposed Committee Note be moved to the rule itself, creating a new subdivision stating that the Rule does not affect any law that requires court approval of a settlement. Four other members expressed agreement with the idea of putting such a caveat into the Rule text. A motion was made and seconded to amend the proposal to include such a caveat; the motion passed. The Committee discussed how to draft the caveat; it started by considering language that had been used in a prior draft, as follows: “If court approval of a settlement is required by law or sought by the parties, the court may approve the settlement or remand to consider whether to approve it.” Following a break and extensive discussion of

possible language, including suggestions from the style consultants, Judge Chagares proposed instead to add a new subdivision (c) which would modify both preceding paragraphs of Rule 42 and state as follows: “(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.” The Committee Note was revised to add a cite to “F.R.Civ.P. 23(e) (requiring district court approval)” and to explain that the “amendment replaces old terminology and clarifies that any order beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order.” By consensus, this new subdivision (c) was incorporated into the proposed amendments to Rule 42, upon which the Committee proceeded to vote.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 42.**

### *Information Items*

*Possible Additional Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing).* Judge Chagares advised that the Advisory Committee continued to study whether amendments were warranted to clarify and codify practices under Rules 35 and 40.

*Rule 4 (Appeal as of Right – When Taken).* Judge Chagares explained that the Advisory Committee has been considering whether to amend Rule 4(a)(5)(C) (which deals with extensions of time to appeal) in light of the Court’s decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). In *Hamer*, the Court distinguished time limits imposed by rule from those imposed by statute, characterizing time limits set only by rules as non-jurisdictional procedural limits. Professor Hartnett noted that the Advisory Committee tabled its consideration of the issue pending the Court’s decision in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). In *Nutraceutical*, the Court held that a mandatory claim-processing rule was not subject to equitable tolling. After reviewing this holding, the Advisory Committee decided not to take action on a possible amendment to Rule 4(a)(5)(C).

*Potential Amendment to Rule 36.* The Advisory Committee considered 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. Consideration was tabled pending the Court’s decision in *Yovino v. Rizo*, 139 S. Ct. 706 (2019), addressing whether a federal court may count the vote of a judge who dies before the decision is issued. The Court answered this question in the negative, explaining that “federal judges are appointed for life, not for eternity.” Since the Court has resolved the question, the Advisory Committee removed this item from its docket.

*Suggestion Regarding the Railroad Retirement Act and Civil Rule 5.2.* Judge Chagares noted that the U.S. Railroad Retirement Board’s General Counsel submitted a suggestion that cases brought under the Railroad Retirement Act should be among the cases excluded (under Civil Rule 5.2) from certain types of electronic access. Petitions for review of the Railroad Retirement Board’s final decisions go directly to the courts of appeals, not the district courts; thus, any change would need to be to the Federal Rules of Appellate Procedure. Judge Chagares has appointed a subcommittee to consider the suggestion and to investigate whether any other

benefit regimes would warrant similar treatment. The subcommittee is consulting with the Committee on Court Administration and Case Management.

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

Judge Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules.

### *Action Items*

Judge Dow first addressed proposed amendments to three rules published for comment last August: Rule 2002 (Notices), Rule 2004 (Examination), and Rule 8012 (Corporate Disclosure Statement).

*Final Approval of Proposed Amendments to Rule 2002 (Notices).* Judge Dow explained that Rule 2002 generally deals with requirements for providing notice in bankruptcy cases, and that the proposed changes affect three subparts of the Rule. The first change involves Rule 2002(f)(7), which currently directs notices to be given of the “entry of an order confirming a chapter 9, 11, or 12 plan.” Although it is unclear why the rule does not currently require notice of the entry of a Chapter 13 confirmation order, the Advisory Committee concluded that notice of a confirmation order is appropriate under all bankruptcy chapters. The one comment addressing this change argued that the amendment was not needed because at least one court already serves orders confirming Chapter 13 plans. Because that comment addressed a local practice only, however, the Advisory Committee recommended final approval of the amendment as proposed.

The Committee had no questions and Judge Campbell suggested that the Committee vote separately on the proposed amendments to each of the three relevant subparts of Rule 2002. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(f)(7) for approval by the Judicial Conference.**

The second change pertains to Rule 2002(h) which authorizes the court to direct that certain notices to creditors in chapter 7 cases be sent only to creditors that timely file a proof of claim. The proposed amendment would allow the court to exercise similar discretion in chapter 12 and 13 cases and would also conform time periods in the subdivision to the respective deadlines for filing proofs of claim set out in recently amended Rule 3002(c).

One of the comments on Rule 2002(h), while generally supportive, raised two issues. The first issue concerned whether the clerk’s noticing responsibilities in a chapter 13 case should extend 30 days beyond the proof-of-claim deadline to give the debtor or trustee time to file a claim on behalf of a creditor. The Advisory Committee rejected this suggestion because the rule does not currently address such a situation in a chapter 7 case and the purpose of the proposed amendment is simply to extend the rule to chapter 12 and 13 cases. In addition, because the rule is permissive, a court already has authority to continue to provide notices until after the expiration of a debtor or trustee’s derivative authority to file a proof of claim on behalf of a creditor.

The second issue raised was whether notice of the proposed use, sale, or lease of property of the estate and the hearing on approval of a compromise or settlement should be given to all

creditors otherwise entitled to service of the noticed motion, even if they have not timely filed a proof of claim. No justification was provided for this suggestion and the Advisory Committee saw no reason to amend the rule in this respect. It recommended that Rule 2002(h) be approved as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(h) for approval by the Judicial Conference.**

The final amendment to Rule 2002 concerned subdivision (k) which addresses providing notices under specified parts of Rule 2002 to the U.S. trustee. The change adds a reference to subdivision (a)(9) of the rule, corresponding to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The change ensures that the U.S. trustee will continue to receive notice of this deadline.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(k) for approval by the Judicial Conference.**

Judge Dow next addressed the proposed amendments to Rule 2004. He explained that the rule provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case, and that it includes provisions to compel the attendance of witnesses and the production of documents. The Advisory Committee received a suggestion that the rule be amended to impose a proportionality limitation on the scope of the production of documents and electronically stored information.

The Advisory Committee considered this issue over three meetings. By a close vote, the Committee ultimately decided not to add proportionality language because the rule already allows the court to limit the scope of a document request, and because the change might prompt additional litigation. The Advisory Committee did, however, decide to propose amendments to Rule 2004(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.

After considering the comments, the Advisory Committee unanimously approved the amendments to Rule 2004(c) as published. Two of the three comments submitted supported the proposal as published. Although a third comment urged inclusion of proportionality language, the Advisory Committee declined to revisit that issue as it had been carefully considered and rejected by the Advisory Committee prior to publication.

Judge Campbell recalled discussion at the Advisory Committee meeting of the fact that debtor examinations in bankruptcy are intended to be broad in scope and of a concern that adding proportionality language might signal an intent to limit those examinations. Judge Dow agreed.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2004 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendments to Rule 8012 (Corporate Disclosure Statement)*. Current Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a statement that there is no such corporation). It is based on Federal Rule of Appellate Procedure 26.1. Amendments to Rule 26.1 were promulgated by the Supreme Court on April 25, 2019 and are scheduled to go into effect December 1, 2019 absent contrary action by Congress.

The Advisory Committee's proposed amendments to Rule 8012 track the relevant amendments to Appellate Rule 26.1. An amendment to 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors, and a new subsection (b) requires disclosure of debtors' names and requires disclosures about nongovernmental corporate debtors. Publication of the proposed amendments to Rule 8012 elicited three supportive comments and no suggestions for revision.

Judge Dow noted that, during the consideration of the proposed amendments, one member of the Advisory Committee suggested a need for additional amendments that would extend the Rules' disclosure requirements to a broader range of entities. Judge Dow said such an undertaking would require coordination with the other advisory committees and should not delay the current round of amendments, which are designed to conform Rule 8012 to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 8012 for approval by the Judicial Conference.**

Judge Dow then addressed several proposed amendments that the Advisory Committee considered to be technical in nature and appropriate for the Standing Committee's final approval without publication.

*Proposed Amendments to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)*. Rule 2005(c), which addresses conditions to ensure attendance and appearance, refers to provisions of the federal criminal code (previously codified at 18 U.S.C. § 3146) that were repealed more than 30 years ago. The Advisory Committee considered the matter and recommended a technical amendment updating the statutory citation in the rule to 18 U.S.C. § 3142, the part of the criminal code that now addresses conditions to ensure attendance or appearance. Judge Dow explained, however, that after the Standing Committee's agenda book was published there was discussion among the reporters about whether such a change would be appropriate without publication.

Professor Struve explained her concerns with a technical amendment. Current Section 3142 contains a number of features that were not present in the old Section 3146. For example, it refers to statutory authorization for the collection of DNA samples. Presumably it is implausible to think that a debtor apprehended under Rule 2005 would be subjected to DNA collection as a condition of release. But, she suggested, such differences between the former and

present statutory provisions provided reason to send the proposed amendment through the ordinary process of notice and comment.

Professor Capra raised the issue of whether statutory citations should be included in the Rules at all given that statutes change. Perhaps it would be better for the Rule to direct the court to consider “the applicable requirement in the criminal code” in considering conditions to compel attendance or appearance. Professor Kimble suggested that a general reference would not help readers. If a particular statute is relevant it should be cited and updated as needed.

A member suggested that there was little risk that inapposite provisions of § 3142 would be applied under Rule 2005(c), and Professor Bartell stated that bankruptcy debtors are not arrestees, so there is not a realistic danger that they would be subjected to DNA collection.

Judge Campbell observed that the Committee must decide whether citation to an updated statutory cross reference was appropriate, or whether the prior statutory language should be inserted into the rule. In addition, even if only a statutory cross reference was appropriate, the Committee also needed to decide the separate issue of whether approval would be appropriate without public comment.

Professor Garner suggested that “applicable” or “relevant” be inserted prior to the Rule’s reference to the “provisions and policies of” the statutory provision.

After further discussion Judge Campbell observed that it seemed clear that the Committee did not support amending the rule as a technical matter without publication, and Judge Dow amended the request on behalf of the Advisory Committee to seek the Standing Committee’s approval to publish the amendment for public comment, with a slight revision. Instead of a simple change to replace the existing statutory citation with the new statutory citation, the proposed amendment to Rule 2005(c) would state that in determining the conditions that would reasonably ensure attendance the court would be “governed by the **relevant** provisions and policies of title 18 U.S.C. § 3142.” In addition, a new sentence was added to the Committee Note: “Because 18 U.S.C. § 3142 contains provisions bearing on topics not included in former 18 U.S.C. § 3146(a) and (b), the rule is also amended to limit the reference to the ‘relevant’ provisions and policies of § 3142.”

**The Committee approved the proposed amendments to Rule 2005(c) for publication in August 2019.**

Judge Dow next discussed proposed technical conforming amendments to Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs). The amendments would revise these Rules to accord with the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court’s electronic-filing system and would revise Rule 8015 to accord with the pending amendment to Rule 8012.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendments to Rules 8013, 8015, and 8021 for approval by the Judicial Conference without prior publication.**

The final recommended technical change concerned Official Form 122A-1, the first part of a two-part form used to calculate the debtor's disposable income and to determine whether it is appropriate for the debtor to file under Chapter 7 of the Bankruptcy Code. An instruction at the end of Official Form 122A-1 tells the filer not to complete the second part of the form (Official Form 122A-2) if the box at line 14a is checked. Line 14a, in turn, should be checked if the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. The Advisory Committee received a suggestion that the instruction at the bottom of the form is often overlooked, and that it should also be included at the end of line 14a. The Advisory Committee agreed that the suggested amendment would make it more likely that the forms would be completed correctly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendment to Official Form 122A-1 for approval by the Judicial Conference without prior publication.**

Professor Gibson next reported on three proposed amendments recommended for publication.

Rule 3007 (Objections to Claims). The proposed amendment addresses the narrow issue of how credit unions should be served with objections to their claims. Rule 3007 was amended in 2017 to clarify that objections to claims are generally not required to be served in the manner of a summons and complaint, as provided by Rule 7004, but instead may be served on most claimants by mailing them to the person designated on the proof of claim. Rule 3007 contains two exceptions to this general procedure, one of which is that "if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h)." Rule 3007(a)(2)(A)(ii). The purpose of this exception is to comply with a legislative mandate (enacted as part of the Bankruptcy Reform Act of 1994 and set forth in Rule 7004(h)) providing that an "insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)" is entitled to a heightened level of service in adversary proceedings and contested matters.

The Advisory Committee concluded that the exception set out in Rule 3007(a)(2)(A)(ii) is too broad because it does not qualify the term "insured depository institution" by the definition set forth in section 3 of the Federal Deposit Insurance Act, as is the case in Rule 7004(h) itself. Rule 7004(h) was added by the Bankruptcy Reform Act of 1994 which required special service requirements for insured depository institutions as defined under the FDIA. Because the more expansive Bankruptcy Code definition of "insured depository institution" set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under Rule 3007(a)(2)(A)(ii). The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 3007.**

Rule 7007.1 governs disclosure statements in the bankruptcy court. Like the amendment to Rule 8012 discussed earlier, the proposed amendment to Rule 7007.1 would conform the rule to the pending amendments to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7007.1.**

The proposed amendment to Rule 9036 would implement a suggestion from the Committee on Court Administration and Case Management that high-volume-paper-notice recipients (initially defined as recipients of more than 100 court-generated paper notices in a calendar month) be required to sign up for electronic service, subject to exceptions required by statute.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. However, only courts may serve or give notice to an entity at an electronic address registered with the Bankruptcy Noticing Center as part of the Electronic Bankruptcy Noticing program.

Finally, the title of Rule 9036 is changed to "Notice and Service by Electronic Transmission" to better reflect its applicability to both electronic noticing and service. The rule does not preclude noticing and service by other means authorized by the court or rules.

Proposed amendments to Rule 2002(g) and Official Form 410 were previously published in 2017. These proposed amendments (like the proposed amendments to Rule 9036) are designed to increase electronic noticing and service. The proposed amendments to Rule 2002 and Form 410 would create an 'opt-in' system at an email address indicated on the proof of claim. The Advisory Committee has not yet submitted those proposed amendments for final approval, however, because the comments recommended a delayed effective date of December 1, 2021 to provide time to make needed implementation changes to the courts' case management and electronic filing system. Because that is the same date the proposed changes to Rule 9036 would be on track to go into effect if published this summer, the recommended changes to Rules 2002(g) and 9036 and Official Form 410 could go into effect at the same time.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 9036.**

*Information Items*

Professor Bartell reported on two information items, beginning with the ongoing project to restyle the bankruptcy rules. The style consultants provided an initial draft of Part I to the reporters in mid-May, and the reporters have given the consultants comments on that draft. Professor Bartell reported that she and Professor Gibson have been delighted at what the style consultants have done. She thinks the bench and bar will welcome the improvements to the Rules. She praised the style consultants for their work. When the consultants respond to the reporters' comments and produce another draft, the Restyling Subcommittee will consider it. The consultants will also be producing an initial draft of Part II soon, which will be handled in the same way.

The second information item concerns part of a larger project within the judiciary to address the problem of unclaimed funds in the bankruptcy system. The Committee on the Administration of the Bankruptcy System created an "Unclaimed Funds Task Force" to address this issue. Among other things, the Unclaimed Funds Task Force proposed adoption of a Director's Bankruptcy Form (along with proposed instructions and a proposed order) for applications for withdrawal of unclaimed funds in closed bankruptcy cases. The Advisory Committee concluded that standard documentation would be appropriate, made minor modifications to the draft submitted by the task force, and recommended that the Director of the Administrative Office adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of [uscourts.gov](http://uscourts.gov) and will be relocated to the list of Official and Director's Bankruptcy Forms on December 1, 2019.

Judge Campbell praised the restyling effort and observed that the Advisory Committee is on track to consider the first batch of restyled rules at its fall 2019 meeting. Judge Campbell noted that the time is ripe to send a letter to the appropriate congressional leaders making sure they know the restyling effort is underway.

**REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Bates provided the report of the Advisory Committee on Civil Rules, with support from Professors Cooper and Marcus. Judge Bates noted the Advisory Committee had two action items, one for final approval and the second for publication, and several information items.

*Action Items*

*Rule 30(b)(6)*. The Advisory Committee recommended final approval of an amendment to Rule 30(b)(6), the rule that deals with depositions of an organization. This issue drew intense interest from the bar. After the proposed amendment was published for comment in August 2018, two public hearings were held. The first hearing in Phoenix drew twenty-five witnesses. Fifty-five witnesses testified at the second hearing in Washington, DC. Some 1780 written comments were submitted, although that number overstates the substance of the comments as many of those comments repeated points made in previous comments.

After considering the public comments, the Advisory Committee approved a modified version of the proposed amendment that was published for comment. Compared with the current rule, the central change made by the revised proposal is to require the party taking the deposition and the organization to confer in advance of the deposition about the matters for examination. Many commenters observed that conferring in advance of the deposition reflects best practice; this modest proposed rule change did not cause great concern from commenters and was uniformly supported by the Advisory Committee. The Advisory Committee made several changes to the proposed amendment as compared with the version that went out for comment. It deleted the proposed requirement that the parties confer about the identity of the witnesses that the organization would designate, and it also deleted the requirement that the parties confer about the “number and description of” the matters for examination. Because the conferring-in-advance requirement would be superfluous in connection with a deposition by written questions, the Advisory Committee added to the Committee Note the observation that the duty to confer about the matters for examination does not apply to depositions by written questions under Rule 31(a)(4).

Other proposed changes to Rule 30(b)(6) were the subject of active discussion and debate, although the Advisory Committee ultimately decided not to recommend them. One change considered by the Advisory Committee would have required the organization to identify the designated witness or witnesses at some specified time in advance of the deposition. Another change would have added a 30-day notice requirement for 30(b)(6) depositions. It was agreed that these changes would have likely required re-publication. After a great deal of discussion, the Advisory Committee determined, in a split but clear vote, not to pursue these amendments.

Professor Marcus agreed with the summary of the process of considering changes to Rule 30(b)(6) as related by Judge Bates and noted that the Standing Committee had also engaged in a vigorous discussion of the issues at previous meetings. Judge Bates noted that the Advisory Committee voted to approve the Committee Note language line-by-line, and virtually word-by-word. The ultimate proposal reflects the hard work of a subcommittee chaired by Judge Joan Ericksen.

A member voiced support for changes to a rule both sides of the bar agree is problematic but wondered whether much is accomplished by imposing a requirement to confer without specifying what must be discussed; this member suggested that the proposed amendment had “no meat on the bone.” The Committee Note could provide additional guidance, but the current version does not do so. The member noted the difficulty in changing the rule given the differing views on what should be a required disclosure prior to a deposition. A judge member echoed the concern that the modest amendment does not add that much given that Rules 26 and 37 provide a process to handle any objection to a 30(b)(6) notice.

Judge Bates agreed that the amendment is modest and will not lead to a wholesale change in 30(b)(6) deposition practice. The amendment does put existing best practice in the rule itself, which may lead to improvements in some cases. The Advisory Committee ended up with this limited recommendation because it found agreement within the bar on this narrow issue, while in general other suggestions were met with intense disagreement from one side or the other.

A judge member stated that he understood the disagreement and the reasons for it but wondered why the Committee should endorse such a limited change given the presumption that something notable has changed. Judge Campbell responded that often rules are written for the weakest lawyers and gave his view that the modest change would improve practice in some cases. In his experience, the most frequent complaint from one side is that the witness is not adequately prepared while the most frequent complaint by the other is that the notice is not precise enough on what the matters are for examination. These complaints usually come to him from the lawyers who do not talk to each other in advance of the deposition. He has often thought if you could get people to talk in advance of the deposition both sides would have greater understanding going into the deposition and a better-prepared witness. It is a marginal change but one that will help. Judge Bates stated that this was the sentiment of the Advisory Committee.

Responding to the suggestion that Rules 26 and 37 already provide a process to handle disputes over Rule 30(b)(6) depositions, Professor Marcus noted that those rules address the handling of disputes that have already become combative; the proposed amendment to Rule 30(b)(6), by contrast, would require the parties to confer *before* conflict has a chance to arise. A member noted that he viewed the amendment as a warning of sorts not to engage in gamesmanship. If this does not work, this rule will come back to the Committee. Judge Bates noted that this rule comes back to the Advisory Committee every few years. The Federal Magistrate Judges Association, Professor Marcus noted, supported the proposed amendment while also suggesting that further changes might be warranted depending on how this change works in practice.

Professor Beale complimented the Advisory Committee on the consideration of a huge amount of input received from the public. She stated that Professor Marcus's presentation of that input could serve as a model for how to handle a large volume of comments. Judge Bates and Professor Coquillette echoed similar praise for the work of the Advisory Committee and Professor Marcus. Professor Coquillette emphasized that it is not just the result that matters, it is the public perception of the process. The Reporters and the Committee, he observed, had done much to build confidence in that process among members of the bar. Another member emphasized that with this particular rule, most changes proposed by one party were changes thought to alter the negotiating balance vis-à-vis the opposing party. The Advisory Committee's careful and impressive effort had been to improve the Rule without seeming to favor one side or the other.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 30(b)(6) for approval by the Judicial Conference.**

*Rule 7.1.* Judge Bates introduced the second action item from the Advisory Committee, a proposal to publish for comment amendments to Rule 7.1, the rule concerning disclosure statements. The first proposed amendment conforms Rule 7.1 to pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) so that a disclosure statement is required of a nongovernmental corporation that seeks to intervene. The proposed amendment also deletes the direction to file two copies of the disclosure statement, as that requirement has been rendered superfluous by electronic court dockets.

A second proposed amendment would add a new subsection 7.1(a)(2) requiring parties to disclose the name and citizenship of those whose citizenship is attributable to the party for purposes of determining diversity jurisdiction. A prominent example of the need for this amendment arises in cases where a party is a limited liability company (LLC). Many judges now require the parties to provide detailed information about LLC citizenship. This practice serves to ensure that diversity jurisdiction actually exists, a significant matter, and it protects against the risk that a federal court's substantial investment in a case will be lost by a belated discovery – perhaps even on appeal – that there is no diversity.

Judge Bates observed that a member of the Standing Committee had raised a question about the applicability of 7.1(b)(2), which requires a supplemental filing whenever information changes after the filing of a disclosure statement. Given that diversity is determined at the time of filing, a supplemental filing is irrelevant for diversity purposes. Accordingly, Judge Bates suggested a slight modification of the proposed language to 7.1(a)(2) to state: “at the time of filing.” This would remove the obligation to make a supplemental filing when it is not relevant to the diversity determination.

A judge member spoke in favor of the proposal, as modified by the friendly amendment just described. He suggested a conforming change to the Committee Note (at page 232, line 273 of the agenda book).

Judge Campbell pointed to the language “unless the court orders otherwise” in proposed new subdivision (a)(2) as a safety valve for situations in which a party has a privacy concern connected to disclosure. In such an instance, the party could seek court protection from public disclosure of the information but would still need to provide the information bearing on the existence (or not) of diversity jurisdiction.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7.1.**

#### *Information Items*

*Consideration of Proposals to Develop MDL Rules.* Judge Bates reviewed the continuing examination of proposals to formulate rules for multidistrict litigation (MDL) proceedings, the work on which has been done by the MDL Subcommittee, chaired by Judge Robert Dow. Judge Bates described efforts by the subcommittee to obtain information on this complex set of issues. He noted that the Judicial Panel on Multidistrict Litigation (JPML) has been very helpful and engaged. Judge Bates observed that the consideration of possible MDL rules has generated a great deal of discussion among lawyers and judges, and the MDL process will likely be improved as a result, even if rules are not ultimately proposed.

Judge Bates described the focus of ongoing work, primarily on four subjects: (1) the use of Plaintiff Fact Sheets (PFSS) – and perhaps Defendant Fact Sheets (DFSS) – to organize MDL personal injury litigation, particularly in MDLs with a thousand or more cases, and to “jump start” discovery; (2) the feasibility of providing an additional avenue for interlocutory appellate review of district court orders in MDLs; (3) addressing the court's role in relation to global

settlement of multiple claims in MDLs; and (4) third-party litigation funding (TPLF), which is not unique to the MDL setting.

*TPLF.* Judge Bates noted that the general topic of TPLF has received a great deal of attention. TPLF is not unique to MDL proceedings, and indeed might be less prevalent in MDLs than other settings. Many courts require disclosure of TPLF information. TPLF is a rapidly evolving area. The TPLF topic remains on the subcommittee's agenda; it is not clear whether the subcommittee will recommend a rules response to this issue.

*Judicial Involvement in MDL Settlements.* The subcommittee continues to study judicial involvement in review of MDL settlements. Both the plaintiffs' and the defense bar would like to avoid rules that would require more judicial involvement in settlements. Current practice varies a lot by judge; transferee judges are split on it, with some being very active in settlements and others not. The issues are different than in a class action because every individual MDL plaintiff has an attorney.

*PFSs/DFSs.* Judge Bates stated that most of the subcommittee's attention has focused on PFSs and interlocutory appellate review. PFSs are used in some 80% of the big MDLs, although there is some definitional issue about what counts as a PFS. DFSs are also often used in large MDLs. A more recent proposal concerns something called an initial census of claims, which is similar to a PFS but more streamlined, and would be used early in the litigation to capture exposure and injury, not expert testimony or causation. This proposal has some support from both sides of the bar, which may mean there is no reason to have a rule. One problem with a PFS is the length of time to get those negotiated – sometimes as long as eight months – as well as the time necessary to produce responsive information. Something simpler that could be routinely used might be advantageous. The subcommittee continues to look for ideas that could get support from transferee judges as well as the plaintiffs' and defense bars.

*Interlocutory Review.* Judge Bates described the subcommittee's ongoing examination of issues concerning interlocutory review in MDL proceedings, a subject on which plaintiff and defense counsel have very different perspectives. One area of dispute is the utility of review under 28 U.S.C. § 1292(b). Different studies have reached different conclusions. The Advisory Committee received one study on the subject compiled by the defense bar. At a recent event in Boston, the plaintiffs' bar presented additional and contrary data in an oral presentation. The Advisory Committee asked the plaintiffs' bar to put their empirical data in writing. The defense bar felt it had not responded fully to the plaintiffs' presentation. The subcommittee is awaiting further information from both sides of the bar.

Professor Marcus noted that the process of considering rulemaking has generated good discussion about best practices that may ultimately be more beneficial than new rules.

A member asked whether the subcommittee had analyzed the grant rate for § 1292(b) applications by circuit. This member has asked an associate to look at this question but the research is not completed yet. The question, this member suggested, is whether the district court should continue to serve as a gatekeeper for these interlocutory appeals. This member noted that Rule 23(f) works well in the class action context and wondered about comparing the grant rate for Rule

23(f) petitions. Judge Bates responded that the bar is providing that data, and sometimes conflicting data. One might also investigate whether the defense bar sometimes opts not to seek review under § 1292(b). Professor Marcus indicated that the data are currently contested.

A judge member asked why the proposal under discussion would expand the availability of interlocutory review only for mass tort MDLs and not other complex litigation. Professor Marcus characterized the current issue as responding to the “squeaky wheel” and pointed to proposed legislation that addresses claims in the MDL setting. Professor Marcus noted that in rulemaking applicable to one type of case, you will always have to define what the rule does not apply to, which can be difficult. An attorney member suggested that expanded interlocutory review should apply to all MDLs, not merely a subset of them. Judge Bates observed that the more one increases the number of MDLs eligible for expanded interlocutory review, the harder it would become to provide expedited treatment for those appeals.

Judge Campbell noted that requiring PFSs in cases over a certain threshold, for example, MDLs over a thousand cases, will raise the issue that MDLs grow over time; by the time a given MDL hits the threshold, it might be late to require a PFS. Professor Marcus noted that because MDL centralization may often occur before a given threshold number of cases is reached, it is difficult to draft an applicable rule. Who monitors this, and how do you write that in a rule? Judge Bates stated this is an example of why transferee judges say they need flexibility.

Another judge member noted that there are two different things going on with regard to PFS proposals. The first is use of the PFS to jump start discovery. The second is use of the PFS to screen out meritless cases. These are two different objectives, which may require different solutions.

*Social Security Disability Review.* The Social Security Disability Review Subcommittee continues to work toward a determination whether new Civil Rules can improve the handling of actions to review disability decisions under 42 U.S.C. § 405(g). This proposal originated from the Administrative Conference of the United States. Professor Cooper has worked on this effort along with the chair of the subcommittee, Judge Sara Lioi.

The Social Security Administration (SSA) is very enthusiastic about the idea of national rules, even the pared-down discussion draft that the subcommittee has discussed with SSA and other groups most recently. The DOJ is not as enthusiastic but is not voicing an objection. The plaintiffs’ bar is coalescing in opposition to national rules, which it views as unnecessary. The subcommittee met on June 20, 2019 with claimants’ representatives, the SSA, the DOJ, magistrate judges, and others who are familiar with present practices. The purpose of the meeting was to focus on getting input from the claimants’ bar. It was a good meeting with positive input that will lead to changes in the working draft.

Professor Cooper stated the subcommittee hopes to make a recommendation at the Advisory Committee’s October meeting on whether to proceed further with a rulemaking proposal on this topic. Such rulemaking, he noted, would be in tension with the important principle of trans-substantivity in the rules. Even so, Professor Cooper cautioned that the subcommittee should not lightly turn away from a proposal that could improve the lives of those

who deal with these cases. Social Security cases, he observed, constitute a large share (8%) of the federal civil docket. Another issue is how to draft a rule that would supersede undesirable local rules while permitting the retention of valuable ones.

Professor Coquillette emphasized the need to exercise caution when departing from the principle of trans-substantivity in rulemaking. As soon as one permits the insertion into the national Rules of substance-specific provisions, one increases the risk of lobbying by special interests. If there is a need for rules on Social Security review cases, one solution might be to create a separate set of rules for that purpose.

*Other Information Items.* Judge Bates briefly summarized the following additional information items:

(1) Questions have arisen about the meaning of the provisions in Civil Rule 4(c)(3) for service of process by a United States marshal in cases brought by a plaintiff *in forma pauperis*. These questions are being explored with the U.S. Marshals Service.

(2) The Civil and Appellate Rules Committees have formed a joint subcommittee to consider whether to amend the rules – perhaps only the Civil Rules – to address the effect (on the final judgment rule) of consolidating initially separate actions. *Hall v. Hall*, 138 S. Ct. 1118 (2018), established a clear rule that actions initially filed as separate actions retain their separate identities for purposes of final judgment appeals, no matter how completely the actions have been consolidated in the trial court. Complete disposition of all claims among all parties to what began as a single case establishes finality for purposes of appeal under 28 U.S.C. § 1291. The subcommittee has begun its deliberations with a conference call to discuss initial steps. The opinion in *Hall v. Hall* concluded by suggesting that if “our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly.”

(3) Rule 73(b)(1) was reviewed after the Advisory Committee received reports that the CM/ECF system automatically sends to the district judge assigned to a case individual consents to trial before a magistrate judge. That feature of the system disrupts the operation of the rule that “[a] district judge or magistrate judge may be informed of a party’s response to the clerk’s notice only if all parties have consented to the referral.” No other ground to revisit Rule 73(b)(1) has been suggested. It would be better to correct the workings of the CM/ECF system than to amend the rule. Initial advice was that it is not possible to defeat the automatic notice feature, but there may be a work-around that would obviate the need for a rule. The Advisory Committee has suspended consideration of possible rule amendments while a system fix is explored.

(4) The Advisory Committee continues to consider the privacy of disability filings under the Railroad Retirement Act. The Appellate Rules Committee is taking the lead because review of those cases goes to the courts of appeals in the first instance.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules. Judge Livingston explained that the Advisory Committee had one action item – the proposed amendment to Rule 404(b) for final approval – and three information items related to Rules 106, 615, and 702.

*Proposed Amendment to Rule 404(b) (Character Evidence; Crimes or Other Acts).* The Advisory Committee sought final approval of proposed amendments to Rule 404(b). Professor Capra explained that the Advisory Committee had been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. He stated that the Advisory Committee determined that it would not propose substantive amendments to Rule 404(b) to accord with the developing case law because such amendments would make the rule rigid and more difficult to apply without achieving substantial improvement.

The Advisory Committee determined, however, that it would be useful to amend Rule 404(b) in some respects, especially with regard to the notice requirement in criminal cases. As to that requirement, the Committee determined that the notice should articulate the purpose for which the evidence will be offered and the reasoning supporting the purpose. Professor Capra noted issues that the Committee had observed with the operation of the current Rule. In some cases a party offers evidence for a laundry list of purposes, and the jury receives a corresponding laundry list of limiting instructions. Some courts rule on admissibility without analyzing the non-propensity purpose for which the evidence is offered. And some notices lack adequate specificity.

Professor Capra stated that the proposal to amend Rule 404(b) was published for comment in August 2018. Given how often 404(b) is invoked in criminal cases, Professor Capra expected robust comments, but only a few comments were filed, and they were generally favorable. In response to public comments and discussion before the Standing Committee, the Advisory Committee made two changes to the proposed Rule text as issued for public comment. Most importantly, the Committee changed the term “non-propensity” purpose to “permitted” purpose. Secondly, the Committee changed the notice provision to clarify that the “fair opportunity” requirement applies to notice given at trial after a finding of good cause.

A Committee member suggested replacing the verb “articulate” in the proposed amendment because, he suggested, the term usually refers to a spoken word rather than written material. He noted that the term is not used elsewhere in the Federal Rules. Professor Capra pointed out that the proposed amendment was an effort to get beyond merely stating a purpose. The terms “specify” or “state” were suggested as substitutions for “articulate.” Judge Campbell stated that the use of the term “articulate” suggests both identifying the purpose and explaining the reasoning. Professor Capra noted that the word “articulate” is what the Advisory Committee agreed to, and it suggests more rigor. A DOJ representative noted that the language in the proposed amendment was the subject of painstaking negotiation, and that she preferred to retain

the negotiated language to avoid unintended consequences. The Committee determined to retain the term “articulate.”

A judge member noted that the Committee Note still used the term “non-propensity” purpose even though that term had been removed from the text of the rule. Professor Capra explained that the use of the term was intentional and resulted from significant discussion at the Advisory Committee’s meeting. Judge Campbell added that part of the reason for retaining the language in the Committee Note was to provide guidance to judges in applying the rule. Judge Livingston explained that the term propensity is embedded in caselaw and the Committee Note’s use of that term would provide a good signal to readers to focus their caselaw research on that term.

Another judge member asked about the use of the term “relevant” in the Committee Note’s statement that “[t]he prosecution must ... articulate a non-propensity purpose ... and the basis for concluding that the evidence is relevant in light of this purpose.” Judge Livingston explained that this passage reflected a complex underlying discussion, and that the Committee was attempting to avoid undue specificity in the Committee Note.

Upon motion by a member, seconded by another, and on a voice vote: **The Committee decided to recommend the amendments to Rule 404(b) for approval by the Judicial Conference.**

Professor Capra thanked the DOJ for all its work on the rule. A DOJ representative noted the sensitivity of Rule 404(b) and thanked Professor Capra, Judge Livingston, and prior chair Judge Sessions for more than five years’ work on the rule.

### *Information Items*

Professor Capra summarized the Advisory Committee’s ongoing consideration of possible amendments to Rule 106, sometimes known as the rule of completeness. The Advisory Committee is considering two kinds of potential amendments – one that would provide that a completing statement is admissible over a hearsay objection, and another that would provide that the rule covers oral as well as written or recorded statements. In an illustrative scenario, the defendant makes the statement “this is my gun, but I sold it two months ago,” and the prosecution offers the first portion of the statement and objects to the admission of the latter portion on hearsay grounds. Some courts admit a completing oral statement into evidence over a hearsay objection, but other courts do not admit the completing statement. The Advisory Committee reached consensus on the desirability of acting to resolve the conflict but is carefully considering how such an amendment should be written and what limitations should govern when such a completing statement should be admitted over a hearsay objection. The Advisory Committee has received information about how completing oral statements are handled in other jurisdictions, including California and New Hampshire.

The next information item concerns Rule 615, the sequestration rule. The Advisory Committee is considering whether to propose an amendment addressing the scope of a Rule 615 order. The Rule text contemplates the exclusion of witnesses from the courtroom; one question is

whether a Rule 615 order can also bar access to trial testimony by witnesses when they are outside the courtroom. Most courts have answered this question in the affirmative, but others apply a more literal reading of the rule. The Advisory Committee is considering an amendment that would specifically allow courts discretion to extend a Rule 615 order beyond the courtroom. The rule would not be mandatory. One potentially challenging issue is how to treat trial counsel's preparation of excluded witnesses.

Professor Capra next reported on the Advisory Committee's ongoing work with regard to Rule 702. In September 2016 the President's Council of Advisors on Science and Technology issued a report which contained a host of recommendations for federal scientific agencies, the 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 possible changes to Rule 702. Judge Livingston appointed a Rule 702 Subcommittee to study what the Advisory Committee might do to address concerns relating to forensic evidence. In fall 2017 the Advisory Committee held a symposium on forensics and *Daubert* at Boston College School of Law.

Following discussion by the Advisory Committee, the main issue the subcommittee is considering concerns how to help courts to deal with overstatements by expert witnesses, including forensic expert witnesses. Professor Capra noted that the DOJ is currently reviewing its practices related to forensic evidence testimony, and some have suggested waiting to see the results of the DOJ's efforts. Judge Livingston stated that one threshold issue is whether the problems should be addressed by rule, or perhaps by judicial education. Judge Livingston thanked the DOJ and Professor Capra for putting together a presentation for the Second Circuit on forensic evidence that is available on video. Professor Capra noted that there will be a miniconference in the fall at Vanderbilt Law School to continue discussion of these issues and *Daubert*.

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

Judge Molloy presented the report of the Advisory Committee on Criminal Rules, which consisted of four information items.

Judge Molloy first reported on the Advisory Committee's decision not to move forward with suggestions that it amend Rule 43 to permit the court to sentence or take a guilty plea by videoconference. The Advisory Committee has considered suggestions to amend Rule 43 several times in recent years. The first suggestion came from a judge who assists in districts other than his own and who sought to conduct proceedings by videoconference as a matter of efficiency and convenience. The Advisory Committee concluded that an amendment to Rule 43 was not warranted to address that circumstance.

The second suggestion to amend Rule 43 came from the Seventh Circuit's opinion in *United States v. Bethea*, 888 F.3d 864, 868 (7th Cir. 2018), which included the specific statement that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence. In *Bethea*, the defendant's many health problems made it extremely difficult for him to come to the courtroom, and given his susceptibility to

broken bones, doing so might have been dangerous for him. After *Bethea* was permitted to appear by videoconference for his plea and sentencing as requested by his counsel, *Bethea* appealed and argued that the physical-presence requirement in Rule 43 was not waivable. The Seventh Circuit in *Bethea* concluded that even under the exceptional facts presented “the plain language of Rule 43 requires all parties to be present for a defendant’s plea” and “a defendant cannot consent to a plea via videoconference.” *Id.* at 867. Advisory Committee members emphasized that physical presence is extraordinarily important at plea and sentencing proceedings, but they also recognized that *Bethea* was a very compelling case. On the other hand, members wondered if the case might be a one-off, since practical accommodations at the request of the defendant – with the agreement of the government and the court – have been made in such rare situations, obviating the need for an amendment.

A subcommittee that was formed to consider the issue and chaired by Judge Denise Page Hood recommended against amending the rule to permit use of videoconferencing for plea and sentencing proceedings. The subcommittee acknowledged that there are, and will continue to be, cases in which health problems make it difficult or impossible for a defendant to appear in court to enter a plea or be sentenced, and that Rule 43 does not presently allow the use of videoconferencing in such cases (though that is less clear for sentencing than for plea proceedings). Nonetheless, it recommended against amending the rule for three reasons. First, and most important, the subcommittee reaffirmed the importance of direct face-to-face contact between the judge and a defendant who is entering a plea or being sentenced. Second, there are options – other than amending the rules – to allow a case to move forward despite serious health concerns. These options include, for example, reducing the criminal charge to a misdemeanor (where videoconferencing is permissible under Rule 43), transferring the case to another district to avoid the need for a gravely ill defendant to travel, and entering a plea agreement containing both a specific sentence under Rule 11(c)(1)(C) and an appeal waiver. Finally, the subcommittee was concerned that there would inevitably be constant pressure from judges to expand any exception to the requirement of physical presence at plea or sentencing. The Advisory Committee unanimously agreed with the subcommittee’s recommendation not to amend Rule 43.

Shortly after that determination, the Advisory Committee received a request for reconsideration of that determination. Judges who serve in border states asked for the ability to use videoconferencing for pleas and sentencing. These judges explained that their courts were dealing with thousands of cases brought under 8 U.S.C. § 1326 against defendants charged with illegal reentry. Their districts cover vast distances and, under existing rules, either the judge must travel, or the U.S. Marshals Service must transport defendants. While sympathetic to the issue, the Advisory Committee determined that it would be undesirable to open the door to videoconferencing for these critical procedures. There is a slippery slope and once exceptions are made to the physical presence requirement, exceptions could swallow the rule in the name of efficiency.

Professor King noted that several years ago when the rules were reviewed with an idea of updating them to account for technological advancements, including enhanced audio/visual capabilities, some rules were amended but Rule 43’s physical-presence requirement was left unchanged.

Judge Molloy next addressed the Advisory Committee's consideration of a suggestion received from a magistrate judge to amend Rule 40 to clarify the procedures for arrest for violations of conditions of release set in another district. The issue arises from the interaction of Rule 40 with 18 U.S.C. § 3148(b) and Rule 5(c)(3). Section 3148(b) governs the procedure for revocation of pretrial release, and as generally understood it provides that the revocation proceedings will ordinarily be heard by the judicial officer who ordered the release. After discussing the ambiguities in Rule 40 and in 18 U.S.C. § 3148(b), the Advisory Committee decided Rule 40 could benefit from clarification but agreed with an observation by Judge Campbell that many rules could benefit from clarification, but the Rules Committees must be selective. Given the relative infrequency with which this scenario arises, and the fact that the courts have generally handled the cases that do arise without significant problems, the Advisory Committee decided to take no action at this time. Judge Bruce McGiverin greatly assisted the Advisory Committee in understanding the issues by sharing his own experience and by consulting widely among the community of magistrate judges.

Judge Molloy next introduced the Advisory Committee's consideration of Rule 16, an issue he noted ties in with the Evidence Rules Advisory Committee's report about expert testimony as well as Civil Rule 26's requirements for expert discovery. Judge Molloy noted that he has served on the Advisory Committee for eleven years and for most of that time Rule 16 has been on the agenda. Judge Kethledge chairs the Rule 16 Subcommittee that has been asked to review suggestions to amend Rule 16 so that it more closely follows Civil Rule 26's provisions for disclosures regarding expert witnesses. Back in the early 1990s, there was a suggestion that discovery rules on experts in criminal cases be made parallel to rules governing civil cases. The Criminal Rules did not change, although changes to Civil Rule 26 went forward.

To address the questions before the subcommittee, Judge Kethledge convened a miniconference to discuss possible amendments to Rule 16. There was a very strong group of participants, from various parts of the country, including six or seven defense practitioners, and five or six representatives from the DOJ. Most had significant personal experience with these issues and had worked with experts.

Judge Kethledge organized discussion at the miniconference into two parts. First, participants were asked to identify any concerns or problems they saw with the current rule. Second, they were asked to provide suggestions to improve the rule.

The defense side identified two problems with the rule. First, Rule 16 has no timing requirement. Practitioners reported they sometimes received summaries of expert testimony a week or the night before trial, which significantly impaired their ability to prepare for trial. Second, they said that they do not receive disclosures with sufficiently detailed information to allow them to prepare to cross examine the witness. In contrast, the DOJ representatives stated that they were unaware of problems with the rule and expressed opposition to making criminal discovery more akin to Rule 26.

When discussion turned to possible solutions on the issues of timing and completeness of expert discovery, participants made significant progress in identifying some common ground. The DOJ representatives said that framing the problems in terms of timing and sufficiency of the

notice was very helpful. It was useful to know that the practitioners were not seeking changes regarding forensic evidence, overstatement by expert witnesses, or information about the expert's credentials. The lack of precise framing explained, at least to some degree, why the DOJ personnel who focused on these other issues were not aware of problems with disclosure relating to expert witnesses. The subcommittee came away from the miniconference with concrete suggestions for language that would address timing and completeness of expert discovery.

Judge Molloy stated that the subcommittee plans to present a proposal to amend Rule 16 at the Advisory Committee's September meeting.

A DOJ representative noted that the Department views this less as a need for a rule change and more as a need to train lawyers so that prosecutors and defense counsel alike understand what the rules are. Prosecutors need to understand what the concerns are and the Department needs to conduct training to ensure this understanding. The DOJ has worked with Federal Public Defender Donna Elm to highlight the problematic issues; a training course presented by the DOJ's National Advocacy Center will be shown to all prosecutors. Even if a rule change were to go forward, it would take years. Collaboration on training means that the Department can begin to address problems now.

Judge Molloy provided a brief update on progress in implementing the recommendations of the Task Force on Protecting Cooperators. Task Force member Judge St. Eve reported on the status of efforts by the Bureau of Prisons to implement certain recommendations. One recommendation is to adopt provisions for disciplining inmates who pressure other inmates to "show their papers."

Judge Campbell thanked the advisory committee chairs and reporters for all the work that goes into the consideration of every suggestion. He noted that even a five-minute report on a given issue may be the result of long and painstaking effort.

### **OTHER COMMITTEE BUSINESS**

*Proposal to Revise Electronic Filing Deadline.* Judge Chagares explained his suggestion that the Advisory Committees study whether the rules should be amended to move the current midnight electronic-filing deadline to earlier in the day, such as when the clerk's office closes in the respective court's time zone. The Supreme Court of Delaware has adopted such a practice. Judge Campbell delegated to Judge Chagares the task of forming a subcommittee to study the issue and provide an initial report at the January meeting.

*Legislative Report.* Julie Wilson delivered the legislative report. She noted that the 116<sup>th</sup> Congress convened on January 3, 2019, and she described several bills that have been introduced or reintroduced that are of interest to the rules process or the courts generally. There has been no legislative activity to move these bills forward. Ms. Wilson reviewed several pieces of legislation of general interest to the courts. Scott Myers provided an overview of H.R. 3304, a bipartisan bill introduced the week before the Committee meeting that would extend for an additional four years the existing exemption from the means test for chapter seven filers who are certain National Guard reservists. The bill is expected to pass; absent passage, an amendment to the

Bankruptcy Rules would be required. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

*Judiciary Strategic Planning.* Judge Campbell discussed the Judiciary’s strategic planning process and the Committee’s involvement in that process. He solicited comments on the Committee’s identified strategic initiatives and the extent to which those initiatives have achieved their desired outcomes. Judge Campbell also invited input on the proposed approach for the update of the *Strategic Plan for the Federal Judiciary* that is to take place in 2020. Judge Campbell will correspond with the Judiciary’s planning coordinator regarding these matters.

*Procedure for Handling Public Input Outside the Established Public Comment Period.* Judge Campbell summarized prior discussions by the Committee concerning how public submissions received outside the formal public comment period should be handled, including submissions addressed directly to the Standing Committee. Professor Struve explained the revised draft principles concerning public input during the Rules Enabling Act process and welcomed additional comments on the draft. These procedures are proposed to be posted on the website for the Judiciary. *See Revised Draft Principles Concerning Public Input During the Rules Enabling Act Process* (agenda book, p. 495).

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the principles concerning public input.**

#### 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 in Phoenix, Arizona on January 28, 2020.

Respectfully submitted,

Rebecca A. Womeldorf  
Secretary, Standing Committee

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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

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

The Advisory Committee has been considering possible amendments to Rule 702 for the last several meetings. 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 --- or to put it another way, possibly, the limitation would be that the expert would not be allowed to express an opinion with a "degree of confidence" that is not supported by the foundation for the expert's testimony.
2. An amendment clarifying that the questions of sufficiency of facts or 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).

Over the last four meetings – after a miniconference that was devoted mostly to these two possible amendments --- the Committee has focused on a draft involving overstatement/degree of confidence. As to the weight/admissibility issue, the Committee has resolved that the text of the Rule should not be changed to address it, because Rule 702 already establishes that the reliability requirements are questions for the court, to be decided by a preponderance of the evidence. The Committee did agree to consider addressing the weight/admissibility problem in a Committee Note should the amendment regarding overstatement be approved.

This memorandum further develops the matters that the Committee wished to continue discussing, and addresses some of the questions raised at the Spring 2019 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 drafting alternatives, and a draft Committee Note.

**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).**

**Also attached to the memo is the draft proposal (and draft Committee Note) from the Criminal Rules Committee for an amendment to Criminal Rule 16, that would provide for more robust discovery with respect to expert testimony.**

## **I. The Problem of Overstatement**

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

Many speakers at the Boston College Symposium in 2017 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. Notably, the DOJ has issued 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.

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 *federal* problem as well, and remains a problem even in the recent cases. There are many reported cases in which an expert’s conclusions went well beyond what the expert’s basis and methodology could support -- - claims such as zero rate of error, or opinions to a reasonable degree of scientific certainty.

And, as discussed below, there is an argument that problems remain with forensic “identification” testimony even under the DOJ protocols. Thus, it would seem that there is some reason to seek to control overstatement, especially in forensic evidence cases. The question for the Committee is whether this “control” should come from a rule amendment or rather should be left to cross-examination.

## ***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? Five possible sources might exist: 1) Court regulation under existing law; 2) Education efforts; 3) DOJ efforts to regulate forensic experts; 4) Cross-examination; and 5) Providing for more robust discovery of expert opinions. 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>1</sup> and has been widely distributed, but courts are still happily using that “reasonable degree” 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 the least, an important means of effectuating change in accompaniment with judicial education.

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<sup>1</sup> See <https://www.justice.gov/nfs/file/795146/download> (concluding that “the term ‘reasonable degree of scientific [or discipline] certainty’ has no place in the judicial process”).

**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 analysts 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:

- 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.<sup>2</sup> 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 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 (including experts for the criminal defense).

- 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 involved with the new FJC Manual on the subject, has provided a statement in response to the Reporter’s question about the

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<sup>2</sup> The National Commission on Forensic Science has this to say about alternatives to the “reasonable degree of certainty language:

Additional work is needed in both the scientific and legal communities to identify appropriate language that may be used by experts to express conclusions and opinions to the trier of fact based on observations of evidence and data derived from evidence. 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.

DOJ standards.<sup>3</sup> 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.

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<sup>3</sup> As the Committee is aware, Dr. Cecil has appeared at Committee meetings and has debated with the DOJ about whether the DOJ standards are sufficient to protect against the risk of overstatement. Dr. Cecil’s position, set forth in an email to the Reporter and reproduced here, was also included in the last memo on Rule 702.

\* \* \*

*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>4</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:

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

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<sup>4</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.”).

Moreover, at the last meeting some of the Committee’s discussion indicated confusion and concern about the DOJ’s line between “identification” and “match”. For example, the Minutes of the Spring 2019 meeting provide the following account:

Judge Campbell queried how an examiner logically could state that a mark came from a particular defendant without saying it *didn’t* come from another person.

Another Committee member expressed similar confusion about the DOJ characterization of “source identification.” While this Committee member understood the expert’s inability to claim infallibility, he expressed confusion about how the DOJ testimony allowed for a “source identification” without “individualizing” the opinion. He emphasized the logical inability to identify one source *without excluding other sources*.

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.

The 2018 Report of the American Statistical Association on Statistical Statements for Forensic Evidence supports Dr. 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.

#### ***4. Cross-examination?***

At the last meeting, at least one member asserted that the question of overstatement of expert opinion can be adequately handled by cross-examination. For example, if a forensic expert says that he has determined, by a reasonable degree of scientific certainty, that there is a match between a trace substance and the defendant, the defense counsel can attack that testimony on cross-examination --- defense counsel can contradict the conclusion by referring to the PCAST report, or the DOJ standards; counsel might establish through cross-examination the subjective choices that the expert made. And so forth.

Whether cross-examination is a sufficient device to regulate overstatement is a difficult question to assess. There are very few data points to rely on. Perhaps one data point is all the criminal convictions in which forensic experts overstated their conclusions (including the hair identification scandal in which the DOJ admitted that experts overstated their results in hundreds of cases that resulted in conviction). Apparently, cross-examination was *not* a sufficient regulator in all of these cases --- including the very recent cases set forth in the case digest. Of course the weight of this data point must be tempered by possible contrary indicators that might have led to conviction, such as: 1. The existence of other evidence; and 2. Defense counsel either didn't cross-examine the expert or cross-examined ineffectively. Nonetheless, the historical and current record

of convictions has some relevance to the effectiveness of cross-examination in regulating overstatement of a forensic expert witness.

Perhaps another way to think about cross-examination as a remedy is to compare the overstatement issue to the issues of sufficiency of basis, reliability of methodology, and reliable application of that methodology. As we know, those three factors must be shown by a preponderance of the evidence. The whole point of Rule 702 --- and the *Daubert*-Rule 104(a) gatekeeping function --- is that these issues *cannot* be left to cross-examination. The underpinning of *Daubert* is that an expert's opinion could be unreliable and the jury could not figure that out, even given cross-examination and argument, because the jurors are deferent to a qualified expert (i.e., the white lab coat effect). The premise is that cross-examination cannot undo the damage that has been done by the expert who has power over the jury. This is because, for the very reason that an expert is needed (because lay jurors need assistance) the jury may well be unable to figure out whether the expert is providing real information or junk. The real question, then, is whether the dangers of overstatement are any different from the dangers of insufficient basis, unreliability of methodology, and unreliable application. Why would cross-examination be insufficient for the latter yet sufficient for the former?

It is hard to see any difference between the risk of overstatement and the other risks that are regulated by Rule 702. When an expert says that they are certain of a result --- when they cannot be --- how is that easier for the jury to figure out than if an expert says something like “I relied on four scientifically valid studies concluding that PCB’s cause small lung cancer.”<sup>5</sup> When an expert says he employed a “scientific methodology” when that is not so, how is that different from an expert saying “I employed a reliable methodology” when that is not so?

Judge Rakoff, in *United States v. Glynn*, 578 F.Supp.2d 567, 574 (S.D.N.Y. 2008), when evaluating the admissibility of ballistics evidence, directly addressed the need for a gatekeeper when it comes to overstatement:

The problem is how to admit [the expert opinion] into evidence without giving the jury the impression—always a risk where forensic evidence is concerned—that it has greater reliability than its imperfect methodology permits. The problem is compounded by the tendency of ballistics experts . . . to make assertions that their matches are certain beyond all doubt, that the error rate of their methodology is “zero,” and other such pretensions. *Although effective cross-examination may mitigate some of these dangers, the explicit premise of Daubert and Kumho Tire is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge,*

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<sup>5</sup> That was the expert's testimony in *Joiner* and the Supreme Court held that the trial judge correctly exercised the gatekeeping function in excluding the testimony, because the studies did not actually support a conclusion of causation. But why wasn't it sufficient that the lack of support could have been brought up on cross-examination? The answer is, the gatekeeping function assumes that cross-examination will be insufficient when there is an analytical gap between methodology and conclusion.

*so that the Court must play a greater role, not only in excluding unreliable testimony, but also in alerting the jury to the limitations of what is presented.*

It should also be noted that cross-examination has its work cut out for it when it comes to experts expressing unjustified confidence in an opinion. Research on juries (including post-trial interviews) indicates that the more confidence expressed, the more the expert's testimony is likely to sway the jury. If this confidence is unfounded, the risk of inaccurate verdicts runs high.<sup>6</sup>

It can certainly be argued not only that overstatement is not different from reliable methodology reliably applied, but that overstatement is actually the *same* as a defect in methodology and application. For example, an expert who testifies that "I am certain that there is a match" might be using a reliable methodology (e.g., ballistics), but is not applying it reliably (because the methodology is subjective and so not error-free).

Perhaps the real question is not whether overstatement is different from the other reliability factors --- because it could be though to be inherent in those factors. Instead, perhaps the real question is why an overstatement amendment would be necessary if "don't overstate" is inherent in the reliability factors already set forth in Rule 702. The response to that question might be: while overstatement is inherent in the existing factors, it might be useful to break it out as a separate factor, in order to draw attention to it --- because the case digest shows that courts are *not* regulating overstatement as seriously as they are the three reliability factors set forth in the text of Rule 702.

In any case, it seems difficult to argue that cross-examination is the solution for overstatement, while gatekeeping is required for the related questions of reliable methodology and reliable application.

## ***5. Fortified Discovery?***

Perhaps the effectiveness of cross-examination would be increased --- and the argument for including a prohibition on overstatement accordingly less compelling --- if criminal discovery were improved.<sup>7</sup> The question of the adequacy of criminal discovery was addressed by Judge Grimm at the 2017 Symposium at Boston College. Judge Grimm argued that because criminal discovery is so truncated, and late in the day, defense counsel are unduly hampered in cross-examining forensic experts.

Judge Grimm and Judge Rakoff both proposed that the Criminal Rules Committee undertake efforts to amend Criminal Rule 16 to provide for greater and more timely discovery

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<sup>6</sup> See, e.g., Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 American J. of Pub. Health, S137 (2005) (finding that an expert's confidence in an opinion was a critical factor in assessing the weight of the expert's testimony).

<sup>7</sup> This whole issue of cross-examination as the remedy is based on the premise that defense counsel, if adequately notified, will in fact cross-examine effectively. To hear many judges tell it, that premise is not empirically supported.

related to expert testimony in criminal cases. The Criminal Rules Committee formed a Subcommittee, which held a miniconference on the subject. As of this writing, the Committee has proposed changes that would, according to the draft Committee Note, address “two shortcomings of the prior provisions: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure.”<sup>8</sup>

Currently the prosecution must provide only a summary of the expert’s testimony. **The proposed amendment requires disclosure of the following:**

**(iii) Contents of the Disclosure.** The ~~disclosure summary provided under this paragraph~~ must contain

- a complete statement of all ~~describe the witness’s~~ opinions, that the government will elicit from the witness in its case-in-chief;
- the bases and reasons for those opinions; ~~and~~
- the witness’s qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

If the government previously provided a report under (F) that contained any information required by this subparagraph (G), that information need not be repeated in the expert witness disclosure.

**(iv) Signature on the Disclosure.** The witness must approve and sign the disclosure, unless the government states in the disclosure that it could not obtain the witness’s signature.

As to timeliness, the amendment requires that “the court or a local rule must set a time for the government to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government’s evidence.”<sup>9</sup>

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<sup>8</sup> The draft Committee Note can be found behind this memo in the agenda book.

<sup>9</sup> The fair opportunity language is drawn from the recent amendments to Evidence Rules 404(b) and 807.

At the miniconference on Rule 16, the DOJ representative argued that whatever changes might be made to Rule 16, none were necessary in the forensic area. That was because, under DOJ policy, the prosecutor ordinarily has an obligation to turn over the forensic report. This is due to a 2017 memorandum issued by Sally Yates. That memorandum states that the prosecution must obtain the forensic expert's lab report and that "[i]n most cases the best practice is to turn over the forensic expert's report to the defense if requested." The memo also sets forth further requirements:

- "The prosecutor should disclose to the defense, if requested, a written summary for any forensic expert the government intends to call as an expert at trial. This statement should summarize the analyses performed by the forensic expert and describe any conclusions reached."
- "[I]f requested, the prosecutor should provide the defense with . . . the laboratory or forensic expert's 'case file' . . . . This information . . . normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another expert to understand the expert's report. The exact material contained in a case file varies depending on the type of forensic analysis performed. It may include such items as a chain-of-custody log; photographs of physical evidence; analysts' worksheets or bench notes; a scope of work; an examination plan; and data, charts and graphs that illustrate the results of the tests conducted."
- "[T]he prosecution should provide to the defense information on the expert's qualifications. Typically, this material will include such items as the expert's curriculum vitae, highlighting relevant education, training and publications, and a brief summary that describes the analyst's synopsis of experience in testifying as an expert at trial or by deposition."

So, there may in the future be significant improvements in disclosure of information that will be relevant to cross-examination of experts generally; and there are already internal standards at the DOJ in place for disclosure pertinent to cross-examination of forensic experts.<sup>10</sup> Moreover, there are efforts being made to provide a notice period that would allow defense counsel to have more time to prepare cross-examination.

Some have argued, however, that even assuming that cross-examination is a remedy for overstatement, the discovery obligations imposed by the Yates memo are insufficient to guarantee effective cross-examination. In a reply email to me, Chris Fabricant of the Innocence Project came

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<sup>10</sup> Of course, the internal regulations are not legally enforceable and they can be abrogated.

Also note that the DOJ argued that *no* changes to Rule 16 were necessary because internal efforts were being made to provide more effective discovery than required by the existing Rule 16. That is the same argument that the DOJ has made to the Evidence Rules Committee regarding overstatement by forensic experts. It appears that the Rule 16 Subcommittee was not persuaded by that argument in the context of criminal discovery.

up with a list of information that would be necessary for effective cross-examination of a forensic expert, beyond what is currently provided:

Going into a cross-examination, I would want the analyst's bench notes, their personnel file, all proficiency tests, prior transcripts, validation/calibration documentation of any instrument used, a list of publication that support's the analyst's opinion - OSAC standards should provide a list of publications; "peer review" info (expert disagreement), and all communication between the prosecution and the forensic analyst, as it relates to contextual bias influencing expert opinion). From the lab, I would want accreditation audits (on-sight assessments and self-reported) and any/all "corrective actions" related to expert testifying and the specific unit within the lab. Note that sometimes labs claim these last two items are confidential accreditation documents. But the Houston crime lab posts these online, so the confidentiality claim is simply a policy to avoid disclosure.

Thus, even if cross-examination is the answer, and discovery standards are being fortified, there is still some debate about whether defense counsel will get enough information in sufficient time to effectively cross-examine a forensic expert. This is not to criticize the admirable efforts being taken by the Criminal Rules Committee and the DOJ. It is just to say that there is debate on whether these discovery advances are the complete answer to the overstatement problem.

It can surely be argued that it is not one or the other, i.e., better and faster discovery *or* an amendment to the Evidence Rules to prohibit overstatement. There is a good argument that *both* changes are necessary. Better and faster discovery will allow the defense a better chance at convincing the judge at a *Daubert* hearing that the government's expert is overstating the conclusion that can be fairly drawn from the methodology employed. An amendment to Rule 702 will highlight to defense lawyers that they should look for "overstatements" while an amendment to Rule 16 will give them the information to make that argument, and better discovery will arm the trial judge with the specific basis for excluding overstated testimony.

### ***C. Support for a Proposal to Regulate Overstatement***

At the Chair's suggestion, the Reporter sought out some sources that would support a rule regulated overstatement. 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 about 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.”).

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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.

### ***Other PCAST Participants***

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.

### ***Other Jurisdictions***

Some support for an amendment regarding overstatement can be found in the United Kingdom. U.K. Rule of Criminal Procedure 19 governs the procedural and evidentiary aspects of expert witness testimony in British criminal trials.

Rule 19.4 states that the expert report must include:

- (f) where there is a range of opinion on the matters dealt with in the report— (i) summarise the range of opinion, and (ii) give reasons for the expert’s own opinion;
- (g) if the expert is not able to give an opinion without qualification, state the qualification;<sup>11</sup>

On the other hand, it should be noted that none of the state versions of Rule 702 contain language addressed to the problem of overstatement. The closest that the states get to regulating forensic expert testimony is Ohio Rule 702, which has language specifically addressed to reports of a procedure, test or experiment (that would presumably cover forensic expert testimony). Ohio 702 provides as follows:

A witness may testify as an expert if all of the following apply:

- (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
- (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. *To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:*

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<sup>11</sup> Thanks to Dr. Tim Lau for drawing the UK rule to my attention.

- (1) *The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;*
- (2) *The design of the procedure, test, or experiment reliably implements the theory;*
- (3) *The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.*

### ***D. Trial Court Evaluations of an Expert's "Credibility"***

At the Fall, 2018 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.

On the other hand, 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>12</sup> In contrast, 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

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<sup>12</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).

improperly make “credibility” determinations. If the judge finds that the expert overstated the opinion, then the trial judge should prohibit the opinion.

### ***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 Federal 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;

5) There is an incentive for an expert to overstate a conclusion in a civil case --- they are financially beholden to the party. *Judge Kaplan explains it like this:*

Lawyers want experts who will express unwavering certainty about their conclusions: Eighty-four percent of lawyers surveyed in a recent study said that the adamancy of an expert’s support for the lawyer’s position was an important consideration in the expert selection process. Experts are well aware of this overwhelming preference. The same study showed that sixty-four percent of experts believe that the willingness to draw firm conclusions was important to being retained. ***The desire to please lawyers often leads experts to overstate the certainty of their conclusions and to gloss over important nuances in an effort to present the most uncompromising support for the lawyers’ position.***<sup>13</sup>

6) ***Most importantly, there are a number of reported cases in which an expert appears to have gotten away with a conclusion that overstates what they could fairly say based on the methodology employed. That is, there is a problem of overstatement outside the forensic area.***

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<sup>13</sup> Hon. Lewis Kaplan, *Experts in the Courthouse: Problems and Opportunities*, 2006 Colum. Bus. L.Rev. 247 (2006). The study cited by Judge Kaplan is by Daniel Shurman et. al., *An Empirical Examination of the Use of Expert Witnesses in the Courts --- Part II: A Three-City Study*, 34 *Jurimetrics* 193 (1994).

*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>14</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. Here are some recent examples:

- ***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 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 prosecution for healthcare fraud resulting in death 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).
- ***Puga v. RCX Solutions, Inc.***, 922 F.3d 285 (5<sup>th</sup> Cir. 2019) (police officer who arrived at an accident was properly permitted to testify that a truck driver “must have been driving too fast” even though he did not examine the truck, the brakes, the weight of the truck, or attempt to estimate his speed).
- ***United States v. Tingle***, 880 F.3d 850, 855 (7<sup>th</sup> Cir. 2018) (rejecting the defendant’s argument that DEA agent’s expert testimony violated FRE 704(b) where the agent testified that the amount of drugs found in the 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.”).
- ***United States v. Johnson***, 916 F.3d 579 (7<sup>th</sup> Cir. 2019): In a trial on charges of possessing a handgun in furtherance of a drug trafficking crime, an expert on drug dealers was allowed to testify that “where there’s guns, there’s drugs, and where there’s drugs, there’s guns.”

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<sup>14</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.

- *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 a sudden acceleration accident).
- *United States v. Lopez*, 880 F.3d 974 (8<sup>th</sup> Cir. 2018) (affirming admission of a DEA agent’s expert testimony 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) (the district court erred in excluding medical expert’s opinions that prescription drug caused the plaintiff’s rare cancer even though the 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 the admission of expert testimony by a tire expert to refute a murder defendant’s alibi that he was not at work at the time of the 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 the government’s drug trafficking expert to testify that the defendant’s “blind mule theory” had “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 a challenge to expert testimony that the plaintiff’s many injuries “were entirely caused” by a collision and that “every single rear-end collision that has ever occurred” is a plausible mechanism for causing lumbar disc injury).
- *In re Trasyolol Prod. Liab. Litig.*, 2010 WL 8354662 (S.D.Fla.) (the expert was allowed to testify, on the basis of a differential diagnosis, that the use of a drug was a contributor “in all medical certainty” to a kidney injury, despite conceding “scientific unknowns”).

## 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.) (the district court erred in admitting an FBI agent’s expert testimony about a “precise location” of cell phones, but the error was harmless).
- *United States v. Naranjo-Rosaro*, 871 F.3d 86, 96 (1<sup>st</sup> Cir. 2017) (the trial court erred in allowing the agent handling a drug-sniffing dog to testify as a lay witness, but the error was harmless where the 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 the household during relevant times because the 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.”).

At the last meeting, the Committee resolved that if anything is specifically said about the reasonable degree of certainty standard in a Committee Note, it should be limited to the topic of forensic evidence. The Committee Note set forth in Part Three of this memo is so limited.

## **F. How Would a Rule Regulating Overstatement Affect Experience-Based Experts?**

One concern expressed by some Committee members at previous meetings is that an amendment regulating overstatement would be difficult to apply to the testimony of some experts who testify on the basis of experience. To address this concern, and to consider how a bar on overstatement could operate on experience-based experts, it might be best to proceed by example.

Let’s take the facts of *Maryland Cas. Co. v. Therm-O-Disc., Inc.*, 137 F.3d 780 (4<sup>th</sup> Cir. 1998), a case involving a dispute over what caused a fire in a building. An electrician was allowed to testify that the fire was “caused by a malfunction in a thermostat” manufactured by the defendant. The expert stated that his opinion was based on “examination of the conditions inside the disputed switch and the application of principles of electrical engineering to those conditions.” He also cited numerous works of technical literature in support of his methodology and explained how his experience led to his conclusion. The court of appeals found this testimony properly admitted. Would there be a different result under an amendment prohibiting overstatement? Specifically, would the statement “in my opinion, the fire was caused by a malfunction in a thermostat” be an overstatement?

It seems unlikely that such an opinion is an overstatement if it is properly grounded in a sufficient basis of information and based on standard principles in the field --- as the court found. The whole point of the grounding of the opinion in experience and supporting literature is that the expert has a sufficient basis and proper methodology to opine on causation of an event.

So what would be the role of a prohibition on overstatement for such experience-based testimony? Let’s take the same example, with the same grounding, but the expert tacks on extravagant claims, such as “without a doubt,” or “to a scientific certainty,” or “there is no possibility of an alternate cause.” Without knowing much about the area of expertise, it’s still probably safe to assume that the expert’s grounding in experience and supporting literature is not enough to opine on causation with absolute certainty (just as a forensic expert’s grounding in experience is not enough to allow a conclusion of “scientific certainty”).

Here is another example: *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496 (10<sup>th</sup> Cir. 1996), in which the plaintiff alleged that he received an electrical shock from a Pepsi machine, that resulted

in a burn and a broken shoulder. The Pepsi machine was removed from the site, and the plug removed, so it could not be tested by the plaintiff. The plaintiff's expert electrical engineer testified that if the wrong type of plug had been attached to the machine, "it could have produced a shock sufficient to cause" the plaintiff's injuries. The court found that testimony properly admitted under *Daubert*. It noted that the expert did not testify that the soda machine actually caused the injuries, but merely theorized circumstances under which the machine could have created an electrical shock sufficient to cause the injuries. That opinion was permissible *because* it did not overstate the results. Given what the expert knew (and did not know), the only thing he could say was that the wrong type of plug could have caused the injuries. If he had stated, given his limited basis of information, that "the plaintiff's injuries had to be caused by the wrong type of plug on the Pepsi machine," that would have been an overstatement and excludable as such.

These examples show that an overstatement amendment can be usefully employed to reject extravagant claims by an experience-based expert. The court can look at principles, methods, and basis, and then determine whether the opinion as expressed by the expert goes beyond the foundation. Of course there will be line-drawing involved. But that can't be the sole reason for rejecting an amendment. Virtually all questions of evidentiary admissibility require some kind of line-drawing.

The Committee Note to the draft amendment below adds a paragraph discussing how a regulation on overstatement might apply to experience-based testimony.

## **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 Fall, 2018 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.

A previous 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 sufficiently detract from 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 actually has found in terms of the expert’s basis, methodology and application. 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 to be 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>15</sup>

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<sup>15</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.

### ***Discussion at Previous Committee Meetings:***

At previous meetings 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 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, the draft set forth in Part Three below adds Rule 104(a)-related instructions to the Committee Note that would accompany an amendment regarding overstatement.

**The text of the draft amendment and Committee Note begins on the next page.**

### III. Draft of a Possible Amendment to Rule 702 to Address Overstatement (With Language in the Committee Note Regarding Weight/Admissibility)

#### Rule 702. Testimony by Expert Witnesses

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

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; ~~and~~
- (d) the expert has reliably applied the principles and methods to the facts of the case; and
- (e) the expert does not claim a degree of confidence that is unsupported by a 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 the degree of confidence that an expert expresses in an opinion cannot be greater than what the expert’s principles and methods can support. 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 and requires intervention by the judge as gatekeeper. 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 the 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 meaning 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 a forensic expert expresses an opinion to a “reasonable degree of [scientific/forensic] certainty” should be prohibited under the amendment. That phrase has no scientific meaning; it was developed by lawyers, not scientists. 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 make extravagant claims that are clearly unsupported by the expert’s basis and methodology.

The limitation on overstatement of an expert’s opinion applies to all experts, including those whose opinions are based on experience. This does not mean that such experts cannot make properly founded conclusions on causation, damages, and the like. But it does mean that they are not allowed to make extravagant claims that are unsupported by the methodology. For example, an electrician might be permitted to testify that a fire was “caused by a malfunction in the thermostat” manufactured by the defendant, if that opinion is properly grounded in experience and in an examination of the thermostat. However, such an expert would not have a sufficient foundation to testify that the malfunction was the cause of the fire “without any doubt” or “to a scientific certainty.”

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), so 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.

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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.

### *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 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.”

**Cell Site Location --- regulation of overstatement: *United States v. Hill***, 818 F.3d 289 (6<sup>th</sup> Cir. 2017): The court held that the science and methods upon which historical cell site location is based are understood and well-documented. But the court emphasized that the trial expert “emphasized that Hill’s cell phone’s use of a cell site did not mean that Hill was right at that tower or at any particular spot near that tower.” It concluded that the expert’s disclaimer “save[d] his testimony” because historical cell-site analysis can only “show with sufficient reliability that a phone was in a general area, especially in a well-populated area.”

Because the *Hill* court was concerned that a jury might overestimate the quality of the information provided by historical cell-site analysis, it cautioned the Government “not to present historical cell-site evidence without clearly indicating the level of precision—or imprecision—with which that particular evidence pinpoints a person’s location at a given time.”) And it warned that “[t]he admission of historical cell-site evidence that overpromises on the technique’s precision—or fails to account adequately for its potential flaws—may well be an abuse of discretion.”

**Comparative bullet lead analysis: *Kennedy v. Peele***, 552 Fed. Appx. 787 (10<sup>th</sup> 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. Kelsey***, 917 F.3d 740 (D.C. Cir. 2019): In a prosecution for sexual assault, the government relied at trial on a DNA match taken from the victim’s sexual assault kit. One witness, Shana Mills, testified as to the processing of DNA swabs from the kit – i.e., taking cuttings from swabs, placing them in test tubes, and loading them into a machine called a genetic analyzer which produced electropherograms (charts that list the alleles present at different locations of a length of DNA). The data that Mills generated was transferred to another lab and analyzed by an expert, Hope Parker. Mills testified and compared the

information in a report she wrote with the information that Parker used. Mills also testified that she identified a male profile in the DNA sample, which helped to explain why the electropherogram analysis was sent to Parker for a mixture analysis. The court held that Mills's testimony was properly admitted and that the trial judge did not abuse discretion in precluding cross-examination of Mills as to alleged deficient mixture analyses at the Department of Forensic Sciences' Laboratory. The court reasoned that any problems were irrelevant to Mills's credibility, because the benchwork in this case predated the problems with mixture analysis in the lab.

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

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

**DNA identification:** *United States v. Preston*, 706 F.3d 1106 (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 (9<sup>th</sup> 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. 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 for an identification. 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.

**Note: The DOJ says this entry is misrepresentative because, while the court used the term “match” the witness never did. Rather the witness used and “identification” methodology. But this only shows that courts (like pretty much everyone else) do not get the DOJ’s fine distinction between a match and an identification. And if courts don’t understand it, how are juries supposed to?**

**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: Limitations on Cross-examination: *United States v. Bonds***, 922 F.3d 343 (7<sup>th</sup> Cir. 2019): The defendant argued that his Sixth Amendment right to confront an FBI fingerprint expert was impaired when the trial judge prohibited him from cross-examining the expert about an error that the FBI lab had made in the Brandon Mayfield (Madrid bombing) case. The court found no error in prohibiting this cross-examination. The court stated that the defendant had “ample opportunity to supply the jury with evidence about the reliability of the ACE-V

method” --- specifically the analysis provided in the NAS and the PCAST reports. The court specifically noted that the summary on fingerprint identification provided in the PCAST report “provides the defense bar with paths to cross-examine witnesses who used the ACE-V approach. Have they avoided confirmation bias? Have they avoided contextual bias? Has their proficiency been confirmed by testing?” The court noted that Bonds was not arguing that he was precluded from using the NAS and PCAST reports on cross. His only complaint was that he was not allowed to raise the Mayfield error.

**Fingerprint identification: *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.

**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.”

**Fingerprint identification --- 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 --- Abdicating the gatekeeper function: *United States v. Ruvalcaba-Garcia***, 923 F.3d 1183 (9<sup>th</sup> Cir. 2019): In an illegal reentry case, a government expert was called to testify that the fingerprint he took from the defendant matched the fingerprint on an order of removal. The expert’s methodology was ACE, but not –V: meaning that he did not have his conclusion of a match validated in any way. The expert was not a member of the International Association for Identification (“IAI”) or the Scientific Working Group on Friction Ridge Analysis, Study, and Technology (“SWGFAST”). The trial judge essentially ruled that the expert’s qualifications and methodology were questions for the jury. The court found error, because qualifications and reliability of methodology are clearly admissibility questions for the court under Rule 702 and *Daubert*. The court concluded as follows:

Here, the district court abused its discretion by failing to make any findings regarding the reliability of Beers’s expert testimony and instead delegating that issue to the jury. Indeed, the district court made this error three times during Ruvalcaba’s \* \* \* trial. After the government conducted an initial voir dire of Beers and “move[d] to have [him] qualified as an expert fingerprint technician,” the court responded, “That’s a determination for the jury.” After Ruvalcaba cross-examined Beers and the government again “move[d] to qualify him as an expert,” the court responded, “Again, that’s an issue for the jury.” And when Ruvalcaba “object[ed] to the qualifying [of Beers] as an expert,” the court overruled the objection and told the jury that it was up to them “to decide whether the witness by virtue of his experience and training is qualified to give opinions.” \* \* \* The district court’s failure to make an explicit reliability finding before admitting Beers’s expert testimony in this case constituted an abuse of discretion.

**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 (11th Cir. 2010):** The defendant challenged the expert’s use of the ACE-V method. The court simply relied on precedent to reject the challenge. In *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005), the court had concluded that the error rate of latent fingerprint examination was infinitesimal, and that latent fingerprint examiners follow a uniform methodology. The *Abreu* court also gave significant weight to the fact that latent fingerprint methodology was generally accepted --- by the field of latent fingerprint examiners (which is not a large surprise). The *Scott* court concluded as follows:

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

**Reporter’s Note: The term “match” is used by the court. It is unknown what the witness testified to. But the fact that a court thinks it is a “match” is cause for concern.**

**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: *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.

**Hair identification – overstatement – violation of constitutional rights by government presentation of “false” expert testimony: *United States v. Ausby*, 916 F.3d 1089 (D.C.Cir. 2019):** At the defendant’s trial on rape and murder in 1972, the government’s forensic expert testified that hairs found at the crime scene were “microscopically identical” to the defendant’s hair, and that hair is “unique to a particular individual.” The defendant was convicted and sentenced to life in prison. In 2012, the FBI concluded that the expert in Ausby’s case “misled the jury by implying that he could positively identify the hairs taken from the crime scene as belonging to Ausby.” The government conceded error, but in this proceeding argued that the error was not material to the conviction. The court, in light of the government’s concession, found that the government had violated *Napue v. Illinois*, 360 U.S. 264 (1959) by presenting false testimony. The court concluded that the false testimony was material, and held that Ausby should be granted relief under §2255, and that the trial court erred in refusing to vacate Ausby’s conviction.

**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.): 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.

**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.

**Reporter’s Note: The DOJ memo states that this case is not problematic because “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.” But it is hard to see how it is better when it is the court rather than the witness who is responsible for the overstatement. It actually seems that it is worse when it is the court that is responsible.**

**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: *United States v. Pugh***, 2009 WL 2928757 (S.D. Miss.): The court rejected a challenge to ballistics testimony. 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: *United States v. Romero-Lobato*, 2019 WL 2150938 (D. Nev.):** In a prosecution for robbery and related offenses, the government called a ballistics expert to testify, in the court’s words, “that the Taurus handgun found in the stolen Yukon following the police chase is the same gun that was used to fire a round into the ceiling of Aguitas Bar and Grill.” The trial court held a *Daubert* hearing in which it considered the NAS and PCAST reports as applied to ballistics analysis using the Association of Firearm and Tool Mark Examiners (“AFTE”) method. In its opinion, the court first summarized the case law:

The cases surveyed by the Court indicate that some federal courts have recently become more hesitant to automatically accept expert testimony derived from the AFTE method. While no federal court (at least to the Court's knowledge) has found the AFTE method to be unreliable under *Daubert*, several have placed limitations on the manner in which the expert is allowed to testify. The general consensus is that firearm examiners should not testify that their conclusions are infallible or not subject to any rate of error, nor should they arbitrarily give a statistical probability for the accuracy of their conclusions. Several courts have also prohibited a firearm examiner from asserting that a particular bullet or shell casing could only have been discharged from a particular gun to the exclusion of all other guns in the world. These restrictions are in accord with guidelines issued by the Department of Justice for its own federal firearm examiners which went into effect in January 2019. But it is also important to note that the courts that imposed limitations on firearm and toolmark expert testimony were the exception rather than the rule. Many courts have continued to allow unfettered testimony from firearm examiners who have utilized the AFTE method.

In a lengthy analysis, the court applied the *Daubert* factors and concluded that the ballistics expert would be permitted to testify. It summed up as follows:

Balancing the *Daubert* factors, the Court finds that Johnson's testimony derived from the AFTE method is reliable and therefore admissible. The only factor that does not support the admission of the testimony is the lack of objective criteria governing the application of the AFTE method. But this lack of objective criteria is countered by the method's relatively low rate of error, widespread acceptance in the scientific community, testability, and frequent publication in scientific journals. The balance of the factors therefore weighs strongly in favor of the admission of Johnson's testimony. The Court also notes that the defense has not cited to a single case where a federal court has completely prohibited firearms identification testimony on the basis that it fails the *Daubert* reliability analysis. The lack of such authority indicates to the Court that defendant's request to exclude Johnson's testimony wholesale is unprecedented, and when such a request is made, a defendant must make a remarkable argument supported by remarkable evidence. Defendant has not done so here.

In its analysis, the court discussed the case law, such as *Glynn*, that has sought to put limitations not on ballistics as a whole but on the overstatement of an expert's conclusion. While the court does not specifically reject those cases, *there is nothing in the final order that appears to impose any limitation on the expert's conclusions --- which are described by the court as testimony of a match.*

**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: Extensive analysis, discussion of overstatement: *United States v. Johnson*, 2019 WL 1130258 (S.D.N.Y.):** In a prosecution of a street gang, the government offered expert testimony from a ballistics examiner. The expert report stated that the cartridge casings produced from test fires were “discharged from the SAME firearm” as the thirteen cartridge casings recovered from the scene of the Bronx Restaurant Shooting, “based on the observed agreement of their class characteristics and sufficient agreement of their individual characteristics.” In a thorough and detailed opinion, the court denied the defendant’s motion to exclude the expert testimony.

The court discussed the NAS and PCAST reports, and summarized the federal court treatment of those reports as applied to ballistics testimony:

All of these courts admitted expert testimony concerning toolmark identification, rejecting arguments that the 2008-2016 scientific reports had rendered such evidence inadmissible. While acknowledging that toolmark identification evidence does not feature the full rigor of a science, and suffers from subjectivity and an absence of a precise, widely accepted methodology, these courts concluded that it is nonetheless a proper subject for expert testimony. These courts found such evidence “sufficiently plausible, relevant, and helpful to the jury to be admitted in some form,” *Willock*, 696 F. Supp. 2d at 568, and reasoned that the weaknesses in toolmark identification can be effectively explored on cross-examination. These courts also precluded toolmark identification experts from expressing their opinions in terms of absolute scientific certainty. See, e.g., *Ashburn*, 88 F. Supp. 3d at 248-50; *Monteiro*, 407 F. Supp. 2d at 369; *Cerna*, 2010 WL 3448528, at \*5.

Courts have also emphasized that the demanding scientific standards on display in the three reports require a level of certainty and infallibility not properly applied in a courtroom.

The court then proceeded to an application of the *Daubert* factors. As to *testability*, the court stated as follows (with many citations omitted):

There appears to be little dispute that toolmark identification is testable as a general matter. The PCAST Report observed that “[o]ver the past 15 years, the field has undertaken

a number of studies that have sought to estimate the accuracy of examiners' conclusions.” While the PCAST Report dismissed “many of the[se] studies [as] not appropriate for assessing scientific validity and estimating the reliability because they employed artificial designs that differ in important ways from the problems faced in casework,” PCAST acknowledged that one study was appropriately designed, and called for additional such studies to be performed.

Indeed, many courts have relied on the existing scientific literature – including the studies examined in the PCAST Report — in concluding that toolmark identification analysis satisfies the “testability” factor of *Daubert*. \* \* \* While some courts have acknowledged the limitations of these “validation studies,” even the PCAST Report – which is the report most critical of toolmark identification – conceded that these studies “indicate that examiners can, under some circumstances, associate ammunition with the gun from which it was fired.”

The “testability” of Detective Fox’s methods and conclusions is also supported by the annual proficiency testing he undergoes. While these proficiency tests do not validate the underlying assumption of uniqueness upon which the AFTE theory rests, they do provide a mechanism by which to test examiners' ability – employing the AFTE method – to accurately determine whether bullets and cartridge casings have been fired from a particular weapon.

Finally, \* \* \* Detective Fox testified that he is required to photograph “positive comparisons” so that “if a qualified examiner w[ere] to reexamine [his] case[,] ... he could have an idea of what [Detective Fox] was looking at and what [he] was comparing” in reaching his conclusions. Moreover, Detective Fox testified that a second microscopist reviews his conclusions, by performing “an independent verification and technical review of [Detective Fox’s] findings to see if they are correct or not.” The firearms examiner conducting the review is not aware of Detective Fox’s conclusions when he or she conducts the review. These procedures demonstrate that Detective Fox’s methodology can be challenged and reasonably assessed for reliability.

As to *peer review*, the court noted that most of the literature concerning the AFTE theory and methodology has been published in AFTE’s peer-reviewed journal, the AFTE Journal. The defendant argued that this should be discounted as peer review because the AFTE is essentially a captive journal for ballistics experts. But the court found that other courts have found the AFTE journal to be a scholarly publication.

As to *standards and controls*, the court declared as follows (with many citations omitted):

AFTE has a well-known standard for toolmark identification, which the Government and Detective Fox have repeatedly invoked – “sufficient agreement.” As discussed above, both courts and the scientific community have voiced serious concerns about the “sufficient agreement” standard, characterizing it as “tautological,” “wholly subjective,” “circular,” “leav[ing] much to be desired,” and “not scientific.” The Court

shares some of these concerns. Having heard Detective Fox's testimony, however, the Court is persuaded that his methodology is governed by controlling standards sufficient to render it reliable.

As an initial matter, several aspects of Detective Fox's methodology discussed in connection with the "testability" *Daubert* factor constitute "standards controlling ... [toolmark identification's] operation." For example, the photographic documentation and verification requirements are industry standards adhered to by most, if not all, other crime labs in the country. Similarly, the extensive AFTE training and proficiency testing Detective Fox has received — which appear to be administered to firearms examiners nationwide — also supply such standards.

Moreover, Detective Fox's testimony about his methodology demonstrates the existence of standards controlling his determination as to whether "sufficient agreement" exists with respect to a particular comparison. As discussed above, the photographic comparisons included in Detective Fox's December 5, 2018 report demonstrate how he can determine — from the individual characteristics of two casings or bullets — whether striations line up or "match" one another. The photographic comparisons at issue here reflect striations that line up exactly between the test-fired cartridge casings and those recovered from the scene of the Bronx Restaurant Shooting. The "matching" of the striations is stark, even to an untrained observer. Accordingly, the issue is not whether the ballistics evidence in this case shares specific individual characteristics. Instead, the issue is at what point Detective Fox concludes that the shared individual characteristics he has observed and photographically documented are sufficient to declare that the casings or bullets were fired from the same firearm.

On cross-examination, Detective Fox resisted defense counsel's efforts to have him specify the number of matching individual characteristics that are necessary before a "sufficient agreement" conclusion can be reached. Instead, Detective Fox stated that "[e]very single case is different," and that he employs a holistic approach incorporating his "training as a whole" and his experience "based on all the cartridge casings and ballistics that [he] ha[s] identified and compared." Detective Fox did set out certain principles that ground his conclusions, however. For example, the CMS standard — six consecutive matching striations or two groups of three matching striations — represents a "bottom standard" or a floor for declaring a match. Detective Fox will not declare that "sufficient agreement" exists unless microscopic examination reveals a toolmark impression with one area containing six consecutive matching individual characteristics, or two areas with three consecutive matching individual characteristics. Detective Fox's analysis does not end at that point, however. Instead, Detective Fox goes on to examine every impression on the ballistics evidence. "All these lines should match," as well, and if they do not, Detective Fox will not find "sufficient agreement."

These criteria provide standards for Detective Fox's findings as to "sufficient agreement." While Detective Fox's ultimate findings are subjective — a fact which he readily concedes — all technical fields which require the testimony of expert witnesses engender some degree of subjectivity requiring the expert to employ his or her individual

judgment, which is based on specialized training, education, and relevant work experience. Accordingly, the presence of a subjective element in a technical expert's field does not operate as an automatic bar to admissibility.

As to *rate of error*, the court recognized that no error rate for ballistics examination has been conclusively established. It also noted that based on studies conducted, PCAST concluded that the error rate is as high as 1 in 46. But it concluded that “even accepting the PCAST Report’s assertion that the error rate could be as high as 1 in 46, or close to 2.2%, such an error rate is not impermissibly high. The court concludes that the absence of a definite error rate for toolmark identification does not require that such evidence be precluded.”

Finally, as to *general acceptance*, the court concluded that “[t]here is no dispute here that toolmark identification analysis is a generally accepted method in the community of forensic scientists, and firearms examiners in particular.”

After finding that tool mark comparison withstood a *Daubert* challenge, the court turned to possible limitations on the ballistics expert’s testimony. The defendant asked the court to limit the expert’s testimony “to a factual description of the method he applied and his observations of similarities and differences he found between sets of ballistics.” But the court declined to do so. It discussed the case law concerning potential overstatement of a ballistics expert’s conclusion, and noted that most of it was related to testimony to a “specific degree of scientific certainty.” Citing *Glynn*, the court stated that “[o]ften these limitations are imposed because of judicial or defense counsel concern that the firearms examiner intends to offer an opinion with absolute or 100% certainty.” The court concluded that in this case, it was clear that the expert did not intend to assert – and the Government did not intend to elicit – “any particular degree of certainty as to his opinions regarding the ballistics match.” The court stated that “Detective Fox’s repeated concession at the *Daubert* hearing that his conclusions are based on his subjective opinion stands in stark contrast to the “tendency of [other] ballistics experts ... to make assertions that their matches are certain beyond all doubt. *Glynn*, 578 F. Supp. 2d at 574.” The court also emphasized that the expert stated that he “would never” state his conclusion that ballistics evidence matches to a particular firearm “to the exclusion of all other firearms in a court proceeding, because I haven’t looked at all other firearms.” The court concluded that “[g]iven the testimony at the *Daubert* hearing and the Government’s representations as to what it will elicit from Detective Fox, there is no need for this Court to impose limitations on Detective Fox’s opinions.”

**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.”**

**DOJ points out, by way of correction of this entry, that the “reasonable degree” testimony was required by the court and not chosen by the witness. That is so, but it seems especially problematic for a court to require witnesses to testify to standards that have been so widely discredited in the scientific community and by DOJ itself.**

**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.

Also note that this is a 2018 case and presumably the DOJ standards should have kept the expert from proffering an opinion based on a practical impossibility or a reasonable degree of certainty. And yet the expert was prepared to offer such an opinion.

**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 noting 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.”

**Cell Site Location --- court-imposed limitation on overstatement: *United States v. Medley*, 312 F.Supp.3d 493 (D.Md. 2018)(Grimm, J.):** The court held that historical cell site location information is sufficiently reliable to be admissible under *Daubert*. But the court recognized that there was a danger in expert testimony that would ascribe a level of precision to CSLI that is not actually supported by the methodology. Thus the court limited the expert’s testimony to the opinion that the “general location” of the defendant’s phone was “consistent with” the location of the crime. And the court held that this opinion could only be given after the expert has “fully explained during direct examination the inherent limitations of the accuracy of the location evidence --- namely, the phone can only be placed in the general area of the cell tower sector that it connected to near the time of the carjacking, and the it cannot be placed any more specifically within the sector.”

**Cell Site Location --- admissible because the government accepted a limitation on overstatement: *United States v. Brown*, 2019 WL 3543253 (E.D. Mich.):** The court held that the methodology of cell site location is reliable, but relied on *United States v. Hill*, 818 F.3d 289 (6<sup>th</sup> Cir. 2017), for the proposition that the court cannot “give the Government a blank check when it comes to the admission of historical cell-site analysis.” Specifically, an expert could not be allowed to testify that cell site location is more particularized than the actual methodology could support. It concluded as follows:

Although the science and methods upon which historical cell-site analysis is based are understood and well-documented, they are only reliable to show that a cell phone was in a general area. The Government acknowledges this relative imprecision in its response to Brown's motion. Thus, assuming that the Government lays a proper foundation and accurately represents historical cell-site analysis's limits at trial, its expert testimony is reliable.

**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 – Mixtures, test found unreliable: *United States v. Williams***, 382 F.Supp.3d 928 (N.D. Cal. 2019): The court addressed the probabilistic genotype program Bullet, used by the Serological Research Institute (SERI) to analyze multiple source DNA mixtures that include up to four possible sources. The government expert, Hopper, analyzed the DNA under a four-person validation, despite a past analyst finding that the sample contained five possible sources. The expert proposed to testify that there is “very strong support” for the proposition that the defendant contributed DNA to the sample. The defendant moved to exclude the Bullet analysis on the ground that the program was not validated for five-source samples.

Judge Orrick provided this helpful background for the challenges to DNA identification of mixed samples:

DNA analysis for single-source and simple mixtures—those with DNA from just one or two individuals—is objective and reproducible in part because it requires the exercise of little if any human judgment. Katherine Kwong, *The Algorithm Says You Did It: The Use of Black Box Algorithms to Analyze Complex DNA Evidence*, 31 Harv. J.L. & Tech. 275, 277 (2017)) By contrast, human judgment is required to analyze complex mixtures with three or more DNA profiles because “all of the individual DNA profiles [are] superimposed atop one another.” Id. at 278. An analyst must decide between “different interpretations that might be equally or similarly valid – and those decisions may have significant impacts on the ultimate results of the analysis.” Id.

It is frequently impossible to tell how many individuals' DNA is present within a complex mixture; a greater number of contributors only increases the rate of error, which usually comes in the form of an underestimate. For example, a 2005 study found that analysts mischaracterized known four-person mixtures as three-person mixtures at a rate of 70%. These errors likely occur because of allele sharing:

Some alleles at some loci are relatively common and therefore likely to overlap between contributors to a mixture. Thus, the more individuals present in a mixture, the more likely it is the mixture will hide identifications of subsequent individuals, as the relative proportion of present versus absent alleles at each locus increases with each new contributor. \* \* \* [A] five-person sample can present very similarly to the way four-person mixtures do.

Advancements in amplification technology have improved analysts' ability to accurately determine the number of contributors because they amplify the alleles at more loci. For example, SERI previously relied on the Identifiler Plus kit, which amplifies the alleles at 15 loci. The newer GlobalFiler kit, which SERI validated in December 2016, amplifies the alleles present at 21 loci, and some of the additional loci are polymorphic. \* \* \* GlobalFiler has improved the reliability of the conclusions regarding the number of contributors for known three-person mixtures. But known five-person mixtures were mischaracterized as originating from four or fewer individuals in approximately 61-75% of samples. When SERI validated GlobalFiler, it tested two-, three-, four-, and five-person mixtures. It experienced the same difficulties. In fact, it underestimated all of the known five-person mixtures tested:

In each five-person mixture tested, the electropherograms showed no indication of more than four contributors. This was not due to a shortcoming of GlobalFiler or the testing process, but rather because, by coincidence, the contributors used to create the test mixture shared alleles. Given the genotypes of the contributors, no more than eight alleles could appear at any one locus.

\* \* \* SERI often uses DNA profiles of employees and friends during validation studies. A 2018 study found that analysts underestimated 64% of known five-person mixtures and 100% of known six-person mixtures—and characterized all of the mixtures as containing DNA from four individuals.

Even with the improvement in amplification technology, other factors present challenges to accurately identifying the number of contributors. The challenge of allele sharing is “frequently exacerbated by samples that have degraded or which originally contained only a small amount of DNA.” Kwong at 278. \* \* \* [D]egradation occurs when DNA breaks off between the bases, which usually happens to larger pieces first. This process occurs naturally over time, although freezing DNA can slow it down. Amplification kits are unable to copy DNA past the point where the breakage has occurred.

The court excluded the Bullet analysis by Hopper because Hopper could not reliably conclude that only four, and not five, individuals contributed to the DNA mixture. The court noted the following issues: (1) the error rate for mistaking five-person mixtures for four-person mixtures was “troubling” (and research showed that the error rate only increased with the number of sources present in the mixture – 64% of 5-person mixtures and 100% of 6-person mixtures were underestimated); (2) SERI itself was unable to distinguish between four and five-person mixtures in a study by GlobalFiler where it failed to make a correct five-person identification even once; (4) Hopper used less than the recommended amount of DNA to test; (5) more than six years elapsed between the first test detecting a 5-person mixture and the second test by Hopper showing a 4-person mixture; and (6) “there are two loci with seven alleles—and one of those loci has a below-threshold peak that could represent an eighth allele. If that is the case, the sample can be a four-person mixture *only if* no two contributors share alleles at that locus, no contributor is a homozygote at that locus, and no additional alleles have dropped out at that locus.”

The government argued that any flaws in the methodology and application to the DNA mixture could be raised on cross-examination. But the court disagreed, explaining as follows:

The government argues that exclusion of the testimony is not appropriate; instead, Elmore can challenge Hopper's analysis and conclusions during cross-examination. But the number of contributors is a foundational part of every calculation Bullet performs. If that input is in doubt, the reliability of the entire analysis is necessarily in doubt. To corroborate Hopper's conclusion about the number of contributors, the government put forth the results he obtained after running Bullet with a five-person mixture input. But Bullet was not validated to test five-person mixtures, and I will not rely on that result for any purpose.

DNA evidence can have a powerful effect on a jury's evaluation of a criminal case. See John W. Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability and Form*, 71 Or. L. Rev. 349, 367 n.81 (1992) (“There is virtual unanimity among courts and commentators that evidence perceived by jurors to be ‘scientific’ in nature will have particularly persuasive effect.”) (citing cases). If SERI could accurately identify five-person mixtures and if it had validated Bullet to analyze them, then it might have a reliable understanding of how underestimating a five-person mixture impacts the likelihood ratio. That understanding could improve the reliability of Hopper's conclusion on the number of contributors or make it appropriate to allow the government to present two likelihood ratios: one based on four contributors and a second based on five. Then the other problems identified in this Order, such as Harmor's changed testimony, the small testing sample, and the signs of degradation, would be ripe for cross-examination. But there are simply too many reasons to question the reliability of

Hopper's conclusion on this foundational issue, which brings the entire analysis outside the parameters of Bullet's validation at SERI. This testimony is not reliable, and it is not admissible.

**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) (Orrick, J.):** 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*.

The court explicitly rejected the government’s arguments that the flaw, if any, was one of application and not methodology and so raised a question of weight and not admissibility:

I fail to see the practical distinction the government seeks to draw between a methodology and the application of that methodology when it comes to my role as gatekeeper. Rule 702 explicitly directs courts to consider whether “the expert has reliably *applied* the principles and methods to the facts of the case.” Fed. R. Evid. 702(d)(emphasis added). Proper application of the methods is a necessary component of ensuring the reliability of the opinion testimony. If SERI improperly employed accepted methodology then the results would lack a sound basis. That inquiry is appropriately included within the scope of a *Daubert* analysis. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (“*Daubert II*”), 43 F.3d 1311, 1316 (9th Cir. 1995)(“Our task, then, is to analyze not what the experts say, but what basis they have for saying it.”). The basis for an expert’s opinion must necessarily

entail how he employed his methodology; that consideration is critical to a determination of whether the opinion “rests on a reliable foundation.” See *Daubert*, 509 U.S. at 597.

**Comment:** Low copy number DNA testing was purportedly a way of finding a match from infinitesimally small samples of DNA. It was a test developed and used in only one lab in the world --- the New York City Medical Examiner’s lab. It was supposedly supported by a validating test, but that test was never disclosed by the Medical Examiner. A lawsuit brought by a forensic examiner alleged that the test was never conducted and the Medical Examiner lied about it. That suit was just settled for \$1,000,000. The Medical Examiner, in 2017, decided to abandon the Low Copy Number procedure. But courts have consistently admitted LCN results. See [https://www.nytimes.com/2019/04/23/nyregion/dna-testing-nyc-medical-examiner.html?emc=edit\\_ur\\_20190424&nl=new-york-today&nid=6330531820190424&te=1](https://www.nytimes.com/2019/04/23/nyregion/dna-testing-nyc-medical-examiner.html?emc=edit_ur_20190424&nl=new-york-today&nid=6330531820190424&te=1)

**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):** 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. 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 was 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.):** 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.

**Drug Identification --- Government had not established the reliability of the methodology:** *United States v. Brown*, 2019 WL 3543253 (E.D. Mich.): The defendant challenged the testimony of a forensic expert on whether cocaine was found in a substance. The government argued that drug identification was basic and well established. It noted that the defendant provided no showing that the process of drug identification was unreliable. But the court stated that “it is the proponent of the testimony that must establish its admissibility by a preponderance of proof.” It concluded as follows:

The Government, as the proponent of Earles’s testimony, has not offered any explanation on how Earles performed her test or about the reliability of her methods, other than to note

that forensic scientists are frequently qualified as experts. Thus, the Government still needs to establish the reliability of Earles's methods.

**Comment:** The court is not at all saying that the methodology for drug identification is suspect. But it is absolutely right that if that methodology is challenged, the government must show its reliability by a preponderance of the evidence. That's the importance of the Rule 104(a) standard.

**Drug identification:** *United States v. Reynoso*, 2019 WL 2868951 (D.N.M.): Testimony from lab analysts that substances obtained from the defendant contained methamphetamine was found to be admissible consistent with *Daubert*. The court stated:

In regard to the forensic scientist and chemists, as the Government points out, "there are no novel scientific principles at play." Each of the proposed expert witnesses is employed in the field of forensic analysis and all are fully qualified to detect and analyze controlled substances. Thus, the Court rules that the proffered expert testimony of Mr. Chavez, Ms. Ponce, and Ms. Dewitt regarding the specific substances they personally analyzed have a reliable basis and will be admitted.

**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.”

**Note: As DOJ points out, it was the court and not the witness who referred to the testimony as a match. As pointed out earlier, the fact that the court thinks that the testimony is matching testimony is a problem of its own.**

**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 was a “match” to 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).

**Note: DOJ says that the word “match” is supplied by the court, not by the witness. But the court used the term “match” after citing two government documents in support of the expert’s testimony. So the term “match” actually comes from the government --- which is the problem that an overstatement amendment is intended to address.**

**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.

**Note: DOJ says that the term “match” comes from the court and that it is unknown what the witness actually testified to. But again, the point is that the court thinks that the testimony is “matching” testimony and admits it with that understanding --- how is a jury supposed to do a better job of distinguishing “match” from “identification”?**

**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.”

**Comment: Again, it is the court that uses the term “match” and we don’t know what the witness actually testified to. But the fact that the court is not following the ambiguous distinction between “match” and “identification” is problematic.**

**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: *United States v. Cruz-Mercedes*, 2019 WL 2124250 (D. Mass.):** The court, during a *Daubert* hearing, compared the testimony of two experts who used the ACE-V method of fingerprint analysis. The government's expert testified to the procedure he followed, where he went through all four stages of ACE-V methodology and documented his procedures according to MSP protocol. However, he failed to follow standards for documentation set by the Scientific Working Group on Friction Ridge Analysis Study and Technology ("SWGFAST"). The defendant's expert did not find that the ACE-V method was unreliable, rather she found that none of the prints used by the government's expert were suitable for comparison or clear enough for positive identification. She also found that the government expert's failure to follow SWGFAST procedures opened the door to unconscious bias and prevented third party evaluation of his analysis. The court concluded as follows:

Based on the testimony presented during the evidentiary hearing, I could not find that Sgt. Costa's methodology was so unreliable that it should be kept from the jury. To be sure, Dr. Wilcox's testimony highlighted the importance of documentation to the scientific process, and I did not accept the Government's suggestion that documentation is irrelevant to a determination of reliability. The documentation here was not full and complete, and that affects the credibility of Sgt. Costa's conclusion, even if he properly used the ACE-V procedures.

While the SWGFAST standards for documentation represent the consensus view on what is appropriate, I was not convinced that Stg. Costa's failure to follow them renders his conclusions so unreliable that his opinion must be kept from the jury entirely. While that failure certainly raised concerns about confirmation bias and opens Stg. Costa's conclusions to robust challenge on cross-examination, the question whether to accept his comparison as accurate is properly left for the jury.

**Comment: In finding the expert's testimony to be not so unreliable to be excluded, it can be argued that the court flipped the burden of persuasion from that imposed by *Daubert* and Rule 104(a): the proponent has the burden of showing reliability by a preponderance of the evidence. The court is essentially saying that defects in reliability are regulated by cross-examination, which is contrary to the presumption of *Daubert*.**

**Fingerprints: *United States v. Stone***, 848 F. Supp. 2d 714 (E.D. Mich. 2012): The court admitted expert testimony regarding fingerprints. 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 a 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: PCAST report; and some limit on overstatement: *United States v. Cantoni*, 2019 WL 1259630 (E.D.N.Y.):** The defendant moved to exclude expert testimony by the NYPD Latent Print Section ("LPS"). The NYPD LPS uses the ACE-V approach for fingerprint analysis. The defendant relied on the PCAST report, which expressed doubts about the reliability of fingerprint identification and proposed a five-step process for to correct for bias. The PCAST recommendations are that latent print examiners (1) have undergone proficiency testing, (2) disclose whether they have analyzed the latent print before comparing it to the known print, (3) document their comparison of the prints' features, (4) disclose the existence of other facts that could have influenced their conclusion, and (5) verify that the latent print is comparable in quality to those prints used in certain foundational studies of latent print analysis. The defendant argued that aside from the NYPD experts undergoing proficiency testing, there was no evidence to suggest that they followed the remaining guidelines.

The court assumed, without deciding, that the defendant was correct that the NYPD experts had not satisfied the PCAST protocol. But the court concluded that "the analysis makes clear that LPS followed the ACE-V procedure, a procedure that the PCAST report deemed scientifically valid and reliable. Indeed, an addendum to the PCAST report concluded that 'there was clear empirical evidence' that 'latent fingerprint analysis [...] method[ology] met the threshold requirements of scientific validity and reliability under the Federal Rules of Evidence.'" (citations and internal quotations omitted). The court concluded as follows:

Although NYPD's methods may have been imperfect and may not have delivered scientifically certain results, there is no indication that they were so fundamentally unreliable as to preclude the testimony of the experts. At best, Cantoni's submission shows certain ways in which cognitive bias may have affected the NYPD examiners' analysis but does not show that it actually did so or that any cognitive bias was so significant as to produce an erroneous conclusion. Defendant's concerns are fodder for cross-examination rather than grounds to exclude the latent print evidence entirely. This is the approach that has been adopted each time courts in this district have considered similar motions.

The defendant alternatively sought relief from possible overstatement in the expert's opinions. He moved to preclude the government experts from testifying that their conclusion is certain, that latent print analysis has a zero error rate, or that their analysis could exclude all other persons who might have left the print. In response, the government acknowledged that "the language and claims that are of concern to defense counsel are disfavored in the latent print discipline," and that "absolutely certain opinions" and identifications "to the exclusion of all others" are "not approved for latent print examination testimony." The court granted the

defendant's motion to exclude such claims "without opposition." [Nonetheless, the experts were presumably allowed to testify to a source identification.]

Finally, the defendant sought to call an expert, Dr. Cole, who would testify to the rate of error in fingerprint identification, and challenges to its reliability. This was the same expert that the defendants proffered in *Pitts, supra*. Like the court in *Pitts*, the court here found that an expert would not be helpful, because the issues that would be addressed by the expert could be raised on cross-examination of the government experts.

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

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

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

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

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

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

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

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

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

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

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

**Fingerprints (Palmprints): Overstatement --- testimony to a match --- *United States v. Council***, 777 F. Supp. 2d 1006 (E.D. Va. 2011): The defendant moved to exclude an expert's testimony that known palm prints collected from the defendant matched a latent palmprint on a handgun. He relied on the NAS report that critiqued fingerprint methodology as subjective and lacking a scientific basis. The court rejected the defendant's arguments, concluding the "friction ridge analysis has gained [acceptance] from numerous forensic experts and law enforcement officials across the country. See *Crisp*, 324 F.3d at 269 (holding a district court was 'within its discretion in accepting at face value the consensus of expert and judicial communities that the fingerprint identification technique is reliable')." The court stated that the NAS report has "usefully pointed out areas in which standards governing friction ridge analysis should continue to develop" but that its critique was "insufficiently penetrating to warrant the exclusion of Dwyer's testimony."

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

**Footprint identification: *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."

**Gunshot residue: *Sanford v. Russell*, 2019 WL 2169911 (E.D. Mich.):** This was a section 1983 action alleging that the defendants prosecuted the plaintiff after coercing his confession and generating false forensic evidence. The defendants challenged the plaintiff's expert testimony that the presence of primer residue on the plaintiff's pants did not mean that he had recently fired a gun. The defendants argued that the expert's opinions about the primer gunshot residue test were fatally uninformed because he admitted that he never even performed such a test. But the court was persuaded by the expert's explanation that he never performed the test *because it was deemed unreliable and too likely to produce misleading results*. Here is the expert's explanation:

During my twenty years at the Michigan State Police Northville Forensic Laboratory, I never performed primer residue testing. To my knowledge, the Michigan State Police has never performed this type of test because the test can generate the false and misleading impression that someone has recently fired a gun when, in fact, it establishes nothing of the kind. In fact, there is no test today, nor has there ever been, that definitively determines whether a person did or did not fire a weapon.

The court stated that “the fact that an expert witness refuses to employ a method that is regarded in his field as unreliable certainly does not justify *excluding* his testimony; in fact, it suggests that his opinions are *more* reliable rather than less.”

**Comment: *Sanford* is a topsy-turvy case because it is essentially law enforcement challenging a (former) criminal defendant's expert testimony that a gunshot residue test is unreliable. It's interesting that the court agrees with the expert that the test is unreliable, given the fact that there is a good deal of precedent (cited in the *North* case, immediately above) that finds gunshot residue tests to be reliable.**

**Handwriting: *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: *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.

**Shooting reconstruction: *Merritt v. Arizona*, 2019 WL 2549696 (D. Ariz.)** (Campbell, J.): This action was a product of the I-10 freeway shootings in Phoenix, AZ. The plaintiff brought section 1983 claims relating to his prosecution for the shootings. The Arizona Department of Public Safety identified plaintiff's weapon, a 9mm handgun, as the source for four freeway shootings. The plaintiff argued that he pawned the gun more than four hours before the shooting of a tire occurred. He proffered experts in shooting reconstruction to testify about the timing of the shooting. The State of Arizona offered rebuttal experts Noedel and Grant to testify about the possibility that the tire in question was shot before the gun was pawned, but retained air pressure for a time after the gun was pawned. The plaintiff moved to exclude these experts under Rule 702 and *Daubert*.

Noedel, an expert in reconstructing shooting incidents, would testify on the question whether the tire at issue could hold air pressure after being struck by a ricocheted bullet. The purpose of his opinion was to attack the plaintiff's experts' testimony that the tire must have lost pressure immediately after being shot, which would make it impossible for the shooting to be caused by the defendant's pawned gun. Noedel concluded that "there are several unknown variables that make it impossible to say, based on analysis of the tire alone, where and when [the] tire was struck, and whether it retained air after being struck. Among the possibilities, none of which can be determined with any degree of certainty, is that the tire retained air after being shot." The court found that Noedel could testify to flaws in the plaintiff's experts' opinions and the variables that make it difficult to replicate the exact damage to the tire. However, the court found no basis for Noedel to go past rebuttal and offer testimony suggesting affirmatively that the tire could have retained pressure after the shooting. Noedel only conducted one test, and in that test the tire lost air immediately. Nothing else he relied on supported his opinion that the tire could retain air after being shot with a ricocheted bullet. The court stated that "when an expert's testimony is not based on independent research or publications, he must present some "other objective, verifiable evidence that the testimony is based on 'scientifically valid principles.'" Here, the court found too great of an analytical gap between the data and the opinion.

Grant was offered as an expert in forensic tire analysis. He offered four conclusions: (1) based on the small size of the puncture, the angle of the puncture, and the loose flaps of rubber inside the puncture, the tire may only have lost minimal air at the time it was shot; (2) it is well known in the tire industry that small punctures do not always leak immediately; (3) it is impossible to determine when the tire was shot to any degree of engineering certainty because of the sporadic air loss the tire experienced while driving; and (4) plaintiff's expert (who tested the BMW tire in question after the shooting, after it had been driven, and after chemical analysis) had inaccurate results because he did not test the tire at the time it was shot. The Court found this expert's testimony to be reliable because of Grant's extensive experience with tires and shooting reconstruction. The court found that Grant's opinion on scientific principles of tires air pressure was necessary for rebuttal because the plaintiff's experts' testimony is "the kind of testimony "whose reliability depends heavily on the knowledge and the experience of the expert, rather than the methodology or theory behind it."

**Comment: This is a good example of expert opinion that avoided overstatement. If anything, it was the plaintiffs’ experts who might have overstated their conclusions, and the defendant’s reconstruction expert was basically explaining the overstatement.**

**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.

**Toolmarks: Court Order Limiting Overstatement Consistently with DOJ Uniform Standards: *United States v. Haig*, 2019 WL 3683584 (D. Nev.):** Haig was charged in connection with the October 2017 Las Vegas music festival mass shooting. Boxes of ammunition were found in the shooter’s room addressed from the defendant. Haig admitted that he sold the shooter ammunition, but claimed that he did not manufacture the ammunition. He claimed the ammunition from the Las Vegas crime scene would not have the toolmarks of his manufactured ammunition. The government’s toolmark expert intended to testify on the process of reloading ammunition, identifying ammunition, identifying toolmarks, and his conclusions in this case. The court rejected the defendant’s argument that the methodology of toolmark identification was unreliable, stating that the Ninth Circuit “has consistently affirmed the admission of toolmark identification evidence

and expert testimony of that evidence. See, e.g., *United States v. Cazares*, 788 F.3d 956, 988 (9th Cir. 2015); see also, e.g., *United States v. Felix*, 727 Fed. App'x 921, 924–925 (9th Cir. 2018). Smith's anticipated testimony falls well-within the type of evidence which the Ninth Circuit has previously considered. Thus, Smith's methods are reliable and his testimony is admissible."

The court noted, however, that "scientific certainty" is an improper characterization of expert conclusions based on toolmark identification methods --- because the conclusions are based on subjective judgment and have not been validated as science. But the court also emphasized that "[t]he government concedes this point and represents that Smith will not provide such testimony as it would violate the Department of Justice's uniform standards for testimonies and reports."

While recognizing the importance of the DOJ standards, the court stated:

Nevertheless, the court will exercise caution and exclude Smith from testifying that he reached his conclusions with scientific certainty or other similar standards of reasonable certainty.

**Voice identification:** *United States v. Felix*, 2019 WL 2744621 (S.D. Ohio): The defendant was indicted for armed bank robbery and sought to introduce expert testimony to rebut the voice identification procedures conducted by the government. The expert would opine that (1) the earwitness procedure used for voice identification was untested and unreliable, (2) Felix's voice did not have any anomalies to draw attention to his voice, (3) memory research is relevant to police investigators' results, and (4) the audio from the recorded traffic stop was poor quality, the signal was enhanced for analysis, and the hearing of listeners could be a factor.

The government did not dispute the expert's qualifications, but the court conducted an independent analysis of the expert's qualifications anyway. The court noted that the expert had a Ph.D. in Psychoacoustics, was a Professor of Speech and Hearing Sciences, and published and presented extensively on speech and voice analysis. The court concluded that the expert could opine on the science of voice analysis and audiology as well as how people recognize vocal patterns, but he could not testify as to whether police practices of voice identification were appropriate or the credibility of victims' voice identifications.

To analyze reliability, the court cited to the *Daubert* factors (testability, peer-reviewed, rate of error, standards and controls, general acceptance). The government argued that the expert's opinion was based on decades-old research and that voice identification or "earwitness" research is less developed and are commonly not accepted by courts. The government also cited to Rule 901's advisory notes that state "voice identification is not a subject of expert testimony." However, the court mentions that the advisory notes were from 1972 and relied on cases from 1935-1952, also decades old, as the government claimed of the expert's research. However, the defense provided an updated supplemental research list relied upon by the expert which were significantly more recent. The court found that based on the updated research *and* the expert's background, education, and experience in the relevant areas, there was a sufficiently reliable foundation to support his area of expertise, but once again, not enough to reliably support his opinions on law enforcement procedures or victim credibility.

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**DISCUSSION DRAFT AMENDMENT TO  
RULE 16(a)(1)(G) – ROUND 3 8-21-19**

1     **Rule 16.     Discovery and Inspection**

2     **(a)   Government’s Disclosure.**

3         **(1) Information Subject to Disclosure**

4                     \* \* \* \*

5         **(G) Expert witnesses. –**

6                     **(i) Duty to Disclose.** At the defendant’s  
7     request, the government must ~~give~~disclose to the  
8     defendant, in writing, the information required by  
9     ~~(G)(iii) for a written summary of~~ any testimony that the  
10    government intends to use under Rules 702, 703, or  
11    705 of the Federal Rules of Evidence during its case-  
12    in-chief at trial. If the government requests discovery  
13    under subdivision (b)(1)(C)(ii) and the defendant  
14    complies, the government must, at the defendant’s  
15    request, ~~give~~disclose to the defendant, in writing, the  
16    information required by ~~(G)(iii) for a written summary~~

2 DISCUSSION DRAFT AMENDMENT TO RULE 16(a)(1)(G) 8-21-2019

17 ~~of~~ the testimony that the government intends to use  
18 under Rules 702, 703, or 705 of the Federal Rules of  
19 Evidence as evidence at trial on the issue of the  
20 defendant's mental condition.

21 (ii) Time to Provide the Disclosure. The  
22 court or a local rule must set a time for the government  
23 to make the disclosure. The time must be sufficiently  
24 before trial to provide a fair opportunity for the  
25 defendant to meet the government's evidence.

26 (iii) Contents of the Disclosure. The  
27 disclosure summary provided under this paragraph  
28 must contain

29 • a complete statement of all ~~describe the~~  
30 witness's opinions; that the government will elicit  
31 from the witness in its case-in-chief;

32 • the bases and reasons for those opinions;  
33 and

34                   ● the witness's qualifications, including a list  
35 of all publications authored in the previous 10 years;  
36 and

37                   ● a list of all other cases in which, during the  
38 previous 4 years, the witness has testified as an expert  
39 at trial or by deposition.

40                   If the government previously provided a  
41 report under (F) that contained any information  
42 required by this subparagraph (G), that information  
43 need not be repeated in the expert witness disclosure.

44                   **(iv) Signature on the Disclosure.** The witness  
45 must approve and sign the disclosure, unless the  
46 government states in the disclosure that it could not  
47 obtain the witness's signature.

48                   **(v) Supplementing and Correcting the**  
49 **Disclosure.** The government must supplement or  
50 correct the disclosure [for the defendant] in accordance  
51 with (c).

# TAB 3D

## Committee Note

The amendment addresses two shortcomings of the prior provisions: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure. The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Like the existing provisions, amended subsections (a)(1)(G) (government disclosure) and (b)(1)(C) (defense disclosure) mirror one another.

To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, subsections (G)(i) and (iii)—and the parallel provisions in (C)(i) and (iii)—delete the phrase “written summary” and substitute specific requirements that the parties provide “a complete statement” of the witness's opinions, the basis and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years.

On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. In such circumstances, the party who wishes to call the expert may seek an order modifying discovery under Rule 16(d).

Subparagraphs (G)(iii) and (C)(iii) also recognize that in some situations required information may already have been provided in a report of an examination or test under (a)(1)(F) or (b)(1)(B) or supporting materials that accompany that report. That information need not be provided again in the expert disclosure.

To ensure enforceable deadlines that the prior provisions lacked, subparagraphs (G)(ii) and (C)(ii) provide that the court or a local rule must set a time for the government to make its disclosure of expert testimony to the defendant, and for the defense to make its disclosure of expert testimony to the government. These disclosure times, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amended Rule does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order. The Rule requires the court to set a time for disclosure in each case if that time is not already set by local rule or standing order. Under Rule 16.1, the parties must “confer and try to agree on a timetable” for pretrial disclosures, and the court in setting times for expert disclosures in individual cases should consider the parties' recommendations.

Subparagraphs (G)(iv) and (C)(iv) of the amended rule require that the expert witness approve and sign the disclosure. However, the amended provisions also recognize the possibility that a party may not be able to obtain a witness's approval and signature. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but the inability to procure a witness's approval and signature following a request is sufficient explanation for an unsigned disclosure.

Subsections (G)(v) and (C)(v) require the parties to supplement or correct each disclosure to the other party in accordance with Rule 16(c). This provision is intended to ensure that if there is any modification, expansion, or contraction of a party's expert testimony after the initial disclosure, the other party receives prompt notice of that correction or modification.

# TAB 4

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# 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: October 1, 2019

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 admitted owning the gun at the time of the robbery.<sup>1</sup>

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<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 Rule 106, 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. Courts have correctly held that Rule 106 does not apply to oral unrecorded statements. Most courts, however, have found a rule of completeness for oral statements in Rule 611(a) or the common law. Some courts have not --- perhaps because they have not been directed to Rule 611(a) of the common law by the party seeking completion.<sup>4</sup>

The Committee has reviewed and discussed Judge Grimm’s proposals, which are: 1) to amend Rule 106 to allow a party to admit the party’s statements over a hearsay objection, when they are necessary to complete an unfair, partial presentation of the party’s statements; and 2) to extend Rule 106 to cover oral unrecorded statements.

The Minutes of the Spring 2019 Meeting indicate the position of the Committee on Rule 106 coming into the Fall, 2019 meeting:

- “Three Committee members voted against including oral statements, but four Committee members voted to continue discussing the possibility of adding oral statements to an amended Rule 106.”

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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.

Another example bandied about is the government offering a statement of the defendant, “I killed him” while the defendant offers to complete this deleted portion: “with kindness.”

<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.”

<sup>4</sup> The Supreme Court has stated that Rule 106 is only a “partial codification” of the common-law rule. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988).

- “Committee members unanimously agreed that the proposed language about the contents of oral statements not being substantially in dispute should be dropped in the event that the Committee proceeds with an amendment to Rule 106 that includes oral statements.”
- “No Committee member spoke in favor of retaining the limitation [in the working draft] that the initial statement and the completing statement must be made by the same person.”
- “The Reporter promised to prepare additional drafting alternatives for the fall meeting based upon the Committee’s discussion. With respect to oral statements, the Committee could consider a draft like the New Hampshire rule with a possibly stricter standard for completion that applies only to oral statements. In the alternative, the Committee could consider the minimalist approach that would simply add the term ‘oral’ (or remove the words ‘written or recorded’) from the existing Rule. With respect to the hearsay issue, the Committee could consider the ‘context-only’ approach to admissibility, as well as the Chair’s proposal to draft in a way that elides the hearsay issue by providing that the hearsay rule presents no obstacle to completion.
  - “The Chair noted that she also sensed agreement to stay with the existing ‘fairness’ language with respect to the completion of written and recorded statements and to tighten the standard, if at all, with respect to oral statements only.”<sup>5</sup>

This memo is in five parts.<sup>6</sup> Part One discusses how and when Rule 106 applies, emphasizing 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 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 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**

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<sup>5</sup> The DOJ, at the last meeting, withdrew its suggestion that Rule 106 should be amended to allow for completion only if the initial portion is “misleading.” The drafts at the end of this memo all retain the existing “fairness” language for triggering completion under the Rule.

<sup>6</sup> Some passages from this memo are unchanged from the memo submitted for the Spring, 2019 meeting. But there are many changes, additions, and deletions that have been made to include new case law, to provide responses to some of the arguments and suggestions made at the last meeting, and to adapt to the positions taken by the Committee at the last meeting, as discussed above. New drafting alternatives are presented in response to the Committee’s positions as well.

statements. That memo addresses concerns that including unrecorded statements in the rule will raise special difficulties.<sup>7</sup>

## 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. These narrow standards would not be expanded by any of the proposals the Committee is considering, because as of now the “fairness” language of the existing Rule 106 is being retained.

Rule 106 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 creates an inference *about the statement* that is inaccurate --- i.e., it gives a distorted picture of what the statement really means.

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.

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 about what was actually said. “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 of completeness does *not* require admission. 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 (as a party-opponent statement under Rule 801(d)(2)(A)) without having

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<sup>7</sup> Professor Richter’s memo was provided in the agenda book for the last meeting. It is reproduced for the convenience of the Committee; it also has importance for considering whether to cover oral statements in a separate subdivision, as is done in New Hampshire and Texas.

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 probably 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.<sup>8</sup> 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 stated simultaneously that he 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 knew about the drugs, he was likely to know about the gun. But that was an unfair inference from the statement as a whole, because the defendant explicitly *denied* having a gun. So the portion offered by the

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<sup>8</sup> It is notable that the Department of Justice opposed the fairness standard currently employed in Rule 106. First, the Department pushed for a narrower scope, requesting that completeness apply only within the bounds of the same document. This proposal was shot down by the Advisory Committee. Next, the Justice Department argued that the “fairness” standard was too vague, and that completeness should instead be limited to “the same subject matter.” This argument failed before the Judicial Conference. Finally, Deputy Attorney General Richard Kleindienst sent a letter to the Supreme Court to again request that completeness be limited to both the same document and “same subject matter.” Kleindienst argued that enabling defendants to disrupt the prosecution’s case would allow for abuse, particularly in complicated cases involving a large number of documents. He urged that the current language would allow defense counsel to “usurp the function of cross-examination” and “disrupt the orderly presentation of evidence,” resulting in further jury confusion. The Judicial Conference Committee on Practice and Procedure responded, pointing out that the “fairness” standard was the same one used successfully for depositions in Federal Rule of Civil Procedure 32, and that fairness may ultimately present a more restrictive standard than the suggested “same subject matter” language. Kleindienst’s argument failed, and the Rule passed with the fairness standard in place. And the practice under the rule, as described in the text, indicates that the rule is narrowly applied and that the Department’s “floodgates” predictions have not come to pass.

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. Baker*, 432 F.3d 1189 (11<sup>th</sup> Cir. 2005): This is a case where the prosecution conceded on appeal that the defendant's exculpatory statements, made in a post-arrest confession, should have been admitted under the rule of completeness. There is no discussion in the reported case of what those statements were, and why they were necessary to complete. The court stated that the prosecution was correct in making the concession.

- *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. Williams*, 930 F.3d 44 (2<sup>nd</sup> Cir. 2019) (Livingston, J.): Police found a gun in a car that was driven by the defendant. At a trial for felon-gun-possession, the government offered the defendant’s oral post-arrest statement admitting the gun was his. The defendant sought to complete with other statements to the police in which he said the car belonged to his girlfriend and he did not know about the gun. The court held that Rule 106 could be used to overcome a hearsay objection, and that while Rule 106 did not apply to oral statements, Rule 611(a) and the common law could be used to provide for admissibility on the same grounds as written and recorded statements under Rule 106. However, the completeness principle only applied if the portions admitted by the government were misleading and the portions offered by the defendant corrected the misimpression. In this case, the standards for completion were not met:

To require completion under the doctrine of completeness, Williams had to demonstrate that admission of his initial statements denying ownership of the gun was “necessary to explain” his later statements that the gun was his, “to place [these statements] in context, to avoid misleading the jury, or to ensure fair and impartial understanding” of these later statements. *Castro*, 813 F.2d at 576. Williams did not make such a showing. It is not uncommon for a suspect, upon interrogation by police, to first claim in a self-serving manner that he did not commit a crime, only thereafter to confess that he did. But the rule of completeness does not require the admission of self-serving exculpatory statements in all circumstances, see *United States v. Jackson*, 180 F.3d 55, 73 (2d Cir. 1999), and the mere fact that a suspect denies guilt before admitting it, does not—without more—mandate the admission of his self-serving denial. As the district court here aptly pointed out, Williams’s confession was “simply a reversal of his original position.”

- *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 charged 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. Wandahsega*, 924 F.3d 868 (6<sup>th</sup> Cir. 2019): The defendant was convicted of abusive sexual contact with his six year old son. He sought to introduce a video of his supervised visit with his son, the victim, where his son hugged him and interacted well with him. The defendant offered the video under Rule 106, on the theory that it contradicted testimony from witnesses about the victim’s assertions that the defendant abused him. But the court found Rule 106 inapplicable because the government never sought to admit any portion of the video. *Rule 106 does not provide a ground of admissibility simply because the proffered evidence contradicts the opponent’s evidence.*
  
- *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. Martinez-Camargo*, 764 Fed. Appx. 205 (9th Cir. 2019): A large shipment of marijuana was found in the defendant’s car when she crossed the border. The government offered excerpts of the defendant’s post-arrest statements. The defendant offered other portions in which she sought to explain her conduct and exculpate herself. The court held as follows:

Martinez-Camargo’s argument that the rule of completeness, Fed. R. Evid. 106, compels admission of the whole statement \* \* \* fails. Rule 106 does not “require the introduction of any unedited writing or statement merely because an adverse party has introduced an edited version.” *United States v. Vallejos*, 742 F.3d 902, 905 (9th Cir. 2014). Rather, it applies only when the edited statement creates a misleading distortion of the evidence. Because the admitted portions of her statement were not misleading, the district court did not abuse its discretion in determining that Rule 106 does not compel the admission of the omitted portions of the statement.

- *United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985): The government admitted a portion of the defendant’s confession, leaving out the defendant’s statements of his political and religious motives for committing the charged act. The court ruled that Rule 106 was inapplicable because the defendant’s motivations for his actions “did not change the meaning of the portions of his confession submitted to the jury. The redaction did not alter the fact that he admitted committing the acts with which he was charged. Further, because the defense of necessity was unavailable, Dorrell’s motivation did not excuse the crimes he committed.”

- *United States v. Brown*, 720 F.2d 1059 (9th Cir. 1983): This was a completing attempt by the *government* that was unsuccessful. The government called witnesses who got plea deals, and introduced the deal terms on direct. The defendant argued on cross that there were promises made by the government that were not in the agreement. The

government countered, for completeness purposes, with polygraph clauses in the agreements. But the court found the polygraph clauses to be not necessary for completion, because the defendant's attack was about what was *not* in the plea agreements.

- *United States v. Lesniewski*, 2013 WL 3776235 (S.D.N.Y.): The court held that mere proximity of the omitted portion to the statements introduced does not justify completion. It found that the defendant's statements that were omitted 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."

- *United States v. Nicoletti*, 2019 WL 1876814 (E.D. Mich.): A defendant charged with conspiracy to commit bank fraud argued that if the government was going to admit portions of wiretapped conversations that Nicoletti had with a co-defendant, then all 13 hours should be included under Rule 106. The court stated that "[i]mportantly, Rule 106 places the burden on the party seeking admission to show that the additional evidence is relevant and provides context" and "only those parts which qualify or explain the subject matter of the portion offered by opposing counsel should be admitted." Because the defendant failed to specifically identify which portion of the recordings would clarify the government's proffered evidence, Rule 106 provided no relief.

- *United States v. Rodriguez-Landa*, 2019 WL 175518 (S.D. Cal.): "The Court finds that Rule 106 does not permit the introduction of these statements as they are not 'part' of the same recorded conversation introduced by government exhibit. Although these statements were physically captured on the same audio recording, they arise out of a different conversation with a different participant."

- *United States v. Benally*, 2019 WL 2567335 (D.N.M.): In a murder case, the government admitted excerpts from the defendant's recorded statements to special agents during an interrogation. The statements described the defendant's interactions with the decedent and included a portion of the interrogation where the defendant refused to apologize about the decedent's death. The defendant sought to admit additional excerpts, explaining how the fight began, that the decedent had a knife, that the decedent previously started fights with him, and that he "teared up" when making the statements to the agents. The court held that the excerpts chosen by the government were not misleading and that nothing in the portions offered by the defendant corrected any misimpression. The court stated:

While the Court does not deny that defendant's statements are relevant to the ultimate inquiry of the charged conduct and his statements could provide

additional evidence for the jury to consider, the hearsay rule allows the Government to select the statements it wishes to admit against the defendant, and prevents the defendant from admitting his own out of court statements for the truth of the matter asserted. There is not a compelling reason to override the hearsay objection for the sake of fairness under Fed. R. Evid. 106 in this case. To the extent that defendant argues these statements are misleading or lack context, this is an effort by defendant to get his self-serving statements in front of the jury in the broader sense that exceeds the fairness purpose behind the rule.

- *Rodriguez v. Miami-Dade County*, 2018 WL 3458324 (M.D. Fla.): 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.): 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 Roberson’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>9</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

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<sup>9</sup> Of course reported cases, while relevant, do not tell the whole story of how Rule 106 is used.

prosecutor who offered prior statements of a witness on redirect examination in order to complete what had been selectively adduced on cross-examination; the court found no error in the trial court's allowing completion. And in *United States v. Maccini*, 721 F.2d 840 (1st Cir. 1983), the court held it proper to permit a prosecutor to have additional portions of a witness's grand jury testimony read, after defense counsel introduced a misleading portion of that testimony. Similarly, in *United States v. Mosquera*, 866 F.3d 1032, 1049 (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 later in the trial may not be 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.”

#### ***D. Rule 106 Does Not Exclude Misleading Statements or Portions of Statements***

It is important to note that Rule 106 is not an all-purpose tool that allows a court to exclude evidence whenever it is argued to be “incomplete” or “misleading.” Indeed it is not a rule of exclusion at all. The limited remedy provided by Rule 106 is completion, not exclusion.

For example, in *Chenoweth v. Yellowstone County*, 2019 WL 1382776 (D. Mont.), an employment action, the plaintiff offered a report that contained redacted personal information. The defendant argued that because of the deletions, the report should be excluded under Rule 106, because it was incomplete. But the court disagreed:

Rule 106 does not prohibit admission of an incomplete document. Instead, it allows the party against whom the document is introduced to place the remainder in evidence without additional evidentiary foundation. *United States v. Phillips*, 543 F.3d 1197, 1203 (10th Cir. 2008).

Accord: *Wye Oak Technology, Inc. v. Republic of Iraq*, 2019 WL 1746326 (D.D.C.): “The rule of completeness, codified in Rule 106, does not provide grounds to exclude evidence. Instead, Rule 106 enables Wye Oak to introduce the other referenced documents, if Wye Oak possesses them or can obtain them, that ought to be considered alongside DX 53 and DX 58.”

#### ***E. Rule 106 Partially Codifies the Common Law***

The Supreme Court has stated that Rule 106 is only a “partial codification” of the common-law rule of completeness. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988). The common-law rule of completeness has been 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 explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary.

The common law completeness doctrine applied to oral statements and documents, but generally excluded acts and occurrences.<sup>10</sup> See 4 Wigmore, § 2094. The reasoning behind this limitation is that acts and occurrences are “seldom so inseparably united that any one act or

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<sup>10</sup> The remainder of this discourse on the common law rule of completeness is adapted from a memo by Allyson Schumaker, a research assistant for Professor Richter at the University of Oklahoma. Many thanks to Allyson.

occurrence would by itself be wholly misleading.” *Id.* Thus, it is unlikely that any one act would require comparison with other acts in order to “arrive at a true comprehension of the sense of the former.” *Id.* In contrast, “[v]erbal utterances are attempts to express ideas in words,” and restating an individual part of the idea outside of the context of the whole could easily give a misleading impression of what the speaker intended to convey. *Id.*

Wigmore stressed that the principle of completeness “does no more than recognize the dictates of good sense and common experience,” and laid out three guidelines that courts could use to determine if the opponent should be allowed to introduce completing oral evidence. *Id.* §§ 2094, 2113. First, the remainder should not be allowed if it is irrelevant to the issue. *Id.* § 2113. The purpose of introducing the remainder is to “obtain a correct understanding of the effect of the first part,” and a wholly irrelevant remainder could never serve that function. *Id.* Second, only the remainder that “concerns the same subject, and is explanatory of the first part” is allowed for purposes of completeness. *Id.*

Finally, at least according to Wigmore, the remainder could serve only to give context to the whole of the utterance, and must not itself be used as testimony. 4 Wigmore, § 2113. However, courts did not universally accept this guideline. *Many* common-law courts allowed the admitted fragment to serve as substantive evidence rather than just completing evidence. *See* Michael A. Hardin, *This Space Intentionally Left Blank: What to Do When Hearsay and Rule 106 Completeness Collide*, 82 *Fordham L. Rev.* 1283, 1299 (2013) (noting many common-law courts applied the doctrine of completeness to “make[] admissible statements which otherwise would be inadmissible”) (quoting *Simmons v. State*, 105 So. 2d 691, 694 (Ala. Ct. App. 1958)). Courts applying the common law doctrine routinely allowed otherwise inadmissible evidence to be admitted for the purposes of completeness without controversy. *See Trischet v. Hamilton Mut. Ins. Co.*, 80 *Mass.* 456, 457–58 (1860) (“Where a statement is made in the course of a conversation or correspondence, which is itself admissible in evidence, the rest of the conversation or correspondence must be admitted, so far as it is connected with and necessary to the full understanding of what follows.”); *Williams v. State*, 231 S.W. 110, 113 (Tex. Crim. App. 1921) (holding that if the prosecution introduced an inculpatory part of a whole, the defendant’s right to introduce the explanatory remainder “could not be nullified by the claim of the state that the part of the transaction and conversation introduced by it was exculpatory.”).

At common law, judges had wide discretion to decide whether a remainder of a statement or document could be admitted to complete the first part. 21A *Wright & Graham*, § 5072. The common law doctrine allowed for the admittance of remainders to obtain “a complete understanding of the total tenor and effect of the utterance.” 4 Wigmore, § 2113. Common law courts generally required the remainder to be “necessary” to give context to the first fragment. *See id.*; *Dougherty v. Posegate*, 3 *Iowa* 88, 89 (1856). Drawing the boundaries of “fairness” was a fact-specific inquiry, and no explicit test existed. *See* 1 *Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence*, § 1:42 (4th ed.). However, courts considered factors like “the nature of the part of a statement that is first offered, the nature of the balance, who offers the statement, what it is offered to prove, and the issues in suit” when making the determination. *Id.*

### ***Examples of Common-Law Cases:***

In *Carver v. United States*, 164 U.S. 694, 694–95 (1897), the defendant was convicted for murder after he shot his mistress in the back while grossly intoxicated on a “mixture of hard cider and Jamaica ginger.” The Supreme Court reversed his conviction on a number of errors, including refusal to allow the defendant’s witnesses to testify to what was said between the defendant and his mistress at the scene of the crime, after government witnesses were permitted to testify to the conversation. In finding error, the Court noted that:

If it were competent for one party to prove this conversation, it was equally competent for the other party to prove their version of it. It may not have differed essentially from the government’s version, and it may be that defendant was not prejudiced by the conversation as actually proved; but *where the whole or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary, or contradict it.*

The following year, in *Stevenson v. United States*, 86 F. 106, 108 (5th Cir. 1898), the Fifth Circuit similarly reversed a murder conviction following a western-style shootout in which the defendant claimed self-defense. The victim, a constable and deputy marshal who had a history with the defendant, entered a bar where the defendant was drinking after hearing gunshots fired. He entered with his weapon drawn and fired at the defendant, narrowly missing. As the victim fired, the defendant, standing at the counter, “threw his gun across his left arm, and fired, without putting it to his shoulder or taking aim,” killing the victim. The trial court allowed a witness for the government to testify to a conversation with the defendant immediately following the shooting, in which the defendant admitted to the killing and said that “all he regretted about it was that he did not kill that other son of a bitch.” The defense was then denied the opportunity to have their witness testify to the fuller context of the conversation, in which the defendant had expressed his desire that a man other than the victim had died and tending to show that the defendant did not harbor malice toward the victim. The court noted that it was “elementary” that “[w]here one part of a conversation is introduced, the other party is entitled to all that relates to the same subject, and all that may be necessary to fully understand the portion given.” The Fifth Circuit also indicated that the rule of completeness served a “trumping” function, operating to allow in otherwise inadmissible evidence, noting that:

The conversations and declarations of the accused after his arrest formed no part of the res gestae, and in his behalf were inadmissible, but they were admissible against him if the prosecution saw fit to avail itself of them, and when the United States proved the conversations and declarations the accused was entitled to have the full conversation or conversations given in evidence.

In *United States v. Dennis*, 183 F.2d 201, 229–30 (2d Cir. 1950), Judge Learned Hand held that, “[a]s to the admission of documents,” the defense could only admit those other portions which “contradicted, modified, or otherwise threw any light upon the prosecution’s passages” and rejected the idea that “either the whole document, or no part of it, was competent.”

In *United States v. Paquet*, 484 F.2d 208, 211 (5th Cir. 1973), a case involving counterfeit money, the Fifth Circuit held that where a Secret Service agent was permitted to testify about part of a conversation between an informant and the defendant, the defendant was entitled to testify as to what the informant had told him, as “[t]he prosecution cannot give its version of a matter and thereafter muzzle the defendant.”

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In sum, the common-law rule of completeness is broader than Rule 106 in at least two respects: 1. Completing statements are generally admissible under the common law even though they are hearsay --- and while this is true in many courts under Rule 106, it is not true in others; 2) Oral statements are admissible for completion under the common law, but they are not admissible under the terms of Rule 106. As we will see, this disparity in coverage as to oral statements has been corrected by most courts, who rely on either Rule 611(a) or the common law to admit oral statements when necessary for completion.

There is one final difference between Rule 106 and the common law: when completion *is* allowed under Rule 106, it usually happens at the same time as the distorted portion is admitted. This was generally not so under the common law.

On the other hand, the most important aspect of the common law rule of completeness is incorporated in Rule 106. The treatises and cases show that the *trigger* for completion --- a distorted presentation and a completion that corrects the misimpression --- is essentially the same.

## 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 a 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 defendant's statement that he purchased the gun but then sold it 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 of the statement of ownership, the question then is whether the government can turn around and object on hearsay grounds to the remainder of the defendant's statement that he sold the gun.

As discussed in prior memos, a fair number of 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.

#### ***1. Conflict in the Cases:***

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. Williams*, 930 F.3d 44 (2<sup>nd</sup> Cir. 2019) (Livingston, J.) (“when the omitted portion of a statement is *properly* introduced to correct a misleading impression or place in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced”); *United States v. Johnson*, 507 F.3d 793, 796 (2<sup>d</sup> 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. Gravely*, 840 F.2d 1156, 1163 (4<sup>th</sup> 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 (7<sup>th</sup> 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. Harry*, 816 F.3d 1268 (10<sup>th</sup> Cir. 2016) (noting that the fairness principle of Rule 106 “can override the rule excluding hearsay” but finding that fairness did not require completion in the instant case). See also *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. Wandahsega*, 924 F.3d 868, 883 (6<sup>th</sup> Cir. 2019) (Rule 106 “does not transform inadmissible hearsay into admissible evidence.”); *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.

## ***2. Admitted for What Purpose?***

In those cases where the courts have recognized that a remainder may be admitted under Rule 106 over a hearsay objection, there is some question about the purpose for which that remainder is offered. The narrowest position is that the remainder can be offered not for its truth but only to put the original misleading statement in *context*. As such, it is not hearsay at all. Illustrative of this position is the recent opinion in *United States v. Williams*, 930 F.3d 44 (2<sup>nd</sup> Cir. 2019), where the court states that “when the omitted portion of a statement is *properly* introduced to correct a misleading impression or place in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced.”

In *Williams*, the statement offered for completion was not, in fact, found admissible because it didn't fit the strict fairness standards of Rule 106. In contrast, in most of the reported cases in which completing evidence *was* found admissible over a hearsay objection, it was found to be admissible *as proof of a fact*. Here are a few examples:

- In *Sutton, supra*, the court held that defendant Sucher had the right under Rule 106 to admit portions of a conversation he had, where the government had admitted other portions that were misleading. The government offered Sucher's statements that he sent documents to Kolbert to show consciousness of guilt. The court treats the remainder in this way:

Sucher's defense was that he innocently gave Kolbert the documents without any knowledge of illegality. Three of the four excluded statements would support an inference consistent with that defense. The second statement (2) could have *supported Sucher's assertion* that he provided documents to Kolbert out of a desire to cooperate with his fellow employee at DOE. The first (1) and fourth (4) statements would have *supported an inference* contrary to the government's contention that Sucher exhibited consciousness of his guilt. The possible contrary inference of (1) and (4) is that Sucher gave documents innocently, and was afraid that Kolbert may have falsely told Maxwell that Sucher, as the source of the documents, was a knowing and willing participant in the illegal conspiracy.

It is apparent that the court is holding that the completing statements are offered for the *fact* that Sucher had no consciousness of guilt. That's what it means to “support an inference.” The trial court had excluded the statements on the ground that they were

hearsay to prove Sucher's prior state of mind. And the appellate court is saying that, yes this is true, but it is *admissible* to prove that prior state of mind under Rule 106.

Moreover, as seen earlier, the *Sutton* court emphasized the absence of any language in the Rule suggesting that the completing portion needs to be "otherwise admissible" --- and the court specifically concludes that the completing remainder need not be otherwise admissible. If the court were intending to admit the completing portion for context only, it *would* be otherwise admissible (for a non-hearsay purpose) and all of the court's analysis of the history and location of the rule would be pointless. The court has to be admitting the completing portion for its truth with this analysis.

- In *Haddad, supra*, the Seventh Circuit held that when the government offered the defendant's statement, "the drugs were mine," the defendant should have been allowed to complete with the contemporaneous statement "but I don't know about the gun." The court found the exclusion to be harmless error, however. The analysis of why the completing statement should have been admitted, and the analysis of why exclusion was harmless, indicate that the court is saying that the statement should have been admitted to prove a fact --- that the defendant did not know about the gun:

The marijuana that Mr. Haddad admitted placing under the bed was only some six inches from the implicated gun. The defendant in effect said "Yes, I knew of the marijuana but I had no knowledge of the gun." 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. The error in the evidentiary ruling was, nevertheless, harmless.

Even though Mr. Haddad did not testify, he called his girlfriend, Ms. McMullin, to the witness stand. She testified that it was she who purchased the gun and that she hid it from the defendant and that the defendant had no knowledge of the weapon. So the defendant got before the jury the same message that is contained in the exculpatory portions of his statement to Officer Linder, to-wit: that he had no knowledge of the gun.

So the court is saying that the error is harmless because there was already alternative proof of the same *fact*. Moreover, it makes no sense to say that "I know nothing about the gun" is admissible only for context. The only way it provides context is if it is true.

It appears that courts that allow completion notwithstanding a hearsay objection are doing so on the grounds of fairness and a level playing field -- which suggests a *parity of purpose* for both statements --- a parity which would not be met if a party admits a misleading part of a

statement for its truth, and the opponent only gets to have the completing part admissible for context.

### ***3. “Context” as a Trigger for Completeness, Not as a Limit on How the Completing Statement Can Be Used.***

It is very important to note that when a court says that completion is required to put a statement “in context” it does not necessarily mean that the completing statement *is only admissible for context*. The “in context” standard is the trigger for completion in the first place --- the completing statement is not admissible at all unless it puts the admitted statement in context. But how the statement is to be used once it *is* admitted is a separate question. It is perfectly consistent to say that completion is allowed because a proffered statement must be put in context, but that fairness requires the completing statement to be used for its truth --- because the offering party who created the problem should not be left with an advantage. Moreover, it makes no sense to admit a statement to put the distorting statement in context, and then to not allow the completing statement to be used for the truth, if the only way it provides context *is if it is true*.

Note that the “context” standard must be triggered whether the completing statement is hearsay, non-hearsay, or hearsay subject to an exception. For example, assume a defendant offers an excited utterance as a completing statement during the prosecution’s case. That statement is not immediately admissible under Rule 106 unless a government-proffered statement is subject to a misconception, and the defendant’s statement puts it “in context.” But if those conditions are found, the statement is not limited to being *offered* for context. It is admissible to prove a fact.<sup>11</sup> The same would be true for courts that are finding that Rule 106 operates as a means to admit hearsay necessary for completion.

This dispute, about whether a completing statement can be admissible for its truth (as the reported cases appear to hold), as opposed to admissible only for context, is one that the Committee must work through if it wishes to propose an amendment to Rule 106. The drafting options in the last section of this memo revisit the question of “offered for truth” vs. “offered for context.”

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<sup>11</sup> If you are wondering why you need Rule 106 when the excited utterance is independently admissible, remember that Rule 106 is a timing mechanism. So if the statement is necessary to place another statement in context, the defendant would be able to complete contemporaneously, and wouldn’t have to wait until his case to admit the excited utterance.

## ***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, as stated above, a departure from the common law.<sup>12</sup>

The exclusion of unrecorded statements from Rule 106 has led most courts to find an alternative way to admit such statements when necessary for completion. One possible way is to resort to the common law rule of completeness. The Supreme Court stated in *Beech Aircraft* that the common-law rule of completeness---which does cover unrecorded oral 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”).

But most courts do not directly rely on the common law. Rather, most 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.” Accord *United States v. Williams*, 930 F.3d 44 (2<sup>nd</sup> Cir. 2019) (“in this Circuit, the completeness principle applies to oral statements through Rule 611(a”).

The end result is that in most 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 cases cited above, the following courts have explicitly recognized a rule of completeness applicable to oral unrecorded statements, usually under Rule 611(a):***

- *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. Verdugo*, 617 F.3d 565 (1st Cir. 2010) (“the district court retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements”).

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<sup>12</sup> This section is a discussion of the case law on oral statements. The legislative history behind the exclusion of oral statements from Rule 106 is discussed in the next section.

- *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 (6<sup>th</sup> 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 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. Lopez-Medina*, 596 F.3d 716, 734 (10<sup>th</sup> Cir. 2010) (“We have held the rule of completeness embodied in Rule 106 is substantially applicable to oral testimony as well by virtue of Fed. R. Evid. 611(a)”).
- *United States v. Baker*, 432 F.3d 1189 (11<sup>th</sup> Cir. 2005): “We have extended Rule 106 to oral testimony in light of Rule 611(a)'s requirement that the district court exercise ‘reasonable control’ over witness interrogation and the presentation of evidence to make them effective vehicles ‘for the ascertainment of truth.’ *Range*, 94 F.3d at 621 (citing *United States v. Castro*, 813 F.2d 571, 576 (2<sup>d</sup> Cir.1987)). Thus, the exculpatory portion of a defendant's statement should be admitted if it is relevant to an issue in the case and necessary to clarify or explain the portion received.”
- *United States v. Green*, 694 F. Supp. 107, 110 (E.D. Pa. 1988), *aff’d*, 875 F.2d 312 (3<sup>d</sup> 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).<sup>13</sup>

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<sup>13</sup> The Fifth Circuit in *United States v. Sanjar*, 876 F.3d 725, 739 (5<sup>th</sup> Cir. 2017), in dictum, seems to recognize that oral statements might be admissible to complete under some circumstances (though in *United States v. Gibson*, discussed *infra*, it specifically held that oral statements were not admissible to complete):

The language of Rule 106 expressly limits it “to situations in which part of a writing or recorded statement is introduced into evidence.” That said, the Eleventh Circuit has held that testimony may nonetheless fall within the rule's ambit if it is “tantamount” to offering a recorded statement into evidence. But we have held that this standard is not met in the situation here when the agent neither read from the report nor quoted it.

The common law rule of completeness, which is just a corollary of the principle that relevant evidence is generally admissible, does provide a right to cross examine. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988). The rule comes into play, however, only when the additional inquiry is needed to “explain, vary, or contradict” the testimony already given. The other statements by Sanjar that defense counsel sought to ask the agent about, many of which are assertions of innocence, were “not necessary to qualify, explain, or place into context” the limited statements the agent testified about on direct. [most citations omitted]

While it is, to say the least, disorganized to have three separate sources of authority to cover the completeness problem (i.e., Rule 106 as to written and recorded statements and Rule 611(a) or the common law as to unrecorded oral statements), that lack of user-friendliness would probably not be sufficient cause in itself for amending Rule 106 to cover oral statements. But there are at least two reasons to consider amending Rule 106 to cover oral statements:

1. 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, so that users will find the rule of completeness in one place --- making the rules easier to apply. That is exactly what Wisconsin and New Hampshire have recently done, as recounted in Professor Richter's attached memo. Both states recently amended their Rule 106 counterparts to include oral statements, in order to track the case law that was already admitting oral statements to complete.

2. Moreover, 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 applying the rule of completeness to unrecorded statements through Rule 611(a).

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.

The Fifth Circuit in *Gibson* is not the only court that has excluded unrecorded statements without resort to Rule 611(a) or the common law. ***The following courts also have made statements that end their analysis of oral statements with the language of Rule 106:***

- *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”). In *United States v. Liera-Morales*, 759 F.3d 1105, 1111 (9th Cir. 2014), the 9th Circuit adhered to its view even though it recognized that other circuits allow oral statements to complete:

By its terms, Rule 106 “applies only to written and recorded statements.” *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir.2000). Consistent with Rule 106’s text, we have recently observed that “our cases have applied the rule only to written and recorded statements.” *United States v. Hayat*, 710 F.3d 875, 896 (9th Cir.2013) (internal quotation marks omitted). Nevertheless, at least two of our sister circuits have recognized that the principle underlying Rule 106 also applies to oral testimony “by virtue of Fed.R.Evid. 611(a), which obligates the court to make the interrogation and presentation effective for the ascertainment of the truth.” *United States v. Mussaleen*, 35 F.3d 692, 696 (2d Cir.1994) (internal quotation marks omitted); accord *United States v. Li*, 55 F.3d 325, 329 (7th Cir.1995) (“[T]he rule of completeness applied to the oral statement.”).

- *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.**

**It should be noted that *Ramirez-Perez* is inconsistent with other authority in the 11th Circuit. See *United States v. Blake*, *supra*. But that inconsistency would seem to point to some cause for rule clarification, given the complexity of the Rule 611(a)/common law construct for oral statements that is currently employed by most courts.**

- *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).
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To clarify, none of the above case law states that Rule 611(a) and the common law *cannot* be used for completion of oral statements. These cases do not reach the Rule 611(a) question – perhaps because the party seeking completeness never asked the court to do so. But the very fact that the party may not have directed the court outside the language of Rule 106 might counsel in favor of a clarifying amendment that would put all statements offered for completion *under a single rule*.

As Judge Campbell has said, we don’t need to draft rules for good lawyers, as they can work things out. We need to draft rules for lawyers that read the rules the way they are written and go no further. If that is the case, there is a good argument for amending Rule 106 to cover oral statements --- because *it will not change the result that is currently reached in the courts that have properly addressed the matter*, and it will help the parties and courts where lawyers read the rule and do no more.

Again to emphasize: adding oral statements to Rule 106 will not create a management problem for the court, because most courts have already properly recognized that oral statements *are covered by the rule of completeness*. Thus, it is not a question of opening the floodgates or changing the law in most courts. It is basically a question of making the rule less opaque and more user-friendly.

### **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. 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 under Rule 106. (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.” This means that a party can wait and offer the completing evidence. The Court in *Beech Aircraft* noted that the rule of completeness under common law could be used to complete at a later point in the trial --- indeed that is what happened in *Beech Aircraft* itself, where the completion was not contemporaneous, because the defendant cherry-picked a witness’s report on direct examination

and the court held that it was error to exclude the completing information when it was offered on cross-examination.

So it is unremarkable that a party can rebut or contradict evidence offered by the adversary at a later point. But the more complicated question arises if you assume (or amend a rule to explicitly provide) that the rule of completeness *also operates to admit hearsay*. 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? That is a question that is not answered in *Beech Aircraft*, because the court finds it unnecessary to rule on any aspect of Rule 106.

On the question of timing *under Rule 106*, 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>14</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 under Rule 106 at a later time. 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 stated that --- assuming completion were 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." Thus, in a court holding that Rule 106 can overcome a hearsay objection, a relaxation of the timeliness requirement would mean 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

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)

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<sup>14</sup> It could be argued that the completion could have occurred under the common-law rule of completion, which, according to *Beech Aircraft*, does not require completion to be contemporaneous. Again, though, the proponent could probably be excused for not knowing about the niceties of the common law, when construing the Federal Rules of Evidence.

(upholding trial court's decision not to force prosecution to play ten tape recordings contemporaneously, as the defense had the opportunity to play all ten tapes during its case-in-chief, and the full recordings and transcripts were also available to the jury); *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 under Rule 106).

The court in *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2<sup>nd</sup> Cir. 1995), recognized that the text of Rule 106 seems to require contemporaneous completion, but nonetheless held that the trial court had discretion to allow completion at a later point:

Stone argues that Rule 106 does not apply because appellants never attempted to move the work paper into evidence at the time the financial statements were admitted, but waited until their direct examination of Ambrosini to do so. While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly. *See, e.g., Rubin*, 609 F.2d at 63 (upholding admission of notes under Rule 106 even though government waited until its redirect examination of witness to introduce them). Thus, the timing of appellants' proffer fell within the requirements of Rule 106.

In sum there are questions about the timing of completion that might 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 most 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.

### ***Timeliness Flexibility and Oral Statements***

Another advantage of having a rule that is flexible as to timing is that it gives the court a tool to manage completion when it comes to oral statements and conversations. (Recall that most courts are already admitting oral statements necessary for completion under Rule 611(a)). One concern about completing with oral statements is that it could be complicated to interrupt testimony about a conversation with a contemporary proof of completing statements --- witnesses might need to be called, for example. But the possibility of "interrupting the flow" of testimony when a party seeks to complete a conversation can be ameliorated if the court, in its discretion, decides it is better to allow completion at a later point. Moreover, it can surely be argued that allowing the court to have discretion regarding the timing of completion is consistent with, and promotes, the thrust of the Evidence Rules, which are designed for flexibility through the use of guided judicial 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 for its truth over a hearsay objection.

A second 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 third possibility is to provide that the completing statement is admissible, with the court having discretion to determine whether the statement should be admissible as proof of a fact or only for context.

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>15</sup> A subset of the oral statement question is to determine whether the rule should have a separate subdivision covering oral statements, with a standard of completion that is stricter than that applied to recorded statements.

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).<sup>16</sup>

All these options are discussed below.

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<sup>15</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.

<sup>16</sup> Other options have already been rejected by the Committee at previous meetings:

1. Limiting completion to statements by the same person.
2. Requiring the party who proffers the misleading statement to offer the completing statement.
3. Allowing oral statements only if there is “no substantial dispute” that they were made.
4. Specifically stating that completion is allowed only if the initially proffered statement is “misleading.”

## **A. Providing that a Statement that is Necessary to Complete is Admissible as Proof of a Fact**

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 objection.**

## ***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>17</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

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<sup>17</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. The same goes for civil cases where the completion would have to be done by a third party.

## ***2. Argument Against 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>18</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

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<sup>18</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>19</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.

The federal case law that exists on the subject has denied *Chambers*-based claims where defendants argue unfairness because their inculpatory statements are admitted and their exculpatory statements are not. The leading case is *Gacy v. Welborn*, 994 F.2d 305, 325 (7th Cir. 1993). Gacy filed a petition for federal habeas corpus relief from his murder conviction. The government offered Gacy's inculpatory statements under Rule 801(d)(2)(A), and then, according to the court, "used the hearsay objections to prevent Gacy from getting the more favorable portions of his story before the jury indirectly." Nevertheless, the appellate court found no error in the trial court's exclusion of Gacy's statements. As the court explained:

Beyond explicit rules such as the privilege against self-incrimination and the confrontation clause, none of which applies here, the Constitution has little to say about rules of evidence. The hearsay rule and its exception for admissions of a party opponent are venerable doctrines; no serious constitutional challenge can be raised to them.

A challenge would lie if a state used its evidentiary rules to blot out a substantial defense. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Green v. Georgia*, 442 U.S. 95 (1979). These cases hold that states must permit defendants to introduce reliable third-

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<sup>19</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.

party confessions when direct evidence is unavailable. *No court has extended them to require a state to admit defendants' own out of court words.*

But even if the Constitution could be a solution for completing hearsay from a defendant, 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.

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

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

At a previous meeting, a Committee member complained that an amendment to Rule 106 would allow “unreliable” hearsay to be 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 to be made that a concern about unreliability of a completing statement misses the point. To start with, in the classic case of an adversary’s statement, *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 rationale of the adversary system, 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 (you said it, you live with it) but there must be some protection against foul use (for when that is not what you really said). That is where Rule 106 comes in.

The argument 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, when 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 allow completing statements to be admissible even though hearsay 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>20</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

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<sup>20</sup> Letter from Rakestraw to Senate Jud. Comm., 93<sup>rd</sup> Congress, 121-23.

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>21</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 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>22</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.).

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<sup>21</sup> Rule 801 provides the definition of hearsay; Rule 802 is the source of exclusion of hearsay.

<sup>22</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.

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>23</sup>

## ***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. *See, e.g., United States v. Spotted Bear*, 920 F.3d 1199, 1201 (8<sup>th</sup> Cir. 2019) (“When a criminal defendant creates a false or misleading impression on an issue, . . . the government may clarify, rebut, or complete the issue with what would otherwise be inadmissible evidence, *including hearsay statements.*”).

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

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<sup>23</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*.

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.*”<sup>24</sup>

It is also notable that Evidence Rule 502(a), governing subject matter waiver of privilege, lifted the language from Rule 106 as the “fairness” 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>25</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.

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<sup>24</sup> This quote also addresses the “don’t let unreliable hearsay in” argument discussed above.

<sup>25</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.

## B. The Context Alternative

One argument against adding a hearsay exception to Rule 106 is that it is not needed to remedy the unfairness, because the statement, if necessary to complete, is admissible as non-hearsay. That would mean that the courts that do exclude completing evidence on hearsay grounds are simply wrong about the hearsay question itself (as Judge Livingston noted in the recent *Williams* case, discussed above). 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.

If this analysis is right, then technically there would be no need to amend the rule, because the rule itself does not need to operate as a hearsay exception --- it already allows the completing statement to be admissible because that statement, offered only for context, does not offend the hearsay rule. 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.

### **But there are some pretty serious problems with a rule that allows completing statements to be admitted only for “context”:**

1. The completing statement could be used by the jury only for context and never as proof of a fact, and this results in an *evidentiary imbalance* --- the party that 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 can result 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 is *artificial* in those cases where, 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. An amendment that puts forth an artifice is not doing the job of making Evidence Rules more just and easier to apply.

4. If a rule is written that *only* allows completing statements to be admissible for context, then it changes the law in those circuits that currently allow completing statements to be admitted as proof of a fact. These cases were discussed earlier, but for a quick recap, see *United States v. Sutton*, D.C. Circuit, where the court held that the completing statements should have been admitted to prove that the defendant actually did not have a guilty state of mind; and *United States v. Haddad*, 7<sup>th</sup> Circuit, where the court held that the completing statement should have been admitted to prove that the defendant actually did not know about the gun in the house.

It would be ironic if an amendment purportedly intended to promote fairness under Rule 106 would actually operate to truncate the rule in the circuits that have applied it to allow hearsay statements to be admitted to prove a fact --- on fairness grounds.

Fundamentally the context alternative confuses the reason for allowing completion in the first place (to provide context) with the use to which the evidence should be put upon admission.

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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. At the very least, the

completing statement should be admissible for its truth if that is the only way that it can actually provide context for the distorting statement.<sup>26</sup>

### **C. Allowing Admission for Context or for Truth of the Matter Asserted, Depending on the Circumstances**

At the last meeting, some Committee members expressed interest in considering what might be referred to as a “hybrid” approach to statements offered to complete. Some members argued that at times the completing statement may be offered for its truth, but at times it might be useful (and not artificially so) for context only.

It is no secret that the line between offering a statement to prove a fact, and offering it to put another statement in context can be fuzzy. In an analogous situation, involving hearsay and the right to confrontation, courts have cautioned that an out-of-court statement could not be admitted to show “context” when the statement is effectively being offered for its truth --- or, in other words, when the only way the statement is relevant for context is if it is true. For example, in *United States v. Smith*, 816 F.3d 479 (7<sup>th</sup> Cir. 2016), a public corruption case, the government offered a taped conversation between the defendant and an informant. The defendant’s statements were admissible as party-opponent statements; the government argued that the informant’s statement was offered only to place the defendant’s statement “in context.” The court of appeals found that it was error to admit the informant’s statements, because the “context” purpose only worked if the informant’s statement to the defendant were true. In *Smith*, the informant said 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 said “Yes.” The court noted that the informant’s statement put the defendant’s answer in context, but only if the informant was speaking the truth. In that situation, the informant’s statement was hearsay. Another example is *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

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<sup>26</sup> Professor Dan Blinka explains the proper result to completion this way:

The better practice .. is to introduce the remaining parts on the same footing as those originally offered. . . . Juries, like all people (even lawyers), are ill-equipped to draw tortured distinctions between statements offered for their “truth” and those admitted solely to provide “context.” Nor does it seem necessary to carve out a unique rule for admissions by party opponents. The real protection is [the] reminder that the rule of completeness is not an “unbridled opportunity” to waft inadmissible evidence before the jury: the trial judge should admit only those statements “which are necessary to provide context and prevent distortion.” This standard suffices without resort to a meaningless limiting instruction. When applying the rule of completeness, the judge is, in effect, ruling that a balanced, fair presentation of the evidence includes those parts requested by objecting counsel. Doctrinal messiness dissipates by conceptualizing the evidence as a single admissible unit.

<sup>7</sup> Wisconsin Practice, Evidence § 107.2 (4th ed. August 2019 update).

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.<sup>27</sup>

It is possible to draw a similar line in applying Rule 106. A statement might be properly offered for "context" when it rectifies a misimpression regardless of whether the remainder is true or not. On the other hand, when the completing statement clears up the misconception only if it is true, then "context" becomes a fake use of the evidence --- the statement is actually being offered for its truth (and it should be admitted as such if the strict standards of Rule 106 are met).

***Examples may help to illustrate this distinction.***

The easy example is the Grimm hypothetical --- the statement, "I sold the gun" cannot legitimately be admitted for context only, because it only puts the prior statement in context if it is true. That is a classic illustration of the point that "context" as a trigger for completion is different from how the completing statement is used at trial. If it is necessary for context under Rule 106, then it must be admitted for truth if that is the only way that it provides context. *Sutton* and *Haddad*, discussed above, also fall into the category of "admissible for truth because that is the only way it satisfies its mission of providing context." Thus, in *Haddad*, the statement "I didn't know about the gun" is only useful for context if it is true (if he did know about the gun then it adds nothing of context to the government's portion, which is offered for precisely that inference).

In contrast, here is an example of "context" that does not require admitting the completing statement for its truth: Assume that the defendant, Tinker, is charged with robbing a bank with two other men, Evers and Chance. Tinker's defense is that he was the victim of a shoddy police investigation. A police officer involved in the investigation is asked whether, when he interviewed witnesses to the robbery, one of them identified only Evers and Chance as having run from the bank. The officer answers yes, but the government wants to complete with the fact that the same witness also told the officer that Tinker was in the driver's seat in the getaway car, and he drove Evers and Chance from the bank. First, the completing statement satisfies the "context trigger" of Rule 106. The statement elicited by defense counsel is misleading, and the remainder provides context and rectifies the misimpression. Second, as to the *use* to which the statement can be put, it can be used for context without regard to its truth. The inference that the defendant sought to create was that the police investigation led away from the defendant, and the completing portion dispels that inference *whether it was true or not*. Even if the defendant wasn't driving the car, the

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<sup>27</sup> For a case in which "context" usage was found proper in the hearsay/confrontation context, see *United States v. Wright*, 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant's statement to a confidential informant that he was "stocked up" would have been unintelligible without providing the context of the informant's statements inquiring about drugs, "and a jury would not have any sense of why the conversation was even happening." The court also noted that "most of the CI's statements were inquiries and not factual assertions." The court expressed concern, however, that the district court's limiting instruction on "context" was boilerplate, and that the jury "could have been told that the CI's half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI's statements standing alone were not to be considered as evidence of Wright's guilt."

government acted properly in investigating him given that an eyewitness identified him. That is a proper non-hearsay use.

Here is another example of a completing statement admissible to place another statement in context under Rule 106 and not offered for its truth: In *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, in which the defendant indicated that he 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 Rule 106, to dispel the misleading inference from the second recording that he had independent knowledge. In this context, the assertions in the completing (earlier) conversation provide context without regard to the truth. They are offered only to show that the defendant was made aware of the assertions by the informant, not for the fact of any plot to obstruct justice.

There could be value in writing a rule that sets out the two possible purposes for the completing evidence and leaves it to the court and the parties to determine how the statement is to be used on a case-by-case basis. At the very least it might serve to alleviate some confusion in this troubled area. Right now, the courts do not appear to be focusing on the context/for truth distinction. They are figuring out when the completing evidence may be introduced, but are not really focusing on *how* it can be used once it is admitted.

One of the drafting alternatives below makes an attempt to allow the completing statement to be admissible either for context or its truth, within the discretion of the court, and tries to provide some guidance in a Committee Note.

## **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.” While that is opaque, 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 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.

The original Reporter, Professor Cleary, stated that the term “conversations” was deleted because “the general outline of a conversation is less definite than documentary evidence and exploration of what in fairness ought to be considered with respect to a conversation is likely to involve a more discursive and time-consuming inquiry” than what would be required for writings.<sup>28</sup>

One conclusion from all this 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>29</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.<sup>30</sup> And if that is the case, the drafters’ concerns are ameliorated if the timing of completion is left to the discretion of the court.

Whatever the rationale for excluding oral conversations from Rule 106, the fact is that, as discussed above, most courts *are* admitting oral statements if the strict grounds for completion

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<sup>28</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, to the extent that exclusion of conversations is grounded 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*. And finally, note that whatever “disruption” occurs during completion of oral statements, that is *already occurring* in the vast majority of federal courts, which *do* admit oral statements to complete under Rule 611(a).

<sup>29</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.

<sup>30</sup> For example, you might need to complete an oral conversation with a different witness who was also present and could testify to the remainder. It would be disruptive to interrupt the opponent’s case and present a witness. In contrast, the writing or recording has already been admitted, at least in part.

under Rule 106 are met. This is being done by resort to Rule 611(a) and/or the common law. Therefore the discussion the Committee has had over the past few meetings about “including” oral statements, and the concern about that inclusion, is akin to closing the barn door after the cows have left. Courts are (albeit with some apparent outliers) admitting oral statements to complete. *Thus the question is not about the merits of including oral statements but only about whether it should be done under a single rule rather than a hodgepodge of rules and common law.*

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

Let’s assume, *arguendo*, that the merits of including oral statements within the rule of completeness needs to be discussed. Is there a reason to be concerned about oral statements because they might be harder to prove than written and recorded ones? The answer would seem to be that even if there is concern about disputes over unrecorded oral statements, 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 the rule of completeness gives rise to the possibility of sharp practices and abuse. An example is *United States v. Ramirez-Perez*, 166 F.3d 1106 (11th Cir. 1999), discussed above. The defendant made a written confession, and the government offered a misleading portion. But the rule of completeness was held not to apply because the officer was only asked about what the defendant *said*, not about what he wrote down --- even though there was no showing that the two renditions were different. The prosecutor was careful to ask the witness “what did the defendant say?” Such a baldfaced attempt to avoid the Rule 106 fairness rule was made possible by the circuit case law providing that the rule of completeness does not apply to oral unrecorded statements.

In the end, there is an argument that including unrecorded oral statements in Rule 611(a), --- as an add-on to an amendment to deal with the hearsay question --- will serve these separate purposes:

1) In those many 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. And, as stated above, it would assure that oral and written statements are treated the same way in terms of overcoming a hearsay objection.

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.

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

As discussed above, most circuits allow completion of misleading statements with unrecorded statements. And Professor Richter's extensive memo on state practice analyzes the states that permit oral statements to complete. 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. Nor has there been any concern that I could find in the reported case law about the possibility of a presentation being problematically interrupted by the need to complete a conversation.

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.

As to the possibility of disruption with completing oral statements, to the extent there has been any concern at all, it appears to be remedied by allowing the trial court to have discretion regarding the timing of the completion. Because most courts have held that timing is within the discretion of the court, the courts appear to ameliorate the possibility of disruption by allowing the completing party to present the completing statements at a later point. In *Sweiss, supra*, where the defendant sought to complete a lengthy *taped* conversation with other portions, the court delayed completion until the defendant's case-in-chief in order to avoid disruption, and the court of appeals found no error in that deferral.

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 Separate Subdivision for Oral Statements?***

At the last meeting, some Committee members expressed interest in covering oral statements in a separate subsection. The examples provided to the Committee of such separate treatment were found in New Hampshire and Texas. Here are those provisions:

##### ***New Hampshire:***

New Hampshire Rule 106(a) is substantively identical to Federal Rule 106. New Hampshire 106(b) covers oral statements, as follows:

**(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.

***Texas:***

Texas Rule 106 is substantively identical to Federal Rule 106. It is “fairness” based and it covers written and recorded statements. Texas has a separate rule --- Rule 107, that covers “optional completeness,” that 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.

***Discussion on a Separate Subdivision***

The Committee member who spoke most favorably about separate subdivisions argued the standard for admissibility of oral statements should be stricter than that applied to recorded statements under the Rule 106 “fairness” standard. Specifically he referenced Texas Rule 107, which allows completion by oral statements if “necessary.”

***But there are a number of reasons to refrain from separating oral statements out into a separate subdivision:***

***1. There is no reason to treat oral statements so strictly in terms of triggering completion.***

If “fairness” requires completion with a recorded statement, there is no good reason for the same statement to be inadmissible simply because it is unrecorded. That is the very basis for courts to include oral statements under Rule 611(a) --- that it is “fair” to do so when the strict standards of Rule 106 are met. Is it really the case that “fairness” would require completion, but that something extra --- uber-fairness? --- is required for unrecorded oral statements?

There are two differences between oral and recorded statements that arguably result in different treatment --- but not in terms of whether it is fair to complete with an oral statement. Both these concerns have been discussed above. One is the greater difficulty of proving oral statements. But that has nothing to do with the *fairness* of admitting an oral statement. And, as stated above, any difficulties of proof can be handled in the trial judge’s discretion under Rule 403.<sup>31</sup>

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<sup>31</sup> It is notable that the Committee rejected language for a proposed amendment to Rule 106 that would admit oral statements only if their existence was not substantially in dispute. The Committee reasoned that proof problems for oral statements are better regulated by the trial judge on a case-by-case basis under Rule 403.

The other is the aforementioned problem of interruption by completing at the time of testimony about a conversation. But that problem is better handled with flexibility as to timeliness --- which the courts have already done with *both* oral and recorded statements, as seen earlier in this memo. See *Sweiss, supra*, where the defendant sought to complete a lengthy *taped* conversation with other portions, and the court delayed completion until the defendant's case-in-chief in order to avoid disruption.

***2. There is no indication in New Hampshire or Texas that the courts are employing a stricter substantive standard for oral statements.***

Professor Richter, who has researched the case law in New Hampshire and Texas, has found that the courts are not using these separate provisions to impose a stricter substantive standard for completion. She explains as follows.

A review of the rules and cases in New Hampshire and Texas suggests that the standard for the completion of oral statements in these jurisdictions is similar to the fairness requirement of Rule 106.

First, it appears that Texas breaks written/recorded and oral statements into two separate rules because of the problem with interruption (and not to create a stricter standard for oral statements). Texas Rule 106 allows an adverse party to interrupt and require introduction of completing written/recorded statements "at that time." Because completing with oral statements by definition requires questioning by the adverse party to elicit other portions of oral conversations not memorialized in a writing, Rule 107 does not allow for interruption, but instead allows the adverse party to "inquire into" completing portions on cross or to "introduce" them in its own presentation. This problem of interruption is treated in the working draft of Federal Rule 106 by specifically allowing the court to delay completion in its discretion --- something that many federal courts are already doing.

Secondly, Texas Rule 107 contains two standards for the completion of oral statements. It says that an adverse party may inquire into any oral statements that are part of the *same* conversation if they are on the "same subject" as those already introduced. To some extent, this "same subject" requirement could be read as broader than the federal "fairness" standard if it does not demand distortion of some kind. Rule 107 then provides that an adverse party may introduce *other* conversations, acts, etc. (not already introduced by the adversary) to the extent "necessary" for the jury to fully understand statements already introduced. This "necessary" standard only applies, therefore, to conversations and acts separate from the ones introduced by the opponent. While it may make sense to apply a stricter standard to such separate conversations, the Texas cases (included in the state memo) seem to interpret this "necessary" standard consistently with the Federal Rule 106 fairness standard as well.

For example, in *Washington v. State*, the Texas Appellate court stated:

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. (adding emphasis).

Similarly, in *Hernandez v. State*, the Texas Court of Criminal Appeals talked about admitting the oral portions of an arrest because they were “necessary for the jury to fully understand the conversation as a whole.” So necessity seems to mean “needed to prevent distortion and clarify true meaning” (which is the FRE 106 standard).

Finally in *Wright v. State*, the Texas Court of Criminal Appeals stated that: “By the plain language of the rule [Rule 107], when part of a conversation is placed into evidence by one party, the other party can put the remainder of the conversation into evidence to explain the prior comments or otherwise make them fully understood.” This also seems no more demanding than the federal fairness standard.<sup>32</sup>

As for the recently enacted New Hampshire standard, it extends only to oral statements that are part of the same conversation as those already introduced and allows completion when those remaining statements are 1) on the same subject and 2) explain or shed light on the meaning of the part already admitted. This language, as well as the New Hampshire cases, seem completely consistent with the federal fairness standard. For example, in *State v. Warren* (the New Hampshire Supreme Court case that led to extension of the rule), the court held that the remainder was: “necessary for the jury's proper

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<sup>32</sup> The Committee member at the last meeting suggested that the use of the word “necessary” in Texas Rule 107 called for a stricter standard than is applied for completion under the Federal Rule. But that is not the case. Federal courts often use the word “necessary” as a requirement for completion. For example, see the fountainhead case of *United States v. Sutton*, 801 F.2d 1346, 1349:

the provision of Rule 106 grounding admission on “fairness” reasonably should be interpreted to incorporate the common-law requirements that the evidence be relevant, and be *necessary* to qualify or explain the already introduced evidence allegedly taken out of context. See *United States v. McCorkle*, 511 F.2d 482, 486–87 (7th Cir.) (en banc), cert. denied, 423 U.S. 826, 96 S.Ct. 43, 46 L.Ed.2d 43 (1975) (applying the doctrine of “verbal completeness” prior to the passage of the Federal Rules of Evidence); VII J. Wigmore, *Evidence* § 2113 (3d ed. 1940).

evaluation of the inculpatory phrases that the State chose to elicit, and “to prevent [a] misleading impression ... from taking root.” This seems to mirror the fairness standard.

In sum, the states that break out oral statements for special treatment do not really treat them more strictly in terms of admissibility for completion.

***3. A differentiation will reject the case law in most of the circuits that employ Rule 611(a) to admit oral statements under the Rule 106 fairness standard.***

As stated above, most federal courts are already admitting oral statements to complete under Rule 611(a). And these courts are expressly *not* employing a different or stricter standard for completion than is provided under the Rule 106 fairness standard. The fountainhead case 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.” Thus, the courts applying Rule 611(a) apply exactly the same substantive standard for completion (i.e., fairness) for oral statements as for written statements.

It follows that any attempt to narrow the standard for completion with oral statements will result in a change in law in many circuits. And given the fact that the standard for completion under Rule 106 is *already* narrow, it is hard to see how there can be any benefit that outweighs the dislocation costs of such a change in the law as to oral statements.

If anything, it would be better to leave oral statements where they are right now than it would be to establish a different and more restrictive standard for such statements.

***4. The rule is complicated enough.***

It’s fair to state that the Committee has learned over the last few years that Rule 106 is intricate and complicated. It certainly seems so to the Reporter --- now 55 pages into the Rule 106 memo. There are tons of issues and it is a hard rule to navigate. Adding a separate subsection on oral statements would only provide more complication. Indeed, the very reason for *including* oral statements in Rule 106 would be to make it more user-friendly --- so that both oral and written statements are covered under one rule rather than two. But that purpose is substantially undermined if there are two separate subdivisions, one with a new and narrower standard for completion.

***5. If it is to be the same standard, then it is bad style to have a separate subdivision.*** Assuming that the Committee is *not* seeking to add a stricter standard for oral statements, then a

separate subdivision should be rejected as bad style. Under style standards, there is no reason to have separate subdivisions if they are subject to the same rule of law.

## **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, most 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.

As stated above, discretion as to timing is especially important when completion involves oral unrecorded statements, given the possibly greater likelihood of disruption that might occur when a witness testifies to part of an unrecorded conversation and the opponent offers evidence for completion.

While certainly there should be a preference for contemporaneous completion under Rule 106, 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 allowing the 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 provide a presumption that completion should 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.”

## **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.
- Admissibility for context or for truth, depending on the circumstances.
- Coverage of oral unrecorded statements, but not with a two-tiered approach.
- Discretion as to timeliness.

What follows are a number of drafting alternatives to cover the combination of possibilities.

***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~~ Rule of Completeness**

**a) Introducing the Completing Statement.** If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may introduce <sup>33</sup>~~require the introduction,~~ ~~at that time,~~ ~~of~~ any other part — or any other ~~writing or recorded~~ statement — that in fairness ought to be considered together with the initially introduced statement. ~~at the same time~~ The adverse party may do so even over a hearsay objection.

**b) Timing the Introduction.** Ordinarily, the completing statement should be admitted at the same time as the initial statement. But the court may, in its discretion, allow completion at a later time.

***Draft Committee Note***<sup>34</sup>

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 creates a misimpression because it suggests that the defendant admitted owning the weapon at the time of the crime. The prosecution, which has by definition created the situation that makes completion necessary,

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<sup>33</sup> “Require the introduction” is not correct if the completing statement is admissible at a later point. At any rate, it is passive voice and confusing. The completing party is introducing the evidence one way or another.

<sup>34</sup> Note that the second paragraph of the Committee Note seeks to address the point that sometimes the completing statement should be admissible only for context and sometimes for its truth.

should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object to hearsay that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient if the completing statement is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement is admitted only to show all that the defendant heard, regardless of the underlying truth of the completing statement. But in most cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if in fact the defendant sold the weapon. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule. It is not intended to change the standards for admitting oral unrecorded statements that are currently employed by the courts under Rule 611(a) or the common law.

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.”). 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 under Rule 403.

Third, the rule has been amended to provide more flexibility as to 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 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. But if, for example, there is concern about the disruption that might occur with contemporaneous completion of a conversation, that concern can be remedied by allowing completion at a later point in the case.

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 introduces a statement that creates a misimpression, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

## ***B. Draft Two: Admissibility for Context Only (and Including Oral Statements)***

### **Rule 106. ~~Remainder of or Related Writings or Recorded Statements~~ Rule of Completeness**

**a) Introducing the Completing Statement.** If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may ~~require the introduction, at that time, of~~ introduce any other part — or any other ~~writing or recorded~~ statement --- that in fairness ought to be considered together with the initially introduced statement, at the same time in which event the completing statement is admissible for the non-hearsay purpose of providing context.

**b) Timing the Introduction.** Ordinarily, the completing statement should be admitted at the same time as the initial statement. But the court may, in its discretion, allow completion at a later time.

### ***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 correct a misimpression 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 creates a misimpression 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.

It may be in a particular case that the completing portion is admissible for its truth, because it falls within a hearsay exception or exemption. In that case, the completing statement is admissible for two purposes --- to provide context and as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This

procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule. It is not intended to change the standards for admitting oral unrecorded statements that are currently employed by the courts under Rule 611(a) or the common law.

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.”). 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 under Rule 403.

Third, the rule has been amended to provide more flexibility as to 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 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. But if, for example, there is concern about the disruption that might occur with contemporaneous completion of a conversation, that concern can be remedied by allowing completion at a later point in the case.

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 introduces a statement that creates a misimpression, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

***C. Draft Three: “Hybrid” --- Articulating in the Text that the Completing Statement is Sometimes Admissible for Truth and Sometimes Only for Context***<sup>35</sup>

**Rule 106. ~~Remainder of or Related Writings or Recorded Statements~~ Rule of Completeness**

**a) Introducing the Completing Statement.** If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may ~~require the introduction, at that time,~~ ~~of~~ introduce any other part — or any other ~~writing or recorded~~ statement — that in fairness ought to be considered together with the initially introduced statement. ~~at the same time~~ The adverse party may do so even over a hearsay objection. The court must determine whether fairness requires the completing statement to be admitted as proof of a fact, or for the non-hearsay purpose of providing context.

**b) Timing the Introduction.** Ordinarily, the completing statement should be admitted at the same time as the initial statement. But the court may, in its discretion, allow completion at a later time.

***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 creates a misimpression because it suggests that the defendant admitted owning the weapon at the time of the crime. The prosecution, which 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. A party that presents a distortion can fairly be said to have

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<sup>35</sup> Note that Draft Alternative 1 *does* discuss the difference between use for context and use for truth, but does so in the Committee Note rather than in the text.

forfeited its right to object to hearsay that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient if the completing statement is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement is admitted only to show all that the defendant heard, regardless of the underlying truth of the completing statement. But in most cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if in fact the defendant sold the weapon. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact. As the amendment states, if the court finds that a proffered statement is necessary to correct a misimpression, it must then find whether the statement is admissible to prove a fact or only for the non-hearsay purpose of providing context. This ruling will be dependent upon whether the completing statement corrects a misimpression only if it is true.

It may be in a particular case that the completing portion is admissible for its truth, because it falls within a hearsay exception or exemption. In that case, the completing statement is admissible for two purposes --- to provide context and as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule. It is not intended to change the standards for admitting oral unrecorded statements that are currently employed by the courts under Rule 611(a) or the common law.

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.”). 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 under Rule 403.

Third, the rule has been amended to provide more flexibility as to 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 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. But if, for example, there is concern about the disruption that might occur with contemporaneous completion of a conversation, that concern can be remedied by allowing completion at a later point in the case.

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 introduces a statement that creates a misimpression, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

## ***D. Draft Four: No Coverage of Unrecorded Oral Statements***<sup>36</sup>

### **Rule 106. ~~Remainder of or Related Writings or Recorded Statements~~ Rule of Completeness**

**a) Introducing the Completing Statement.** If a party introduces all or part of a writing or recorded statement, an adverse party may ~~require the introduction, at that time, of~~ introduce any other part — or any other writing or recorded statement — that in fairness ought to be considered together with the initially introduced statement. ~~at the same time~~ The adverse party may do so even over a hearsay objection.

**b) Timing the Introduction.** Ordinarily, the completing statement should be admitted at the same time as the initial statement. But the court may, in its discretion, allow completion at a later time.

### ***Draft Committee Note***

Rule 106 has been amended in two 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 in a written statement that he owned the murder weapon, but also states in the statement that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant admitted owning the weapon at the time of the crime. The prosecution, which 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. A party that presents a distortion can fairly be said to have forfeited its right to object to hearsay that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a completing statement can be put

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<sup>36</sup> This draft uses Draft One as its template --- admissibility over a hearsay objection. If the Committee were to decide to proceed with Draft Two (context only) then that would be easy to do. Draft Four is presented only to illustrate what a draft (and Committee Note) would look like if oral statements remain uncovered by Rule 106.

will be dependent on the circumstances. In some cases, completion will be sufficient if the completing statement is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement is admitted only to show all that the defendant heard, regardless of the underlying truth of the completing statement. But in most cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if in fact the defendant sold the weapon. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Second, the rule has been amended to provide more flexibility as to 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 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. Most 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 Committee found no reason to disrupt existing case law that admits oral unrecorded statements under Rule 611(a) or the common law by amending Rule 106 to cover such statements.

The amendment does not give a green light of admissibility to all excised portions of written and recorded statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party introduces a statement that creates a misimpression, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is

probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

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**TAB 4B**

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## MEMORANDUM

To: Advisory Committee on Evidence Rules

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

Date: October 1, 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, Texas, and Wisconsin 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

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<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

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<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."

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<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

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<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

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<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

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<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>

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<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.

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<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.”

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<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.

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<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

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<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

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<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.

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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.

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<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

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<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.

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<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

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<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

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<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

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<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

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<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>

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<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

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***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.

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<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

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<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

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<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.

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<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

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<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.

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<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.

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<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.

## ***X. Wisconsin***

The rule of completion in Wisconsin provides for the completion of oral statements as follows:

### **901.07. Remainder of or Related Writings or Statements**

When any part of a writing or statement, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion.<sup>64</sup>

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<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).

<sup>64</sup> Wis. Stat. Ann. § 901.07 (West).

Although the Wisconsin rule of completeness originally mirrored Federal Rule 106,<sup>65</sup> it was amended in 2017 to bring oral statements expressly within its reach.<sup>66</sup> This was done to bring the rule text in line with the Wisconsin cases, which have long permitted the admission of completing oral statements --- so that the entire rule of completeness would be accessible through the text of the rule. The Wisconsin courts originally found a right to complete oral statements in the remaining common law of Evidence following enactment of the Wisconsin Evidence Rules.<sup>67</sup> In 1998, the Wisconsin Supreme Court in *State v. Eugenio*,<sup>68</sup> evaluated the admissibility of oral statements through the rule of completion and found that the Wisconsin courts “*need not reach back to the common law rules of evidence for resolution of this inquiry.*”<sup>69</sup> Instead, the court found a right to complete oral statements to prevent distortion in Wisconsin’s counterpart to Federal Rule of Evidence 611(a).<sup>70</sup> The court noted that the fairness rationale supporting completion of written and recorded statements applies equally when oral statements are presented to the fact finder out of context.<sup>71</sup> None of the Wisconsin cases reveal any dispute or other inefficiency about establishing the content of an oral statement.

In clarifying that the rule of completion extends to oral statements, the Wisconsin Supreme Court emphasized that the right to complete is a narrow one that applies only to avoid misleading the fact-finder:

An out-of-court statement that is inconsistent with the declarant’s trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously.<sup>72</sup>

The *Eugenio* court cautioned that the trial court possesses discretion to admit only those completing statements “necessary to provide context and prevent distortion” and further cautioned that trial courts should “closely scrutinize the proffered additional statements to avert abuse of the

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<sup>65</sup> See *State v. Eugenio*, 579 N.W.2d 642, n.6 (Wis. 1998) (noting that the then-existing version of the Wisconsin rule of completeness was “identical” to Fed. R. 106).

<sup>66</sup> 7 Wis. Prac., Wis. Evidence § 107.1, The rule of completeness generally: Written, recorded, and oral statements (4th ed.) (“In 2017 the Wisconsin Supreme Court revised § 901.07 to explicitly include oral statements.”).

<sup>67</sup> See *State v. Sharp*, 511 N.W.2d 316, 322 (Wis. App. 1993) (explaining that the rule of completeness was recognized in the common law of Wisconsin since at least 1872 and that the common law of completion was not limited to written statements, but encompassed conversations).

<sup>68</sup> 579 N.W.2d 642.

<sup>69</sup> *Id.* at 650.

<sup>70</sup> *Id.* (finding that Wisconsin Stat. § 906.11 authorizes trial judges to require completion of oral statements through the court’s duty to “make the interrogation and presentation effective for the ascertainment of truth”).

<sup>71</sup> *Id.* (quoting Daniel D. Blinka, *Wisconsin Practice: Evidence* § 107.1, at 32 (1991)).

<sup>72</sup> *Id.* at 651 (quoting *Wikrent v. Toys R Us, Inc.*, 507 N.W.2d 130 (Wis. App. 1993), *overruled on other grounds*, *Steinberg v. Jensen*, 534 N.W.2d 361 (Wis. 1995)).

rule.”<sup>73</sup> Thus, the expansion of the Wisconsin rule of completeness to include oral statements in no way liberalized the circumstances in which the rule is triggered.

The defendant in *State v. Eugenio* was prosecuted for the sexual assault of a minor. At trial, the defense extensively cross-examined the victim about alleged inconsistencies in her prior oral statements to several individuals concerning the abuse. The alleged inconsistencies concerned matters, such as the time of year that the abuse occurred, the victim’s grade in school, and the circumstances preceding the alleged abuse. In response, the *prosecution* sought to introduce the remainder of the victim’s statements to these individuals to demonstrate their consistency with the victim’s trial testimony concerning the sexual assault itself.<sup>74</sup> The trial court permitted the prosecution to admit the remainder of the statements through the rule of completion over a defense hearsay objection. In affirming the completion of the oral statements by the prosecution, the Wisconsin Supreme Court addressed the hearsay issue, as follows:

[W]here the evidence is offered not to prove the truth of the matter asserted, but rather for some other purpose, such as providing a fair context on which the trier of fact can evaluate the evidence already offered by the opposing party, the evidence is by definition not hearsay... In other cases, where the evidence may fall within the classic definition of hearsay, the ...court in its discretion may determine whether the fairness requirement of the rule of completeness outweighs the principles underpinning the exclusionary rules and permits the trier of fact to consider the additional offer of oral statements.<sup>75</sup>

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<sup>73</sup> *Id.* It appears that the language added to the text of the Wisconsin rule of completeness comes from this portion of the Wisconsin Supreme Court’s opinion.

<sup>74</sup> *Id.*; see also *State v. Booker*, 704 N.W.2d 336 (Wis. App. 2005)(permitting State to offer other portions of the victim’s prior consistent statements under the rule of completion after the defense “essentially argued that the victim ‘engaged in a systematic pattern of lying about the event.’”), *reversed on other grounds*, 29 Wis.2d 43 (2006); *State v. Doyle*, 742 N.W.2d 74 (Wis. App. 2007) (“[w]here ... there is the suggestion of improper influence and an attempt to create inconsistencies in the details of a child’s various statements, evidence is admissible under the rule of completeness to provide the jury ‘the opportunity to evaluate whether incompleteness or inconsistency within and among the interviews indicated improper influence on the child’s testimony.’”).

<sup>75</sup> *Id.* (citing Dale A. Nance, *A Theory of Verbal Completeness*, 80 Iowa L. Rev. 825, 840-41 (1995)). The Wisconsin courts also frequently cite Professor Dan Blinka’s work in resolving evidentiary questions. About the “evidentiary status” of the completing evidence, Professor Blinka says the following:

The better practice .. is to introduce the remaining parts on the same footing as those originally offered. Simply put, the additional evidence “which ought in fairness to be considered” is also admissible under the rule of completeness. Juries, like all people (even lawyers), are ill-equipped to draw tortured distinctions between statements offered for their “truth” and those admitted solely to provide “context.” Nor does it seem necessary to carve out a unique rule for admissions by party opponents. The real protection is *Eugenio*’s trenchant reminder that the rule of completeness is not an “unbridled opportunity” to waft inadmissible evidence before the jury: the trial judge should admit only those statements “which are necessary to provide context and prevent distortion.” This standard suffices without resort to a meaningless limiting instruction. When applying the rule of completeness, the judge is, in effect, ruling that a balanced, fair presentation of the evidence includes those parts requested by objecting counsel. Doctrinal messiness dissipates by conceptualizing the evidence as a single admissible unit.

After explaining that completing oral statements could be admitted over a hearsay objection, the court did not specify whether the remainder of the victim's oral statements in this case were admissible for their truth.

In *State v. Sharp*, just a few years before the Wisconsin Supreme Court decided *Eugenio*, the Wisconsin Court of Appeals had also permitted the *prosecution* to admit a child victim's oral statements to witnesses concerning alleged sexual abuse under the rule of completion.<sup>76</sup> In that case, the defense suggested during cross-examination of the victim that her testimony concerning the abuse had been shaped by several witnesses who had questioned her about the abuse during the months after the assault. The court permitted the prosecution to ask those witnesses about the content of their conversations with the victim to address the defense's implications about their role in shaping testimony during those conversations.<sup>77</sup> Although the court acknowledged that the then-existing Wisconsin rule of completeness did not encompass oral statements, the court found that the common law continued to require completion of an oral statement where needed to "present fairly the 'substance or effect' and context of the statement."<sup>78</sup> Addressing the defense's hearsay objection to the victim's prior consistent statement, the court stated that "otherwise inadmissible evidence will be admissible" under the rule of completeness.<sup>79</sup>

In a case decided just one year after *Eugenio*, the Wisconsin Court of Appeals held that the trial court had erred in refusing to permit a defendant in a homicide prosecution to admit a completing portion of an oral statement he made to an investigator.<sup>80</sup> In that case, the victim had been thrown off a bridge by the defendant and another man. During the prosecution's case, the investigator testified about a conversation he had with the defendant about the moment when the victim was thrown off the bridge. The investigator reported that the defendant said "that [Moore]

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<sup>7</sup> *Wisconsin Practice, Evidence* § 107.2 (4<sup>th</sup> ed. August 2019 update).

<sup>76</sup> 511 N.W.2d 316, 322 (Wis. App. 1993).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 323 (quoting *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987)). The Wisconsin cases also illustrate the confusion that currently exists concerning the proper basis for admitting completing oral statements in a regime where the rule of completeness itself applies only to written or recorded statements. The Wisconsin Court of Appeals found a right to complete oral statements in the continuing "common law" of Evidence, while the Wisconsin Supreme Court a few years later held that the right to complete oral statements emanates -- not from the common law -- but from Wisconsin's counterpart to Fed. R. Evid. 611(a). If appellate judges are perplexed as to the source of a right to complete oral statements, litigants surely are as well.

<sup>79</sup> *Id. Sharp* also illustrates the role that completion can play in admitting prior consistent statements of a testifying witness that are not otherwise admissible through the hearsay exemption for such statements. In *Sharp*, the defense argued that the victim's prior consistent statements during the interactions with the witnesses could not be admitted because the defense claimed that the child fabricated the assault allegations *prior* to the interactions. Thus, her statements to those witnesses were post-motive statements inadmissible through the hearsay exemption for prior consistent statements. Even though her statements were post-motive statements that could not be admitted through the hearsay exemption for prior consistent statements, they were admissible to complete after the defense's characterization of the victim's interactions with the witnesses.

<sup>80</sup> *State v. Anderson*, 600 N.W.2d 913 (Wis. App. 1999). Although the statements were made orally, they appear to have been later memorialized in a report.

had picked her up by the feet and that the 2 of them were walking towards the truck with [the defendant] walking backwards toward the truck...[and that] when they got near the bridge rail ... [Moore] threw her over the railing.” This statement was admitted against the defendant as a party opponent statement. The investigator omitted that the defendant had told him simultaneously that “it was his assumption that they were going to put [the victim] back in the back of the truck” when he picked her up. When the defendant sought to admit this omitted portion of his own statement, the trial court sustained the prosecution’s hearsay objection and excluded it. The trial court found that the defendant had a right not to testify, but that he could not get his testimony in “by the back door” and avoid subjecting himself to cross-examination.

The Wisconsin appeals court found that the remainder of the defendant’s statement to the investigator was needed to rectify the misimpression that arose when the partial statement was introduced. When read alone, the initial portion suggested that the defendant admitted carrying the victim to the rail of the bridge for the purpose of throwing her over. The remainder of the defendant’s statement actually disclaimed such an intention. Accordingly, the court found that partial presentation of the defendant’s statement was misleading as to his concessions. After finding that fairness required completion, the court addressed the hearsay issue, finding that the rule of completeness has a “trumping function” that requires courts to admit completing statements necessary to prevent distortion over a hearsay objection.<sup>81</sup> As for the government’s concern about the defendant’s presentation of his own completing statement in the absence of his cross-examination, the court found that a defendant’s refusal to testify should play no role in the completion analysis, as follows:

Once the court has determined that any additional portion of the statement is necessary under the *Eugenio* standard, it must permit the presentation of that additional portion ... Fairness to the State does not require that the additional portion necessary under the completeness rule be excluded unless the defendant testifies, because the *Eugenio* test is sufficiently narrow to insure that only the additional portion necessary to avoid distortion is admissible. On the other hand, it would be unfair to the defendant to force him or her to choose between giving up the constitutional right not to testify and correcting a distorted impression of his or her prior statement presented by the State.<sup>82</sup>

The court ultimately concluded that the trial court’s error in denying completion was harmless and affirmed the defendant’s conviction, but took care to find that the exclusion of the remainder offered by the defendant was erroneous.

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<sup>81</sup> *Id.* at 923 (“even when [the completing statement] would otherwise be inadmissible hearsay, it is admissible if the court has, in the exercise of its discretion, determined that the rule of completeness requires its admission.”).

<sup>82</sup> *Id.* at 924-25.

Far more often, the Wisconsin courts reject a criminal defendant's attempt to complete partial statements. In *State v. Riley*, the appellate court affirmed the trial court's refusal to permit the defendant to complete his own oral statements, finding that they were not needed to prevent any distortion in the State's original presentation.<sup>83</sup> In *State v. Johnson*, the court also affirmed the trial court's refusal to allow the defendant to complete.<sup>84</sup> The defendant was prosecuted for participating in a heroin transaction involving a third party and an undercover police officer. At trial, the State offered evidence of oral statements made by the third party during the drug transaction to the defendant and to the undercover officer to describe the transaction and the defendant's participation in it. The defendant sought to offer post-arrest statements made by the third party in which he claimed not to remember the details of the drug transaction and in which he did not mention the defendant as having been involved. The appellate court affirmed the trial court's rejection of the defense attempt to complete, emphasizing that completion is a narrow doctrine and that the post-arrest statements in no way corrected any misimpression about the statements made during the transaction that were offered by the State.<sup>85</sup> In *State v. Briggs*, the appellate court also affirmed the trial court's refusal to allow the defendant in an insurance fraud prosecution to read 158 pages of his own deposition given in a prior civil action to complete the State's use of approximately 10 pages of that transcript under the former testimony hearsay exception.<sup>86</sup> The court found that the remainder of the transcript was not necessary to correct any unfairness from the State's partial presentation. In *State v. Wakefield*, the court rejected defendant's claim that the trial court committed a completeness error in refusing to require the prosecution to play an entire recorded phone call between the defendant and his domestic violence victim.<sup>87</sup> Where the prosecution played portions of the call to show that the defendant was attempting to appeal to the victim's sympathies and to coerce her into recanting, the court found that the remainder of the "casual" interaction the defendant had with the victim during the call failed to correct any misimpression in the portions offered by the State.

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<sup>83</sup> 604 N.W.2d 33 (Wis. App. 1999).

<sup>84</sup> *State v. Johnson*, 616 N.W.2d 923 (Wis. App. 2000).

<sup>85</sup> *Id.* ("Here the State used the officer's testimony concerning Hall's comments during the transaction to prove Johnson participated in that transaction. Johnson sought to use Hall's subsequent statements not to remedy an unfair and misleading impression from that testimony, but to show that Hall's earlier statements may not have been made. That is not a recognized use of the rule of completeness.")

<sup>86</sup> *State v. Briggs*, 571 N.W.2d 881 (Wis. App. 1997).

<sup>87</sup> *State v. Wakefield*, 888 N.W.2d 23 (Wis. App. 2016); *see also State v. Hershberger*, 853 N.W.2d 586, 598 (Wis. App. 2014) (redacted holding order offered against defendant in a prosecution for violating order did not require completion with redacted factual basis – redactions did not create distorted impression of order that defendant violated and completeness did not require introduction of redacted factual basis); *In re Commitment of Sudgen*, 795 N.W.2d 456, 466 (Wis. App. 2010) (rejecting completion attempt by sex offender involuntarily committed; portion of expert report offered by the State showing that offender presented future danger was not misleading without omitted portion of report explaining that supervision could ameliorate dangerousness because supervision is statutorily irrelevant in commitment proceeding); *State v. McReynolds*, 757 N.W.2d 849 (Wis. App. 2008) (no completion error when court declined to admit separate post-arrest hearsay statement of co-conspirator after admitting pre-arrest co-conspirator statements by same declarant).

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# FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules

From: Daniel J. Capra, Reporter

Re: Possible Amendment to Rule 615

Date: October 1, 2019

The Committee has been reviewing possible changes to Rule 615, the rule governing sequestration of witnesses. Rule 615 currently provides as follows:

### **Rule 615. Excluding Witnesses**

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) a person authorized by statute to be present.

The purpose of Rule 615 is to prevent prospective witnesses 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.’ ” (quoting 6 *Wigmore on Evidence* § 1838, at 463).<sup>1</sup>

As the Committee is aware, there is 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 being provided trial testimony while excluded from the courtroom.

The Minutes of the Fall, 2018 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.

At the Spring, 2019 meeting, the Committee considered two alternatives: one that would automatically extend a Rule 615 order to prohibit prospective witnesses from accessing or being provided testimony outside the courtroom, and the other that would specify that the trial court has discretion to regulate such access outside the courtroom.

The Minutes of the Spring meeting indicate that the Committee opted for the discretionary provision:

Committee members, after this discussion, generally agreed with the proposition that if an amendment to Rule 615 were to be proposed, it should contain a discretionary rather than mandatory provision for regulating prospective witnesses outside the courtroom.

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<sup>1</sup> The practice of sequestration has existed since Biblical times. In The History of Susanna in the Apocrypha, Susanna was being tried before the assembly for adultery. She was accused by two Elders, whom she had rebuffed when they made sexual advances. Daniel separated the Elders and questioned them. Elder One said Susanna did the act under a fig tree, and Elder Two said that she did the act under a date tree. If Elder Two had been in the courtroom when Elder One said “fig tree” then it is pretty likely that Elder Two would have tailored his testimony around the fig tree. Susanna was acquitted.

A post-script to the story is that both the Elders were beheaded for giving false testimony. Such are the powers of sequestration.

Another problem for discussion arose at the last Committee meeting: whether a sequestration order prohibiting access to trial testimony outside the courtroom could apply to lawyers. Could a lawyer disclosing trial testimony to a prospective witness be in violation of such an order? The Fourth Circuit, en banc, in *United States v. Rhynes*, 218 F.3d 310, 317 (4<sup>th</sup> Cir. 2000) stated 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.” The *Rhynes* court held that a sequestered witness’s testimony could not be excluded when defense counsel disclosed trial testimony in the course of preparing the witness. The Committee discussed whether case law such as *Rhynes* would require a lawyer carve-out for any order that went beyond a simple exclusion of witnesses from the courtroom. The Minutes of the meeting reflect this discussion:

The Committee resolved to follow up on the reach of the *Rhynes* decision for the next meeting to understand more fully the limits and context of that decision. The Committee’s choice would seem to be to push back on the *Rhynes* holding or to codify it in an amended Rule 615. One Committee member advocated exploring the issue further as part of due diligence on the subject. Another Committee member noted that the *Rhynes* case involved a pretty unique set of facts in which a defense witness was accused by another witness of being involved in the charged conspiracy shortly before taking the stand. The defense lawyer had to ask the accused witness about his involvement before deciding whether to put him on the stand. The Committee should consider whether the appellate court’s holding prohibiting the trial judge from excluding the defense witness on the basis of his preparation in that case necessarily means that *any* lawyer may tell *any* witness about other trial testimony in the course of preparing her to testify. The Reporter agreed that he would research the case law on the issue of lawyers conveying trial testimony in the course of witness preparation for the fall meeting.

The discussion concluded with the Committee deciding to consider a discretionary provision for the fall meeting and resolving to explore in detail the case law surrounding sequestration and lawyer-witness preparation.

This memo is in three parts. Part One discusses the conflict in the courts about whether a Rule 615 order extends *outside* the courtroom, and the importance of resolving that conflict by amending the rule to provide guidance on extending an order outside the courtroom. Part Two discusses whether court orders can or should prohibit lawyers from disclosing trial testimony to prospective witnesses --- what might be called the *Rhynes* issue. Part Three sets forth three versions of an amendment --- each specifying that the court has discretion to enter a broader order, with one version exempting counsel, one including counsel in the prohibition if the court so orders, and one not discussing the matter of counsel at all.

It should be noted that the Rule 615 proposal does not present an action item at this meeting. Given the rulemaking timeline, if the Committee after discussion does wish to continue

consideration on an amendment, the time for voting would be the next meeting, in the Spring of 2020. The earliest that any amendment could go into effect would be December 1, 2022.<sup>2</sup>

## I. The Dispute in the Case Law About the Extent of a Rule 615 Order

The text of Rule 615 limits the court's order under that rule to one that excludes the witness from the courtroom. And that is how some courts have construed Rule 615, i.e., as it is written. 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; and nothing 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. As the court put it in *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373–74 (5th Cir. 1981):

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<sup>2</sup> Regarding questions of conflict in the courts on Rule 615, a blog recently reported a potential conflict about how many representatives of an entity party can be exempted under Rule 615(b). The blogger states as follows:

As the United States District Court for the Middle District of Alabama noted in *United States v. McGregor*, 2012 WL 235519 (M.D.Ala. 2012):

The circuit courts are divided as to which provision of Rule 615 permits multiple agents. The Fourth and Sixth Circuit Courts of Appeals have limited the government to one representative under Rule 615(b) and one “essential-presence” agent under Rule 615(c). *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir.1991); *United States v. Farnham*, 791 F.2d 331, 335-36 (4th Cir.1986). By contrast, the Second Circuit Court of Appeals has permitted multiple representatives under Rule 615(b). *United States v. Jackson*, 60 F.3d 128, 134-35 (2d Cir.1995). The distinction between the two subsections is not merely academic. Rule 615(b) is a mandatory exception, whereas Rule 615(c) requires the government to make a showing that the second agent is essential to the presentation of its case.

I checked this out and I don't see a conflict. The Second Circuit case says that there can be multiple agents under the “necessary” exception, Rule 615(c). It's not a holding allowing multiple agents under (b). And *Pulley* allows only one agent under (b) but doesn't at all talk about limiting the number under (c). So I think that the Alabama court reads both cases wrong. The *Pulley* case cites a case from the Fifth Circuit in which two agents were allowed to testify, but that court did not say that they were both allowed to testify under (b). There is some wayward language in both the Second and Fifth Circuit cases that are fuzzy about exempting multiple witnesses under (b) and (c), but there is no actual holding that multiple witnesses can be designated under (b).

I think the rule means that the (b) exemption is for one person only, but (c) could allow for more than one person to be exempt upon a showing of necessity. I don't think there is a division in the courts about this. Rule 615(b) allows exemption for a person “designated as the party's representative.” That sounds like one. Whereas it may well be that there is more than one person who is “essential to presenting the party's claim or defense.” But if the Committee wishes to explore this further, a more extensive treatment will be prepared for the next meeting.

The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads a trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony.

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.

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 the court must in essence enter two orders. 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.

But in fact in most circuits you would be dumb to construe Rule 615 as it is written. Most courts construe Rule 615 orders as *automatically* extending to prevent disclosure of trial testimony to sequestered 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 *Robertson* 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.<sup>3</sup>

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<sup>3</sup> Beyond the cases cited, it appears that the law in the Tenth Circuit is that when the trial judge enters an order under Rule 615, it automatically extends outside the courtroom. *See, e.g., Paradigm Alliance, Inc. v. Celeritas Technologies, LLC*, 722 F. Supp. 2d 1250 (D. Kan. 2010) (where the parties “invoked Rule 615” the court’s order prohibited an excluded witness from obtaining trial testimony).

On the other hand, the Ninth Circuit’s citation of the Fourth Circuit case of *United States v. McMahon* is questionable. After *McMahon*, in *United States v. Rhynes*, 218 F.3d 310 (4<sup>th</sup> Cir. 2000), the en banc Fourth Circuit states that Rule 615’s “plain language relates only to ‘witnesses,’ and it serves only to exclude witnesses from the courtroom.” The holding in that case is that if the court is going to extend an order outside the courtroom, it must do so explicitly (and even then it cannot apply to counsel). So the Fourth Circuit should probably be considered as aligned with the First Circuit in the conflict about the extent of a Rule 615 order.

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 court clearly has the power to do so. The conflict is over whether a party must obtain a supplemental order (or supplemental language in a Rule 615 order) to prevent access to trial testimony --- or whether it is sufficient simply to 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, as in *Sepulveda*. And on the other hand it is also meaningful if a witness is precluded from testifying for violating a “Rule 615 order” by accessing trial testimony on the internet, and the witness 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. 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. And in fact, the order in *Rhynes* was more explicit than that provided by many courts --- it is common for courts to simply issue an order “under Rule 615” or even “under the Rule.”

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.

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 in the text of Rule 615 that an order may extend outside the courtroom, to prevent excluded witnesses from being informed about or obtaining trial testimony.<sup>4</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 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 agrees that the Rule 615 order should be extendable 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

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<sup>4</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 \* \* \*. 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.”

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 an explicit statement of the extent of an order, the court will not be able to control out-of-court disclosures of trial testimony through the threat of sanction --- leading to the danger of tailoring that the Rule is designed to prevent.<sup>5</sup>

## II. Is Counsel Exempt From Orders Precluding Disclosure of Trial Testimony to Prospective Witnesses?

As the court stated in *United States v. Rhynes*, 218 F.3d 310 (4<sup>th</sup> Cir. 2000), Rule 615 on its face does not apply to lawyers: “It is clear from the plain and unambiguous language of Rule 615 that lawyers are simply not subject to the Rule. This Rule’s plain language relates only to ‘witnesses,’ and it serves only to exclude witnesses from the courtroom.” But that does not really answer the question of whether lawyers must be exempted from an order that goes *beyond* Rule 615 to control conduct outside the courtroom.

As to that further point, the plurality in *Rhynes* states that even if a court extends an order outside the courtroom, it is *not* permitted to forbid a lawyer from preparing a witness with trial testimony.<sup>6</sup> While the *Rhynes* case involved a criminal defense lawyer, there is broad language in the opinion that extends protection to all lawyers involved in preparing witnesses.

It turns out, however, that the courts are divided on whether a court can prohibit counsel from preparing a sequestered witness with trial testimony. In fact, most courts have held that courts *can* prevent lawyers from using trial testimony to prepare sequestered witnesses.

This discussion will begin with an in-depth analysis and critique of the plurality opinion in *Rhynes*, and then it will survey the other authority on the subject.

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<sup>5</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>6</sup> The part of the *Rhynes* opinion that is pertinent to orders prohibiting counsel from disclosing trial testimony was joined by four members of a ten-member court. Three judges did not pass on the question. They found that even if the lawyer was subject to an order, the sanction of exclusion was unwarranted. Chief Judge Wilkinson and Judge Niemeyer, joined by Judge Traxler, dissented on the counsel question. So while a plurality, it was 4-3 for the holding that counsel cannot be precluded from preparing a witness with trial testimony.

## ***Rhynes's Reliance on Authority is Questionable***

*Rhynes* was a case in which a defense witness, Alexander, was subject to the ambiguous witness-focused order discussed above. Two days before Alexander was scheduled to testify, a government witness testified that Alexander was a drug dealer. Defense counsel then told Alexander about the testimony while he was preparing Alexander. Assuming the court's order reached such conduct, the question was whether a court had the power to prevent witness preparation with trial testimony. The plurality held that a lawyer's preparation of an excluded witness with trial testimony could not be prohibited.

The plurality confidently stated 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." It is instructive to analyze the authority cited by the plurality, because a close look indicates that there is not much support for the proposition that courts *may not* prevent counsel from disclosing trial testimony while preparing sequestered witnesses. The court cites four sources:

- "Sequestration requires that witnesses not discuss the case among themselves or anyone else, *other than the counsel for the parties.*" *United States v. Walker*, 613 F.2d 1349, 1354 (5th Cir.1980) (emphasis added by the plurality) (citing *Gregory v. United States*, 369 F.2d 185 (D.C.Cir.1966)).

But *Walker*, as well as *Gregory*, the case it cites, is not about lawyers preparing sequestered witnesses. The quote was just a general statement, in a case where the court found no violation of a sequestration order, and counsel was not involved --- rather it was a non-lawyer that disclosed the information. Moreover, discussing "the case" with counsel is not the same as having counsel disclose trial testimony to a sequestered witness.

- *United States v. Buchanan*, 787 F.2d 477, 485 (10th Cir.1986) ("The witnesses should be clearly directed, when [Rule 615] is invoked ... that they are not to discuss the case ... with anyone *other than counsel for either side.*") (emphasis added by the plurality).

But the plurality ignores that just below the snippet that it quotes, the *Buchanan* court provides support for a rule that *covers* counsel:

"The witnesses should be clearly directed, when the Rule is invoked, that they must all leave the courtroom (with the exceptions the Rule permits), and that they are not to discuss the case or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side. See 3 Weinstein's Evidence 615-13. *Counsel know, and are responsible to the court, not to cause any*

*indirect violation of the Rule by themselves discussing what has occurred in the courtroom with the witnesses.”*

The court in *Buchanan* is addressing itself to the issue of witnesses talking to counsel (not another witness) about what *their testimony* has been or is going to be or about what has happened in the courtroom. They can talk to counsel because *counsel knows not to disclose trial testimony of others to sequestered witnesses*. But *Rhynes* is exactly the opposite situation, in which counsel is disclosing to a prospective witness.

- 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 615.06 (Joseph M. McLaughlin, ed., 2d ed. 1998) (“[Sequestration] instructions, however, usually permit the witnesses to discuss their own or other witnesses' testimony *with counsel for either side* .”) (emphasis added).

First of all, the treatise does not say that trial courts are *prohibited* from barring counsel from discussing trial testimony with sequestered witnesses. Moreover, once again, the quote seems to be directed to witnesses talking about their own testimony with counsel --- not about counsel disclosing trial testimony.

- 2 Charles A. Wright, Federal Practice & Procedure § 415 (2d ed. 1982) (“If exclusion is ordered, the witnesses should be instructed not to discuss the case with anyone *except counsel for either side*.”) (emphasis added).

Again this quote is about discussing the case with a lawyer, it is not about the lawyer telling the witness about trial testimony. And the treatise does not say that courts may not prohibit a lawyer from discussing trial testimony with a sequestered witness.

Judge Niemeyer’s take in his dissent on the plurality’s reliance on authority seems to have a good deal of merit:

To be sure, the cases and text relied upon by the plurality acknowledge that attorneys may discuss “the case” with witnesses, but this observation does not suggest that the attorneys may, in the face of a sequestration order, relate to a prospective witness the *testimony* that a prior witness has given.

### ***There is Significant Contrary Authority***

There are not many reported cases on subjecting counsel to orders prohibiting disclosure of trial testimony to sequestered witnesses. But the weight of the case law is that trial courts, in their discretion, can prevent lawyers from preparing sequestered witnesses with trial testimony.

Here are the cases:

- ***United States v. Binetti***, 547 F.2d 265 (5<sup>th</sup> Cir. 1977): The court upheld an instruction on credibility against defense witnesses as a sanction, after the defense lawyer had lunch with defense witnesses and discussed the trial. The court held that defense counsel was prohibited from discussing trial testimony with excluded witnesses even though the trial court's order did not mention counsel. The court states as follows:

The witnesses had been advised not to discuss the case with one another during the course of the trial. Yet the defense attorney, the defendant and two witnesses discussed the trial at lunch. The defendant contends that the trial judge's instructions in invoking the rule were unclear, and did not put the defense on notice that it was prohibited to converse outside of the courtroom with the witnesses who had not yet testified. He claims the rule on its face applies only to exclusion of witnesses from the courtroom, and that he was not given the parameters of any expansion of that scope.

The instruction given by the court upon invocation of the rule was sufficient. His remedial action of comment to the jury was within the discretionary power of the court.

- ***United States v. Robertson***, 895 F.3d 1206, 1214 (9<sup>th</sup> Cir. 2018): Prosecutors provided transcripts of witness testimony to prospective witnesses. The court upheld a finding that this was a violation of Rule 615.

- ***Jerry Parks Equip. Co. v. Southeast Equip. Co., Inc.***, 817 F.2d 340, 342-43 (5<sup>th</sup> Cir.1987): Southeast invoked the sequestration rule, Fed.R.Evid. 615, and all nonparty witnesses were excluded from the courtroom. William Dann, a witness called by Southeast, testified on direct examination and when cross-examined he admitted that he had briefly discussed trial testimony with Southeast lawyers in preparation for his testimony. The trial judge struck the testimony and the court of appeals affirmed:

The lunch table conversation by the president of Southeast, its counsel, and Dann violated the sequestration rule, which Southeast itself had invoked. Southeast challenges the court's decision to strike Dann's testimony as a sanction for the infraction. The trial court could have imposed lesser sanctions; indeed, lesser sanctions would appear more in order. But we are not prepared to say that in striking the testimony the trial court so clearly abused its discretion in selecting the remedy for violation of Rule 615 as to warrant reversal.

- ***Paradigm Alliance, Inc. v. Celeritas Technologies, LLC***, 722 F. Supp. 2d 1250, 1273 (D. Kan. 2010): During the lunch recess, defendant’s counsel prepared a defense witness for trial after the plaintiff’s witness testified. During this preparation, defense counsel referred to an answer given by the plaintiff’s witness during trial. The plaintiff argued this was a violation of Rule 615. As a response, the court struck a limited portion of the defense witness’s testimony. The court declared as follows:

It was clear from the manner in which Evans answered questions that his testimony was influenced by this pre-testimony preparation. To permit this specific type of pre-testimony preparation to influence a witnesses’ testimony based on information obtained through the in-court testimony of another witness would ultimately serve to largely nullify the purpose for which Rule 615 exists.

- ***Weeks Dredging & Contracting, Inc. v. United States***, 11 Cl. Ct. 37 (1986): There was a continuous dialog between counsel and sequestered witnesses about trial developments. The court found a violation of its Rule 615 order and disqualified the witnesses. Defense counsel argued that it had a right to prepare witnesses. But the court stated that there was “no prohibition that will preclude either counsel from conferring with his witnesses. The prohibition is divulging to such witnesses who have not testified the testimony of any witness who has previously testified.”

- ***Reeves v. Int’l Telephone and Telegraph Corp.***, 616 F.2d 1342, 1354 (5th Cir. 1980), rev’d on other grounds by *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133–34 (1988): “Counsel for IT&T met for three hours with at least eleven prospective witnesses and discussed the case in preparation for testimony \* \* \* . The meeting and discussion constituted a direct and flagrant violation of a previously entered sequestration and separation order. \* \* \* In light of the willful nature of the violation on the part of the witnesses and counsel, we do not overturn the district court's order prohibiting any testimony from the violating witnesses.”

- ***Zeigler v. Fisher-Price, Inc.***, 302 F. Supp. 2d 999, 1018 (N.D. Iowa 2004) The court excluded a witness’s testimony after attorneys violated a sequestration order when they “woodshedded” their witness, providing him testimony that was presented the day before the witness testified: “They used information they learned from testimony given by a witness called by the plaintiff during an offer of proof at trial to help their expert witness reshape his testimony to best address, in advance, a serious problem the witness otherwise would have had to face on cross-examination.”

There is only one reported case that I could find on the *Rhynes* plurality’s side of the issue:

- *Minebea Co., Ltd. v. Papsti*, 374 F.Supp.2d 231, 237 (D.D.C. 2005): The court held that a lawyer could not be precluded from using courtroom testimony to prepare witnesses, though the court did caution that “if any lawyer in this case inappropriately ‘coaches’ a witness or helps a witness ‘tailor’ his testimony or fabricate or dissemble, there will be consequences.” But the court declared that in the absence of any such improper influence, “courts must trust and rely on lawyers’ abilities to discharge their ethical obligations, including their duty of candor to the court.”

Finally, it should be noted that Maryland Rule 615 specifically prohibits lawyers from disclosing trial information to sequestered witnesses. **Maryland Rule 615(d) provides:**

(d) Nondisclosure.

(1) A party or an attorney may not disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.

(2) The court may, and upon request of a party shall, order the witness and any other persons present in the courtroom not to disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.<sup>7</sup>

### ***Policy Arguments on Whether Counsel Should Be Prohibited From Using Trial Testimony to Prepare Sequestered Witnesses***

What are the policy arguments for exempting trial counsel from a bar on disclosing trial testimony to sequestered witnesses? And what are the contrary arguments? The basic arguments on one side or the other were pretty well vetted by the plurality and dissenting opinions in *Rhynes*.

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<sup>7</sup> See also *Jones v. State*, 520 S.E.2d 454, 456 (Ga. 1999) (“The rule does not prohibit discussions between an attorney to the case and a prospective witness, at least so long as the attorney talks to him separately from the other witnesses and does not inform him of previous testimony.”).

The plurality's argument was grounded in the right to effective assistance of counsel --- part of effectiveness is preparing witnesses, and an order prohibiting disclosure of trial testimony would hamper preparation. Here is how the plurality put it:

Thorough preparation demands that an attorney interview and prepare witnesses before they testify. No competent lawyer would call a witness without appropriate and thorough pre-trial interviews and discussion. In fact, more than one lawyer has been punished, found ineffective, or even disbarred for incompetent representation that included failure to prepare or interview witnesses. (citations omitted)

In this context, Mr. Scofield's actions were necessary in the exercise of his duties, both constitutional and ethical, as a lawyer. \* \* \* Faced with an allegation that his prime supporting witness, Alexander, had been assisting, or participating in, a drug conspiracy with Rhynes, Mr. Scofield had ethical (and possibly constitutional) duties to investigate these allegations with Alexander before he put Alexander on the stand. Mr. Scofield was thus compelled to ascertain, if possible: (1) whether Davis's allegations were untrue (or, if true, whether Alexander intended to invoke his Fifth Amendment rights); (2) whether Alexander's denials were credible; and (3) why Davis would make potentially false allegations against Alexander. Put simply, Mr. Scofield needed to fully assess his decision to call Alexander as a witness, and, to fulfill his obligations to his client, Scofield was compelled to discuss Davis's testimony with Alexander.

The *Rhynes* plurality next addressed the government's argument that allowing the disclosure of trial testimony could lead to a counsel improperly coaching a witness:

The Government asserts that Mr. Scofield's actions undermined the truthfulness of Alexander's testimony, which, in the Government's view, is surely an act that runs afoul of the sequestration order. On the contrary, lawyers \* \* \* are officers of the court, and, as such, they owe the court a duty of candor, Model Rules of Professional Conduct Rule 3.3 (1995) ("Model Rules"). Of paramount importance here, that duty both forbids an attorney from knowingly presenting perjured testimony and permits the attorney to refuse to offer evidence he or she reasonably believes is false. *Id.* Rule 3.3(a)(4), (c). Similarly, an attorney may not "counsel or assist a witness to testify falsely." *Id.* Rule 3.4(b). And, if an attorney believes that a non-client witness is lying on the witness stand about a material issue, he is obliged to "promptly reveal the fraud to the court." *Id.* Rule 3.3, cmt. 4

\* \* \*

Further, sequestration is not the only technique utilized to ensure the pursuit of truth at trial. Indeed, if an attorney has inappropriately "coached" a witness, thorough cross-examination of that witness violates no privilege and is entirely appropriate and sufficient to address the issue.

Judge Niemeyer, in dissent, basically argued that imposing a “counsel” exception to a prohibition on providing testimony to sequestered witnesses would essentially gut the rule:

[I]f Rule 615 precludes a person from acting as an intermediary to relate to one witness the testimony of another, how can we exempt an attorney from the proscription? Just as a discussion among witnesses outside the courtroom would frustrate the rule that one witness cannot hear the testimony of another, a discussion between a witness and an attorney about another witness' testimony frustrates the rule.

\* \* \*

The lofty purpose of Rule 615 deserves greater deference than it would be given if it were allowed to be engulfed by an attorney exception for trial preparation. And the rule is forfeited altogether by arguing that even though the truth-seeking purpose of Rule 615 might be debased by an attorney exception, cross-examination will fill the gap.

With regard to witness preparation, Judge Niemeyer argued that an attorney could effectively prepare a witness without directly referring to trial testimony. To take the example from *Rhynes* itself, Niemeyer noted that even the defense counsel admitted that he could have prepared the witness without referring to the trial testimony. The goal was to ask the witness whether he was a drug dealer. All he had to do was ask that question. He didn't have to say, “a witness yesterday testified that you were a drug dealer, now what do you have to say for yourself?”

The plurality, in response to Judge Niemeyer's argument, stated that it was too fine a distinction to say that it would be okay to ask “You sold drugs to Davis in August 1997, isn't that true?” but not to ask “Davis testified that you sold drugs to Davis in August 1997. Is that testimony true?” The plurality stated that Judge Niemeyer's distinction “fails because it is simply-and unnecessarily-splitting hairs.”<sup>8</sup>

## ***Analysis***

It seems to be a strong argument that a “witness preparation” exception to Rule 615 could be an exception that swallows the rule. In one of the reported cases above, a prospective witness spent several days in a war room, and trial testimony was discussed virtually in real time with counsel. It seems hard to dispute that this should be considered a violation of an order prohibiting disclosure of trial testimony to prospective witnesses. Of course it is true that the action of defense counsel in *Rhynes* was significantly milder. But finding it a violation would not necessarily, or even likely, result in exclusion of the witness. Indeed, the other holding in *Rhynes* is that even if there was a violation of a sequestration order, the trial judge abused discretion in excluding the witness, as the punishment did not fit the crime.

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<sup>8</sup> One judge in the plurality oddly wrote a separate opinion saying that he “may not agree” with the plurality's rejection of Judge Niemeyer's distinction. I have no idea what that means.

Is it really splitting hairs to allow counsel to say “are you a drug dealer” but not to allow counsel to say “a witness testified that you are a drug dealer, is that true”? The danger regulated by sequestration is the tailoring that occurs from *listening to what others have said at trial*. A direct question from a lawyer about a fact does not raise the risk of tailoring from witness testimony. Of course it is true that direct questions from a lawyer could, in some cases, constitute impermissible coaching, but that is a separate wrong. Simply put, if the witness is not hearing what was said at trial, there is no risk of tailoring that is regulated by Rule 615. To the extent this is splitting hairs, then it can be said that splitting hairs is what lawyers do, especially under the Evidence Rules.

Of course it is possible that a wily witness would figure out from a lawyer’s question that the lawyer must have got the information from trial testimony. But surely figuring out whether such circumstances are a violation of an order should be left to the discretion of the court. The fact that a lawyer might take advantage of a “just the facts” exception does not mean that there should be a broader exception that allows a lawyer to directly and without limitation disclose trial testimony to a prospective witness.

Finally, it should be emphasized that there is no law that says trial judges, in entering a Rule 615 order, are *required* to apply it against counsel. The only question is whether trial courts should have the discretion to do so. Given the long-recognized importance of preventing tailoring of testimony, it seems logical to allow the court to have the discretion to prevent possible tailoring through counsel. That is to say, it appears that the weight of authority has it right --- a court has discretion to prohibit trial counsel from disclosing trial testimony to a sequestered witness.

### ***Must the Counsel Question Be Addressed in an Amendment to Rule 615?***

While it is true that the counsel question raises a conflict in the courts, it is not so obvious that it needs to be addressed in an amendment to Rule 615. Even if an order *can* be applied against counsel, such an order raises complex questions of professional responsibility; and in criminal cases it raises thorny questions about the right to effective assistance of counsel. Such questions are arguably beyond the ken of evidence rulemaking. It can be argued that these sensitive issues are best dealt with on a case-by-case basis, without having an evidence rule seeking to control or influence their resolution. Moreover, the “hair-splitting” referred to above --- allowing preparation with a fact or allegation but without attributing it to trial testimony --- could be hard to impart in rule text.

It is important to remember that the counsel question has arisen infrequently, at least in the reported cases. As seen in this memo, there are only a handful of cases discussing the question. Thus it could be looked at as a niche problem which is removed from the basic reason for amending Rule 615 --- to remedy a conflict about the extent of a Rule 615 order, which is a question that can arise every day. Accordingly, one of the drafting models below does not discuss the applicability of Rule 615 to counsel --- thus maintaining consistency with the original rule. That drafting model has the merit of not biting off more than it can chew.

### III. Drafting Alternatives

At the last meeting, the Committee rejected a draft that automatically extended Rule 615 protection outside the courtroom. Instead it opted for a provision that gives notice of the court's discretion to extend protections outside the courtroom. The three alternatives below contain discretionary provisions. They differ only in treatment of counsel.

#### *A. Including Counsel*

##### **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 about other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

~~(a)~~ **(1)** a party who is a natural person;

~~(b)~~ **(2)** 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)~~ **(3)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or

~~(d)~~ **(4)** a person authorized by statute to be present.

**(b) Additional Orders.** The court may issue further orders to prevent excluded witnesses from learning about, obtaining or being provided trial testimony. The orders may also prohibit counsel from disclosing trial testimony to excluded witnesses.

#### *Draft Committee Note*

Rule 615 has been amended to clarify that the court in entering a sequestration order may also prohibit excluded witnesses from learning about, 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 exposure to trial testimony 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 excluded witnesses from obtaining, learning about, or being provided 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 anyone subject to the order to *disclose* trial testimony to an excluded witness, but will also prohibit an excluded witness from *obtaining* trial testimony, such as through the internet.

The rule permits, but does not require, the court to bar counsel from disclosing trial testimony to an excluded witness. While counsel has an obligation to prepare witnesses, most courts have found that a witness can be effectively prepared without directly disclosing trial testimony. And a court may find that exempting counsel from a Rule 615 order could undermine the order’s effectiveness in protecting against the tailoring of testimony.

## *B. Exempting Counsel*

### **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 about other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- ~~(a)~~ **(1)** a party who is a natural person;
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- ~~(c)~~ **(3)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- ~~(d)~~ **(4)** a person authorized by statute to be present.

**(b) Additional Orders.** The court may issue further orders to prevent excluded witnesses from learning about, obtaining or being provided trial testimony. The orders may not, however, prohibit counsel from disclosing trial testimony to an excluded witness when necessary to prepare the witness to testify.

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The amendment contemplates an order that will not only prohibit anyone subject to the order to *disclose* trial testimony to an excluded witness, but also prohibit an excluded witness from *obtaining* trial testimony, such as through the internet.

The rule does not allow the court to prohibit counsel from disclosing trial testimony to a sequestered witness when disclosure is necessary to prepare the witness to testify. Thorough preparation demands that an attorney interview and prepare witnesses before they testify, and may require disclosure of trial testimony. Of course an attorney may not, under the guise of witness preparation, improperly disclose trial testimony in violation of an order.

### *C. Not Addressing the Counsel Question*

#### **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 about other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

~~(a)~~ **(1)** a party who is a natural person;

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The amendment contemplates an order that will not only prohibit anyone subject to the order to *disclose* trial testimony to an excluded witness, but also prohibit an excluded witness from *obtaining* trial testimony, such as through the internet.

[The rule does not address the question whether the court can or should prohibit counsel from disclosing trial testimony to a sequestered witness. An order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions of professional responsibility and effective assistance of counsel, and is best addressed by the court on a case-by-case basis.]

**Reporter's comment:** Obviously the bracketed paragraph is designed to explain why the counsel question is not addressed in the amendment. The Committee may or may not believe that it is better to leave the whole question of counsel alone, and so not include it. That's why it is in brackets.

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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, 2019

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).

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<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>

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<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 retirement of Justice Kennedy, and the uncertainty over the views of Justices Gorsuch and Kavanaugh. (Though, in a dissent from denial of certiorari, Justice Gorsuch appeared to side with Justice Kagan’s views in *Williams*).

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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* --- 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 (2d 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.”).

**Admission of codefendant’s incriminating statement, made in an informal conversation with a friend, did not violate *Bruton*: *United States v. Hano*, 922 F.3d 1272 (11<sup>th</sup> Cir. 1999):** The court stated that “the same principles that govern whether the admission of testimony violated the Confrontation Clause control whether the admission of the statements of a nontestifying codefendant against a defendant at a joint trial violate *Bruton*.” In this case there was no *Bruton* violation because the codefendant’s incriminating statement was made as part of a “friendly and informal” exchange with a friend.

## 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); *United States v. Ayelotan*, 917 F.3d 394 (5<sup>th</sup> Cir. 2019). *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.”); *United States v. Yurek*, 925 F.3d 423 (10<sup>th</sup> Cir. 2019) (coconspirator hearsay is not testimonial).

**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. *See also, United States v. Hano*, 922 F.3d 1272 (11<sup>th</sup> Cir. 1999) (Incriminating statement was made as part of a “friendly and informal” exchange with a friend; the statement was nontestimonial, and was properly admitted as a declaration against interest).

## 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.” *Compare United States v. Smith*, 919 F.3d 825 (4<sup>th</sup> Cir. 2019) (expert translating coded conversation was

not acting as a conduit; he was “not simply replaying the conspirators’ interpretations” but rather relying on his own expertise, and “exercised his judgment independent of any later debriefings”).

**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 NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

**No confrontation violation where expert who testified did so on the basis of his own retesting:** *United States v. Ortega*, 750 F.3d 1020 (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 Ponzo been at the 1988 trial, he could have cross-examined Hildonen. But like a defendant who obtains a witness’s absence by killing him, by fleeing and remaining on the lam for years, Ponzo effectively schemed to silence Hildonen’s testimony against him. And Hildonen’s subsequent unavailability signifies the success of that scheming. So Ponzo forfeited his confrontation rights. To hold otherwise would allow Ponzo to profit from his own wrong and would undermine the integrity of the criminal-trial system --- which we cannot allow.”

**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 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." **Accord** *United States v. Jones*, 930 F.3d 366 ((5<sup>th</sup> Cir. 2019) ("Agent Clayborne testified that he *knew* that Jones had received a large amount of methamphetamine because of what the confidential informant told him he had heard from others. The jury was not required to make any logical inferences, clear or otherwise, to link the informant's statement to Jones's guilt"; moreover, the informant's statement was not properly offered to

explain the police investigation, because the statement exceeded that permissible purpose by specifically linking the defendant to the crime--- therefore the Agent's testimony rendered testimonial hearsay in violation of the Confrontation Clause.

**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.

*Accord United States v. Benamor*, 925 F.3d 1159 (9<sup>th</sup> Cir. 2019): In a felon-firearm prosecution, the trial judge declared that an officer's conversation with the defendant's landlord (in which the landlord said that the defendant had a shotgun in his car) could not be admitted because the landlord's accusations were testimonial. The government called the officer who was asked only whether the conversation "affected your decision to investigate" and "confirmed your decision to arrest" the defendant. The officer answered yes to both questions. The court of appeals held that this testimony violated the defendant's right to confrontation. It noted that in context, the answers "implied that the landlord confirmed that Defendant possessed the shotgun" and that the government "made that implication unmistakable during closing argument by again emphasizing the landlord's statement." The court stated that it would be an unreasonable application of *Crawford* "to allow police officers to testify to the substance of an unavailable witness's testimonial statements so long as they do so descriptively rather than verbatim or in detail." The court also noted that a brief description may actually be worse for the defendant than a verbatim description of the testimonial hearsay: "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."

## **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.

**Statements by victims to an officer about why they were refusing to testify were not testimonial:** *United States v. Cooper*, 926 F.3d 718 (11<sup>th</sup> Cir. 2019): The defendant was charged with fraud and sex trafficking, resulting from a scheme in which he brought foreign exchange

students to the U.S. but then hired them out for sex. By the time of trial, two of the victims were back in their country and were refusing to cooperate. An officer testified that he had contacted them and that they were refusing to cooperate because they feared humiliation, embarrassment, and further stress. The defendant argued that this testimony violated the Confrontation Clause because the victims' statements to the officer were testimonial. But the court disagreed. It stated that because the agent had questioned the victims "to understand why they refused to testify, not to investigate or establish any fact that was part of an element of the charged offenses or necessary to prove Cooper's guilt, their statements were not testimonial and did not implicate the Confrontation Clause."

**Statements by customers to police officer about their motivation to obtain sex were testimonial: *United States v. Cooper*, 926 F.3d 718 (11<sup>th</sup> Cir. 2019):** The defendant was charged with fraud and sex trafficking, resulting from a scheme in which he brought foreign exchange students to the U.S. but then hired them out for sex. At trial the government offered visitor logs for apartments leased by the defendant. The defendant argued that the logbooks did not show that the visitor were seeking sex when they visited. In response, the government called an officer who testified that he interviewed the men who registered on the log and they told him that they had visited the apartment to obtain sexual services. The court held that the officer's testimony violated the Confrontation Clause because the reports of the visitors about their motivation were testimonial. The court stated: "Statements to police officers are generally testimonial if the primary purpose is investigative. Agent Nguyen questioned the visitors during his investigation to gain facts probative of Cooper's guilt. Their statements were testimonial." The court found the error to be harmless.

## 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.**

**Airline official’s denial to board a plane after defendant resists law enforcement officials was not testimonial: *United States v. Buluc*, 930 F.3d 383 (5<sup>th</sup> Cir. 2019):** The defendant was convicted for taking action to prevent or hamper his removal from the United States. ICE officials brought him to a plane, and, due to his physical resistance, a Turkish Airlines official (Ozel) refused to let him board. The defendant argued that testimony of the ICE agents about Ozel’s refusal violated his right to confrontation. But the court found that Ozel’s statement was not testimonial even though law enforcement was involved: “Ozel’s statement was made, not in response to police questioning, but instead during the heated encounter caused by Buluc’s violent

resistance to being boarded. Under these circumstances, we do not find the primary purpose of the statement was to create evidence to incriminate Buluc at trial.”

**Note: Ozel’s statement did not violation the Confrontation Clause for an independent reason: it wasn’t hearsay. “I refuse to let you on the plane” is not hearsay because it is not an assertion of fact that is either true or false.**

**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. Plier*, 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 *Bochtling*) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts*. Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

## Non-Verbal Information

**Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation:** *United States v. Wallace*, 753 F.3d 671 (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.” *See also United States v. Jones*, 924 F.3d 219 (5<sup>th</sup> Cir. 2019) (rejecting the government’s argument that an informant’s accusation was properly admitted to explain why a police officer followed the defendant as opposed to another person: “A witness’s statement to police that the defendant is guilty of the crime charged is highly likely to influence the direction of a criminal investigation. But a police officer cannot repeat such out-of-court accusations at trial, even if helpful to explain why the defendant became a suspect.”).

**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.”

**Admitting statements to police officer for purposes of “background” did not violate the Confrontation Clause:** *United States v. Audette*, 923 F.3d 1227 (9<sup>th</sup> Cir. 2019): The defendant defrauded people into giving him money by stating that he was on the run from the Mafia and if he didn’t get the money, his wife and stepdaughter would be killed. The defendant claimed that he was ordered to make such statements by various CIA and FBI agents. At trial the government offered testimony by an FBI agent who took part in the investigation, to statements made to him by the wife and stepdaughter that contradicted the defendant’s account. The court found no violation of the Confrontation Clause. It recognized that the statements were testimonial because made to an investigating officer in the course of an interrogation. But the statements were not offered to prove that the defendant was responsible for the fraud. Rather, “the government offered Agent Hill’s testimony to explain why they focused on Audette --- rather than the various CIA and FBI agents who allegedly ordered Audette to borrow money from the victims --- as a suspect.”

**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.

**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: Many 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), *United States v. Ayelotan*, 917 F.3d 394 (5<sup>th</sup> Cir. 2019), 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.”

**Certificate of non-existence of a record, while testimonial, did not violate the Confrontation Clause because the person who authored and signed the certificate testified:** *United States v. Arellano-Banuelos*, 927 F.3d 355 (5<sup>th</sup> Cir. 2019): In an illegal reentry prosecution, the government offered a certificate of the non-existence of a record permitting reentry. The defendant argued that the certificate was testimonial, and the court conceded that it had found such a certificate testimonial after *Melendez-Diaz*, in *United States v. Martinez-Rios*, 595 F.3d 581 (5<sup>th</sup> Cir. 2010), because the affidavit was prepared solely to prove a fact in a criminal prosecution. But the court held that the Confrontation Clause was not violated in this case because the person who authored and signed the certificate was presented at trial, and testified to the search process. The defendant did not cross-examine the witness, but the witness was available for cross-examination, which is all that the Constitution requires. The defendant argued that the Confrontation Clause was nonetheless violated because the witness did not personally check all the systems that led to the certification --- a staff member ran the initial checks and created the printout. But the court found that this did not matter, finding no authority “for the proposition that every individual involved in the preparation of a document such as a CNR must testify at trial.” It was enough that the defendant “had an opportunity to cross-examine the person who prepared and signed the CNR.”

**Certifications by Google and Yahoo of email traffic were not testimonial:** *United States v. Ayelotan*, 917 F.3d 394 (5<sup>th</sup> Cir. 2019): In a fraud scheme involving emails, the trial court admitted the emails, including transmittal data, that were accompanied by certificates from Google

and Yahoo. The certificate authenticated the business records of the providers, stating that these providers recorded the transmittal data as part of the regular practice of a regularly conducted business activity. The court found that the transmittal certificates were not testimonial, because the providers “didn’t create the records to prove a particular fact at a particular trial --- let alone this trial.”

**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).

**Certificate of non-existence of a record, while testimonial, did not violate the Confrontation Clause because the person who authored and signed the certificate testified and could have been cross-examined:** *United States v. Arellano-Banuelos*, 927 F.3d 355 (5<sup>th</sup> Cir. 2019): In an illegal reentry prosecution, the government offered a certificate of the non-existence of a record permitting reentry. The defendant argued that the certificate was testimonial, and the court conceded that it had found such a certificate testimonial after *Melendez-Diaz*, in *United States v. Martinez-Rios*, 595 F.3d 581 (5<sup>th</sup> Cir. 2010), because the affidavit was prepared solely to prove a fact in a criminal prosecution. But the court held that the Confrontation Clause was not violated in this case because the person who authored and signed the certificate was presented at trial, and testified to the search process. The defendant did not cross-examine the witness, but the witness was available for cross-examination, which is all that the Constitution requires.

***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”).