Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

June 9, 2020

Re: Amending Federal Rule of Evidence 702 - A Review of Gatekeeping Practices in Multidistrict Litigation

Dear Ms. Womeldorf:

The Advisory Committee on Evidence Rules is considering an amendment to Federal Rule of Evidence 702 and a Committee Note to clarify that problems with the basis of an expert's opinion or the application of an expert's methodology are threshold issues of admissibility.[1] This letter addresses confusion among some federal courts as to the proper application of Rule 702 in the context of high-stakes Multidistrict Litigation cases ("MDLs"). As attorneys who frequently deal with Rule 702-related issues in mass tort MDLs, we believe this perspective may be helpful to the Advisory Committee.

Our review of twenty-seven recent decisions from MDLs in the pharmaceutical, medical device, and chemical exposure fields demonstrates the need for Advisory Committee action on Rule 702. Courts in these cases frequently dismiss problems with an expert's factual basis or applied methodology as relating to the weight of the evidence rather than its admissibility. Further, differences in the application of Rule 702 have split MDL courts on substantive legal questions. To prevent clogging the federal system with meritless claims based on unreliable opinion testimony and undermining

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[1] *See* Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) – Weight and Admissibility Questions*, at 1 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 19, 2018, meeting) at 171); *see also* David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 30, 33 (2015).

the goal of uniformity that justifies use of the MDL process, we urge the Advisory Committee to draft an amendment to Rule 702 and a Committee Note expressly stating that an expert's factual basis and application of methodology are matters of admissibility, rather than weight.

I. THE MDL PERSPECTIVE ON RULE 702.

We elected to focus on MDLs for several reasons. The first is the sheer impact of MDL decisions. Rulings in MDLs affect hundreds, and sometimes thousands, of individual cases. As of the end of Fiscal Year 2019, more than 130,000 individual actions were pending in MDL matters.[2] Excluding prisoner and social security cases, MDLs make up a majority of the pending civil docket in federal courts.[3] MDLs are a pervasive means of litigation in federal court.

Given the number of individual cases, the monetary stakes of MDL rulings can be staggering. In large MDLs, total recoveries can measure in the billions of dollars.[4] Defendants threatened with potential MDL liability risk adverse publicity and reputational harm, fear among consumers, and reticence from physicians worried about their own liability. These concerns can lead to the unavailability of products that may

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[2] *See* United States Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2019*, at 5 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf.

[3] Bloch Judicial Institute, Duke Law School, *Guidelines and Best Practices for Large and Mass-Tort MDLs*, at vi (2d ed. Sept. 2018).

[4] *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 n.1 (2015).

be important to public health.[5] Other MDL defendants face bankruptcy.[6] Nearly all experience tremendous pressure to settle: "An MDL judge holds the power, with a single decision, to dramatically recast the risk of liability in tens, hundreds, or even thousands of cases at a time," leaving "the painful choice of bearing the risk and expense of trial or succumbing to the pressures to settle."[7] These institutional incentives are amplified by the absence of a practical method for appellate review of district court decisions.[8]

Because of the importance of MDL decisions, Rule 702 issues are more likely to be comprehensively and capably presented and argued by both sides. Similarly, courts are more likely to focus on these matters and provide thorough analyses. If courts are failing to properly apply Rule 702 in MDLs, they are likely failing to do so elsewhere. In this regard, MDL decisions can have a domino effect. Because of their importance, MDL decisions on Rule 702 are frequently cited in both MDL and non-MDL cases

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[5] *See* Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 319, 348, 364 (1992) (noting that the drug Bendectin was pulled from the market following the assertion of MDL claims despite an eventual "scientific consensus that if Bendectin has any teratogenic effects they are virtually undetectable").
[6] *See* Michael Higgins, Mass Tort Makeover? ABA J. Nov. 1998, at 52, 54.
[7] Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1670 (2011) (internal quotation marks omitted); *see In re Gen. Motors LLC Ignition Switch Litig.*, 2019 WL 6827277, at *14 (S.D.N.Y. Dec. 12, 2019) (noting that "the vast majority of MDL cases are, in fact, resolved by settlement . . . due, at least in part, to the sheer magnitude of the risk, in terms of dollar value, of trials").
[8] *See* U.S. Chamber, Institute for Legal Reform, *MDL Imbalance: Why Defendants Need Timely Access to Interlocutory Review* 1 (April 2019) ("Defendants faced with unfavorable dispositive motion rulings that they know will not be addressed by an appellate court for years often feel pressured to settle the hundreds or thousands of claims in an MDL proceeding, rather than incur massive additional litigation expenses and roll the dice on costly trials.").

across jurisdictions.[9] Accordingly, an incorrect application of Rule 702 is more likely to be propagated through MDL decisions.

For many of the same reasons, we concentrated on the portions of MDL decisions that consider the reliability of "general causation" opinions in drug, medical device, and chemical exposure tort cases.[10] General causation decisions typically affect more cases and have more overall impact than specific causation decisions. Experts providing such testimony often rely on similar methodologies, analyses of the Bradford Hill or other causal criteria,[11] in formulating their opinions. Accordingly, the general causation analysis—as its name suggests—is more generalizable between cases of this sort, providing fertile ground for comparison among MDL courts.

We considered twenty-seven most recent decisions from seventeen MDLs to assess how courts in those cases are applying Rule 702. They meet the following criteria: (1) MDL mass tort cases; (2) from the last eight years;[12] (3) concerning

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[9] For example, *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164 (S.D.N.Y. 2009), has been cited in 173 subsequent cases, including district court decisions in every regional circuit.

[10] The general causation question is whether a product is capable of causing a medical problem, as opposed to the specific causation question of whether a product caused the problem in a particular plaintiff. *See, e.g., Goebel v. Denver & Rio Grande W.R.R. Co.*, 346 F.3d 987, 990 (10th Cir. 2003).

[11] These nine criteria for assessing whether a causal relationship exists were first described in a famed epidemiological lecture. *See* Austin Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROCEEDINGS OF THE ROYAL SOCIETY OF MEDICINE 205 (1965).

[12] We did not include cases that reconsider or review rulings that were initially made more than eight years ago. *See, e.g., In re Denture Cream Prods. Liab. Litig.*, 2015 WL 392021 (S.D. Fla. Jan. 28, 2015), *aff'd, Jones v. SmithKline Beecham*, 652 F. App'x 848 (11th Cir. 2016) (conducting updated analysis of general causation testimony following *In re Denture Cream Prods. Liab. Litig.*, 795 F. Supp. 2d 1345 (S.D. Fla. 2011)). Similarly. we did not separately analyze cases that merely adopt prior reasoning. *See, e.g., In re Actos*

pharmaceuticals, medical devices, or chemical exposure; and (4) regarding the admissibility of general causation expert opinion testimony.[13]

(Pioglitazone) Prods. Liab. Litig., 2014 WL 108923, at *6 (W.D. La. Jan. 8, 2014) ("[T]his Court adopts and incorporates rulings as to general causation found in [two prior decisions] to address Defendants' 'core arguments' as to general causation.").

[13] The decisions we have considered are: *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, 299 F. Supp. 3d 1291 (N.D. Fla. 2018); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2013 WL 6796461 (W.D. La. Dec. 19, 2013); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2014 WL 60324 (W.D. La. Jan. 7, 2014); *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 2017 WL 6397721 (D. Minn. Dec. 13, 2017); *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 2019 WL 4394812 (D. Minn. July 31, 2019); *In re Celexa & Lexapro Prods. Liab. Litig.*, 927 F. Supp. 2d 758 (E.D. Mo. 2013); *In re Chantix (Varenicline) Prods. Liab. Litig.*, 889 F. Supp. 2d 1272 (N.D. Ala. 2012); *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, 2013 WL 1558690 (D.N.J. Apr. 10, 2013); *In re Johnson & Johnson Talcum Powder Prods. Marketing, Sales Practices & Prods. Litig.*, No. 3:16-MD-2738(FLW) (D.N.J. Apr. 27, 2020); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig.*, 145 F. Supp. 3d 573 (D.S.C. 2015); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig.*, 174 F. Supp. 3d 911 (D.S.C. 2016); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig.*, 892 F.3d 624 (4th Cir. 2018); *In re Mirena IUD Prods. Liab. Litig.*, 169 F. Supp. 3d 396 (S.D.N.Y. 2016); *In re Mirena IUD Prods. Liab. Litig.*, 713 F. App'x 11 (2d Cir. 2017); *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II)*, 341 F. Supp. 3d 213 (S.D.N.Y. 2018); *In re Nexium (Esomeprazole) Prods. Liab. Litig.*, 2014 WL 5313871 (C.D. Cal. Sept. 30, 2014); *In re Nexium (Esomeprazole) Prods. Liab. Litig.*, 662 F. App'x 528 (9th Cir. 2016); *In re Prempro Prods. Liab. Litig.*, 2012 WL 13033298 (E.D. Ark. Apr. 11, 2012); *In re Prempro Prods. Liab. Litig.*, 2012 WL 13033302 (E.D. Ark. Apr. 19, 2012); *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102 (N.D. Cal. 2018); *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 2019 WL 3997122 (E.D. La. Aug. 23, 2019); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 2017 WL 1833173 (N.D. Ill. May 8, 2017); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 2018 WL 4030585 (N.D. Ill. Aug. 23, 2018); *In re Viagra (Sildenafil Citrate) & Cialis (Tadlafil) Prods. Liab. Litig.*, 424 F. Supp. 3d 781 (N.D. Cal. Jan. 13. 2020); *In re Zoloft*

II. MDL DECISIONS FREQUENTLY HOLD THAT RELIABILITY ISSUES RELATE TO WEIGHT RATHER THAN ADMISSIBILITY.

Our review of these important MDL decisions revealed some troubling trends. Many courts mischaracterize the Rule 702 standard, indicating insufficient guidance from the Rule and uncertainty about the Rule's meaning. Even in cases that correctly state the standard, some courts fail to apply it as intended. Although many MDL decisions properly considered whether a proffered expert had a sufficient factual basis for his or her opinion and whether the expert reliably applied his or her methodology, we also found numerous instances in which courts failed to conduct these inquiries.

A. Overview and Background.

Judges are not scientists. Faced with competing accounts of confidence intervals, p-values, or confounding variables, judges may be all too tempted to simply throw up their hands and send the matter to a jury. Indeed, there is no shortage of cases repeating the refrain that any underlying problems with a proposed expert's testimony are fodder for cross-examination at trial and can be weighed by the trier of fact. This impulse to shift responsibility is understandable, but misguided. If federal judges have trouble sorting good science from bad, why would lay juries fare better? As Justice Breyer has written, "neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the 'gatekeeper' duties that the Federal Rules of Evidence impose."[14]

One core purpose of the Federal Rules of Evidence is to provide clear guidance to federal judges. The drafters of the 2000 amendment to Rule 702 explained that the proponent of expert testimony "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence" under Rule

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(Sertraline Hydrochloride) Prods. Liab. Litig., 2015 WL 7776911 (E.D. Pa. Dec. 2, 2015); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 26 F. Supp. 3d 449 (E.D. Pa. 2014); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787 (3d Cir. 2017).

[14] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 148 (1997) (Breyer, J., concurring).

104(a).[15] They believed "[t]he amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702."[16] And they noted that "[t]he amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case."[17]

Despite this ostensible clarity, several Circuits have held that courts cannot review the factual basis of an expert's testimony.[18] Others have concluded that the misapplication of an expert's methodology is an issue for the jury.[19] The Advisory Committee has taken note of these decisions, in which "courts appear to have not read the Rule as it is intended."[20] As described in an influential article by David Bernstein and Eric Lasker, "[m]any courts continue to resist the judiciary's proper gatekeeping

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[15] Fed. R. Evid. 702 advisory committee's note to 2000 amendment (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)). The Supreme Court mandated this standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 & n.10 (1993).
[16] Fed. R. Evid. 702 advisory committee's note to 2000 amendment.
[17] *Id.* (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)).
[18] *See, e.g., Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) ("The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment." (quoting *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000))); *Milward v. Acuity Specialty Prods. Grp.*, 639 F.3d 11, 22 (1st Cir. 2011) (same).
[19] *See, e.g., City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1048 (9th Cir. 2014) ("[O]nly a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony."); *United States v. Shea*, 211 F.3d 658, 668 (1st Cir. 2000) ("[A]ny flaws in [an expert]'s application of an otherwise reliable methodology went to weight and credibility and not to admissibility.").
[20] *See* Capra, *supra* note 1, at 1 (citing Bernstein, *supra* note 1).

role, either by ignoring Rule 702's mandate altogether or by aggressively reinterpreting the Rule's provisions."[21]

Such misunderstanding regarding the meaning and application of Rule 702 is disconcerting. Excluding unreliable expert testimony "is particularly important considering the aura of authority experts often exude, which can lead juries to give more weight to their testimony."[22] If courts do not fulfill their gatekeeping role, "expert testimony may be assigned talismanic significance in the eyes of lay jurors."[23] This is, of course, the danger that Rule 702 seeks to address: "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."[24]

B. MDL Decisions Frequently Misstate the Rule 702 Standard.

Uncertainty among some federal courts regarding Rule 702's meaning leads to problems in its application in the MDL context. In some cases, MDL courts hold directly and in broad terms that required findings under Rule 702 relate to weight rather than admissibility. Such rulings clearly indicate a fundamental misunderstanding of the Rule.

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[21] Bernstein & Lasker, *supra* note 1, at 48. Other scholars have reached the same conclusion. *See, e.g.*, Brandon L. Garret & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1564 (2018) (noting the "reliability language" of Rule 702 "has largely been ignored by state and federal judges" and that "[m]ore forceful language might make the importance of assessing reliability more salient to judges, perhaps with more detailed accompanying guidance in Advisory Committee notes").
[22] *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063-64 (9th Cir. 2002), *amended*, 319 F.3d 1073 (9th Cir. 2003).
[23] *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004).
[24] Daniel J. Capra, *Memorandum to Advisory Committee on Evidence Rules re: Possible Amendment to Rule 702*, at 11 (Oct. 1, 2019) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 25, 2019, meeting) at 131).

In the *Nexium* MDL, for example, the district court announced that under Rule 702, "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."[25] In the *Bair Hugger* case, the court stated that "generally, the credibility of an expert's basis goes to weight."[26] And in the *Prempro* MDL, the court read Rule 702 to provide that "in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility."[27]

Similarly, in the *Testosterone Replacement Therapy* MDL, the court understood Rule 702 as indicating that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the jury."[28] The *Talcum Powder* MDL also relied on this quotation, and held that disputes regarding study results and trends "cannot be resolved in the context of this *Daubert* motion" because its review "is only confined to whether [an expert's] methodologies in interpreting the studies are reliable."[29] In the same decision, the court stated that "disagreement with the methods used by an expert is a question that goes more to the weight of the evidence than to reliability for *Daubert* purposes" and that the court's role is "simply to evaluate whether the methodology

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[25] *In re Nexium*, 2014 WL 5313871, at *1 (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 n.14 (9th Cir. 2004)).
[26] *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721, at *3.
[27] *In re Prempro*, 2012 WL 13033298, at *3 (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002)).
[28] *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *5 (quoting *Smith*, 215 F.3d at 718).
[29] *In re Johnson & Johnson Talcum Powder*, No. 3:16-MD-2738(FLW), Slip Op. at 79 (quoting *Smith*, 215 F.3d at 718); 126.

used by the expert is reliable, *i.e.*, whether, when correctly employed, that methodology leads to testimony helpful to the trier of fact."[30]

In the *Chantix* decision, the court also stated that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the jury"[31] and emphasized that "the factual basis of an expert opinion is assessed by the jury."[32] Importantly, the Chantix MDL followed an FDA-required black box warning regarding potential risks identified through adverse event reports (uncontrolled and often unverified reports from the public and health professionals). After the district court denied defendant's motion to exclude general causation experts, the litigation settled for approximately $300 million.[33] Subsequently, results from a randomized controlled trial (the gold standard for determining scientific causation) did not show a significantly increased risk of the alleged side effects with the drug and the FDA removed the black box warning from the Chantix label.[34]

MDL decisions also often rely on Circuit Court opinions that demonstrate similar confusion regarding the scope of Rule 702 and thus include analogous, incorrect statements when discussing general standards. For example, the *Roundup* decision cited repeatedly to *City of Pomona v. SQM North America Corp.*;[35] the *Abilify* decision

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[30] *Id.* at 46 (quoting *In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 962545, at *13 (E.D. Pa. June 28, 2000), and *Walker v. Gordon*, 46 F. App'x 691, 695 (3d Cir. 2002)).
[31] *In re Chantix*, 889 F. Supp. 2d at 1286 (quoting *Tucker v. SmithKline Beecham Corp.*, 701 F. Supp. 2d 1040, 1055 (S.D. Ind. 2010), in turn quoting *Smith*, 215 F.3d at 718).
[32] *Id.* at 1297 (citing *Larson v. Kempker*, 414 F.3d 936, 941 (8th Cir. 2005)).
[33] *See* Jeff Lingwall et al., *The Imitation Game: Structural Asymmetry in Multidistrict Litigation*, 87 MISS. L.J. 131, 158 n.160 (2018).
[34] Jeffrey Chasnow & Geoffrey Levitt, *Off-Label Communications: The Prodigal Returns*, 73 FOOD & DRUG L.J. 257, 269 (2018); Natalie Grover, *FDA Drops Black Box Warning on Pfizer's Anti-Smoking Drug*, REUTERS (Dec. 16, 2016).
[35] *In re Roundup*, 390 F. Supp. 3d at 1113, 1141, 1142 (citing *City of Pomona*, 750 F.3d at 1043-49, 1044).

relied on *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*;[36] and both the *Taxotere* and *Fosamax* cases rested on *Milward v. Acuity Specialty Products Group, Inc.*[37] All three of these Circuit Court rulings were brought to the attention of the Rule 702 Subcommittee by Committee Reporter Daniel Capra as likely misunderstanding the required analysis under the current iteration of Rule 702.[38]

Further, a significant proportion of MDL decisions rely—whether directly or indirectly—on case law that predates the 2000 amendment to Rule 702, or even the *Daubert* decision.[39] Reliance on these older cases is inconsistent with the Rules Enabling Act[40] and suggests that amending the Rule to reinforce the impact of the 2000 amendment is warranted. As the court in the *Viagra and Cialis* MDL recently noted, although issues concerning expert testimony are often referred to as *Daubert* matters,

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[36] *In re Abilify*, 299 F. Supp. 3d at 1305 (quoting *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003)).
[37] *In re Taxotere*, 2019 WL 3997122, at *6 n.34 (citing *Milward*, 639 F.3d at 17-22); *In re Fosamax*, 2013 WL 1558690, at *4, *6 (citing *Milward*, 639 F.3d at 15).
[38] Capra, *supra* note 1, at 5-7 (discussing *Milward*) 12-13 (discussing *City of Pomona*), and 15-16 (discussing *Quiet Tech.*).
[39] *See In re Lipitor*, 892 F.3d at 632 (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999)); *In re Zoloft*, 858 F.3d at 792-93 (quoting *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000)); *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *12 (quoting *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 597 (9th Cir. 1996)); *In re Abilify*, 299 F. Supp. 3d at 1318 (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986)); *In re Lipitor*, 174 F. Supp. 3d at 920 (quoting *Westberry*, 178 F.3d at 261); *In re Lipitor*, 145 F. Supp. 3d at 920 (quoting *Westberry*, 178 F.3d at 261); *In re Zoloft*, 2015 WL 7776911, at *3 (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 745, and *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 784 (3d Cir. 1996)).
[40] *See* 28 U.S.C. § 2072(b) ("All laws in conflict with" duly enacted Rules of Evidence "shall be of no further force or effect after such rules have taken effect").

"the governing rule is set out in Rule 702" which "was amended in 2000, seven years after *Daubert* was decided . . . and the amended rule superseded any other law."[41]

C. MDL Decisions Frequently Fail to Apply the Rule 702 Standard as Intended.

In addition to misconstruing Rule 702, many MDL courts dismiss numerous arguments challenging the reliability of expert testimony as going to weight rather than admissibility. For example, in the *Prempro* MDL, the district court accepted that defendants raised "several interesting questions regarding the experts' findings."[42] It asked:

> Why does it appear that one expert lifted her report from another expert? Why does one of Plaintiffs' experts criticize observational studies as potentially misleading but rely on them in the expert report? Why does one of Plaintiffs' experts say it is not appropriate to differentiate receptor status, but other experts say it is appropriate? Why were studies cited in the expert reports that did not support the expert's position?[43]

Nevertheless, the court dispatched these concerns collectively, holding without significant analysis that "all of these points go to credibility, not admissibility."[44] Similarly, the court declined to consider the argument that experts had disregarded differences in drug formulations by noting that the experts "attempted to explain why the differences in formulation were irrelevant" and thus the "jury can determine whether they believe" the proffered reasoning.[45] This deference to "attempted" explanations is plainly not an independent analysis of reliability required by Rule 702, indicating uncertainty about the scope of gatekeeping mandated by the Rule. The

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[41] *In re Viagra & Cialis*, 424 F. Supp. 3d at 788-89.
[42] *In re Prempro*, 2012 WL 13033298, at *4.
[43] *Id.*
[44] *Id.*
[45] *Id.* at *3.

defendants eventually settled thousands of claims in this MDL, probably for more than $1 billion.[46]

A decision in the *Taxotere* MDL likewise demonstrates misapprehension of Rule 702 and the Rule's requirements to independently assess reliability of the proffered opinion. There, the court simply accepted the expert's "personal judgment in deciding what articles to review and include in her analysis."[47] In assessing an expert's consideration of the Bradford Hill criteria, the court held that if "an expert cannot articulate support for a particular factor, this goes to the weight of the expert's opinion, not its admissibility."[48] The court further held that issues with a study's use of overbroad terms to search an FDA database, consideration of studies evaluating medical problems other than the one at issue in the case, and lack of statistically significant results in individual studies were matters that went to weight rather than admissibility.[49]

The *Testosterone Replacement Therapy* MDL provides yet another example. There, the court concluded that Rule 702 did not require an analysis of epidemiological literature underlying the experts' opinions, summarily ruling that larger, more recent studies undercutting plaintiffs' experts' conclusions were "no more authoritative than plaintiffs' argument" and thus "the studies' 'merits and demerits . . . can be explored at trial.'"[50] Although the *Daubert* opinion itself identifies testability and known error rate

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[46] *See* Jordan A. Marzzacco, *A Dose of Reality: The Deadly Truth About Federal Preemption of Generic Drug Manufacturer Liability*, 24 WIDENER L.J. 355, 379 & n.160 (2015).
[47] *In re Taxotere*, 2019 WL 3997122, at *6.
[48] *Id. Cf. In re Zoloft*, 858 F.3d at 796 ("To ensure that the Bradford Hill/weight of the evidence criteria is truly a methodology, rather than a mere conclusion-oriented selection process there must be a scientific method of weighting that is used and explained." (quotation and alteration omitted)).
[49] *In re Taxotere*, 2019 WL 3997122, at *4-5.
[50] *In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *2 (quoting *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 433 (7th Cir. 2013) (alteration in original)).

as factors pertinent to admissibility,[51] the court stated that an "expert's inability to quantify the cardiovascular risk he finds" was "an issue affecting the weight to be accorded to his analysis, not its admissibility."[52] It further ruled that criticisms directed toward an expert's use of a "totality-of-the-evidence methodology" unmoored from any particular discipline "bear on the weight, rather than the admissibility" of opinion testimony.[53] The final defendant in that MDL settled after juries in two cases awarded $140 million and $150 million in punitive damages (both awards were later vacated).[54]

Even in cases in which the court generally conducted an appropriate Rule 702 analysis, we find comments suggesting reluctance to assess reliability. For example, in the *Mirena IUD* MDL, the court "expresse[d] no opinion on the validity of" a study, noting that "because the parties so vehemently disagree on its credibility, it is a suitable topic for cross-examination before a jury."[55] In the *Lipitor* MDL, the court provided a cursory evaluation of various studies, stating that arguments indicating an expert misapplied the Bradford Hill criteria were "a matter for cross-examination, not exclusion."[56] And in the *Zoloft* litigation, the Third Circuit affirmed the exclusion of a particular expert, but cautioned that several problems identified by the district court—including reliance on studies with overlapping populations and drawing conclusions from a study opposite those reached by its authors—were "inquiries . . . more appropriately left to the jury."[57] This reluctance to engage with reliability questions suggests that some courts are not clear about their gatekeeping responsibilities under Rule 702.

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[51] 509 U.S. at 593-94.
[52] *In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *3.
[53] *Id.* at *4.
[54] Alexia Elejalde-Ruiz, *AbbVie Nears Settlement in Thousands of Lawsuits Alleging Harm by Testosterone Drug AndroGel*, CHICAGO TRIBUNE (Sept. 18, 2018).
[55] *In re Mirena*, 169 F. Supp. 3d at 419.
[56] *In re Lipitor*, 174 F. Supp. 3d at 921, 922.
[57] *In re Zoloft*, 858 F.3d at 800.

D. MDL Decisions Frequently Lack Clarity Regarding the Rule 702 Standard.

As Professor Capra has previously noted, it can be difficult to determine whether a court is actually applying an incorrect test when it states that a certain argument goes to weight rather than admissibility.[58] This problem is exacerbated by a lack of clarity in many decisions we considered. District courts must find that the three reliability factors are established by a preponderance of the evidence under Rule 104(a).[59] This analysis should be distinguished from inquiries under Rule 104(b), which merely require evidence "sufficient to support a finding" of the proposition urged.[60] Thus, Rule 104(a) requires a finding that expert testimony is more likely than not based on sufficient facts or data, is the product of reliable principles and methods, and that the expert has reliably applied those principles and methods to the facts of the case.[61] Under Rule 104(b), in contrast, the question would be only whether a reasonable person could make those three findings.[62]

Few courts are clear about these distinctions, which indicates a need to clarify Rule 702. Nearly half of the decisions we reviewed do not reference the preponderance standard at all.[63] In decisions that do so, other language muddies the water. For

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[58] Capra, *supra* note 1, at 2 ("A ruling that some disputes are questions of weight is not necessarily a misapplication of Rule 702/104(a) . . . because even under 104(a) there are disputes that will go to weight and not admissibility.").
[59] *Daubert*, 509 U.S. at 592 n.10; Fed. R. Evid. 702 advisory committee's note to 2000 amendment.
[60] Fed. R. Evid. 104(b).
[61] Fed. R. Evid. 702(b), (c), (d).
[62] *See* Capra, *supra* note 1, at 3.
[63] *In re Lipitor*, 892 F.3d 624; *In re Zoloft*, 858 F.3d 787; *In re Mirena*, 713 F. App'x 11; *In re Nexium*, 662 F. App'x 528; *In re Viagra & Cialis*, 424 F. Supp. 3d 781; *In re Bair Hugger Forced Air Warming Devices*, 2019 WL 4394812; *In re Testosterone Replacement Therapy*, 2018 WL 4030585; *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721; *In re*

example, two decisions in the *Actos* MDL directly cite Rule 104(a) as the controlling standard—a rare occurrence in our sample.[64] But these decisions repeatedly referred to plaintiffs' burden as making a "prima facie" showing of reliability,[65] which is language one would expect in the Rule 104(b) context.[66] Such language indicates that this court did not appreciate the actual requirements of Rule 702.

Despite these interpretational difficulties, the MDL decisions we examined reveal a clear problem. Many MDL courts, whether explicitly or implicitly, have misinterpreted Rule 702 and failed to fulfill their duty to ensure expert testimony has a sufficient basis and is the result of a methodology reliably applied.

III. THE LACK OF UNIFORMITY IN MDL DECISIONS RESULTS IN SUBSTANTIVE DIVISIONS ON CORE ISSUES RELATING TO THE RELIABILITY OF GENERAL CAUSATION OPINIONS.

In the foregoing discussion, we highlight those MDL decisions that have diverged most clearly from the intent of Rule 702. This is not to suggest that all courts share the same misapprehensions regarding the Rule's requirements as to weight and admissibility. In some of the decisions we reviewed, courts appropriately engage with the scientific literature and the methodology underlying a proposed expert's opinion. But differences in MDL courts' application of Rule 702 should give us pause. These differences have led courts to split on important questions.

Zoloft, 2015 WL 7776911; *In re Nexium*, 2014 WL 5313871; *In re Celexa*, 927 F. Supp. 2d 758; *In re Chantix*, 889 F. Supp. 2d 1271.

[64] *In re Actos*, 2014 WL 60324, at *1; *In re Actos*, 2013 WL 6796461, at *2.

[65] *In re Actos*, 2014 WL 60324, at *3, *5, *9; *In re Actos*, 2013 WL 6796461, at *4, *7, *10.

[66] *See United States v. Enright*, 579 F.2d 980, 984-5 (6th Cir. 1978) (describing "the language of 104(b) as a classic restatement of the Prima facie test" and noting that "[a] determination under 104(a) is more demanding than a Prima facie test and calls for the exercise of judicial fact-finding responsibilities by the trial judge").

A. Differing Approaches to Rule 702 Lead to Different Results.

In the *Roundup* MDL, the district court was frank about the problem of divergent approaches to Rule 702. It concluded the scientific "evidence, viewed in its totality, seems too equivocal to support any firm conclusion" on general causation.[67] But it nevertheless admitted opinion testimony supporting plaintiffs' general causation theory.[68] The court stressed that in the Ninth Circuit, Rule 702 has been interpreted to mean that "weaknesses in an unpersuasive expert opinion can be exposed at trial, through cross-examination or testimony by opposing experts," which "has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits."[69]

The *Roundup* court acknowledged that inter-Circuit differences on Rule 702 "could matter in close cases."[70] And the impact of those inter-Circuit differences could be enormous in the *Roundup* MDL. Some observers have estimated a likely settlement amount in the range of $10 billion.[71]

A set of two decisions from the *Bair Hugger* MDL further demonstrates how misunderstanding of Rule 702 can lead to different results. In an initial decision on the admissibility of testimony from several plaintiffs' experts, the district court apparently read Rule 702 as requiring only a superficial appraisal of their factual bases and methodologies.[72] It indicated expert testimony could be excluded only if "so fundamentally unsupported that it can offer no assistance to the jury."[73] And the court

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[67] *In re Roundup*, 390 F. Supp. 3d at 1109.
[68] *Id.*
[69] *Id.* at 1109, 1113.
[70] *Id.* at 1113.
[71] Jef Feeley et al., *Bayer Proposes Paying $8 Billion to Settle Roundup Cancer Claims*, BLOOMBERG (Aug. 9, 2019).
[72] *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721, at *2-6.
[73] *Id.* at *2 (quoting *Children's Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004)).

stated that the credibility of an expert's basis, the need to conduct more thorough testing, and bias in conducting a scientific literature review were issues that went to weight rather than admissibility.[74]

After the jury returned a verdict in defendants' favor in a bellwether trial, the court addressed a renewed motion to exclude the same experts.[75] Despite plaintiffs' insistence that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility," the court admirably reconsidered its prior decision.[76] It rejected an expert who did "not have any basis" for his assertions and had "drifted from the factual realities of his test."[77] After conducting a thorough, if belated, evaluation of the scientific literature and case law concerning Rule 702, the court found "too great an analytical gap between the evidence and the expert's conclusions," and excluded the testimony it had previously ruled admissible.[78]

B. Differing Approaches to Rule 702 Lead Courts to Split on Recurring Substantive Issues.

Variations in the application of Rule 702 impact the broader contours of the law, in addition to the outcomes of particular cases. In considering general causation in these matters, we see the same issues arise again and again. Yet courts have not been able to reach a consensus on some common questions. This discord, driven in large measure by some courts' misunderstanding of Rule 702's requirements, engenders uncertainty regarding the resolution of perennial general causation questions.

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[74] *Id.* at *3, *4, *6.
[75] *In re Bair Hugger Forced Air Warming Devices*, 2019 WL 4394812, at *2-3.
[76] *Id.* at *5 (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir. 2001)), *11.
[77] *Id.* at *7, *9.
[78] *Id.* at *20. This result also highlights the importance of hearing live testimony from proffered experts. The court's prior ruling followed only briefing and oral argument. *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721, at *1.

Courts attempting to apply Rule 702 have reached different conclusions as to the reliability of non-statistically significant, "trending" data. Some courts have permitted experts to rely on such data in support of their general causation conclusions.[79] However, other courts have held that the "novel technique of drawing conclusions by examining 'trends' (often statistically non-significant) across selected studies" is "not scientifically sound."[80]

Many of the proposed experts in the cases we reviewed purport to engage in a Bradford Hill causation analysis. Several courts have recognized that although a statistically significant association is not always required to show causation, it is a necessary first step in applying the Bradford Hill criteria: "the analysis requires a statistician to find a statistically significant association at step one before moving on to apply the factors at step two."[81] Other decisions, however, have rejected the necessity of statistical significance at step one of the Bradford Hill analysis.[82]

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[79] *See In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *3 (allowing an expert to rely on observational studies that "show only 'trends'"); *In re Prempro*, 2012 WL 13033298, at *3 (permitting testimony from an expert who "explained that the studies that lacked statistical significance still revealed a 'trend for association'").
[80] *In re Zoloft*, 26 F. Supp. 3d at 465; *see also In re Abilify*, 299 F. Supp. 3d at 1367 (holding an expert's "five statistically insignificant findings from the clinical trials, and also his characterization of those findings as a trend, must be excluded as unreliable").
[81] *In re Lipitor*, 892 F.3d at 642; *see also In re Mirena (No. II)*, 341 F. Supp. 3d at 265 ("[A]bsent [a demonstrated epidemiological] association, there is no basis to apply the Bradford Hill criteria.").
[82] *See In re Zoloft*, 858 F.3d at 794 n.35 (emphasizing that the lower court declined to hold that "the Bradford-Hill criteria should only be applied after an association is well established"); *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *9 (rejecting defendant's argument that application of the Bradford Hill criteria requires "an association between the drug at issue and the alleged injury, based on epidemiological studies showing an association that is statistically significant").

We also find substantial disagreement among courts on the degree to which proposed experts may "reinterpret" studies conducted by others to reach conclusions opposite of those made by the studies' authors. Some courts have recognized that if "an expert relies on the studies of others, he must not exceed the limitations the authors themselves place on the study."[83] Without detailed analysis, other courts have misread Rule 702 as permitting the contrary conclusion.[84]

Finally, MDL courts have differed on the role of studies dealing with drugs other than those at issue in a case. Some courts hold that such studies are generally of limited value in determining causation.[85] Yet other MDL decisions have struggled to grasp the requirements of Rule 702 and uncritically permitted experts to rely on such evidence.[86]

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[83] *In re Mirena (No. II)*, 341 F. Supp. 3d at 241 (quoting *In re Accutane Prods. Liab. Litig.*, 2009 WL 2496444, at *2 (M.D. Fla. Aug. 11, 2009), *aff'd*, 378 F. App'x 929 (11th Cir. 2010)); *In re Mirena*, 169 F. Supp. 3d at 452 (same); *see also In re Lipitor*, 145 F. Supp. 3d at 593 (holding an expert generally cannot "conduct his own 'reanalysis' solely for the purposes of litigation and testify that the data support a conclusion opposite that of the studies' authors in a peer-reviewed publication").

[84] *See In re Zoloft*, 858 F.3d at 800 (finding no problem with the fact that "in his reanalysis [an expert] drew a different conclusion from a study than its authors did"); *In re Celexa*, 927 F. Supp. 2d at 765 ("There is no requirement that [an expert] reach the same conclusion as [a study's author] just because he relied on [the author's] data.").

[85] *See In re Mirena (No. II)*, 341 F. Supp. 3d at 288 ("[C]ourts regularly exclude expert opinions built on analogies to different chemical compounds than the one at issue."); *In re Abilify*, 299 F. Supp. 3d at 1311 (ruling that "extrapolations from drugs within the same class may not support an expert opinion on general causation unless other reliable scientific evidence establishes the validity of the analogy").

[86] *See In re Celexa*, 927 F. Supp. 2d at 762-63 (permitting expert testimony based on an "analysis of studies relating to SSRIs generally, not Celexa and Lexapro specifically"); *In re Prempro*, 2012 WL 13033302, at *4 (rejecting the concern that "if you lump all hormone therapy formulations together, you may mistakenly attribute a risk to all hormone therapy when only some have that risk" by simply quoting an expert's *ipse dixit*, "Oh, I

C. Lack of Uniformity Among MDL Courts is Problematic.

These MDL decisions show that misunderstanding of Rule 702 results in inconsistent outcomes and disagreement on basic questions related to the reliability of general causation opinions. Such differences encourage forum-shopping, undermine confidence in the courts, and diminish the value of the MDL process.

Although a lack of uniformity in cases on a Federal Rule of Evidence is always cause for concern, the foregoing disagreements are particularly troubling in the MDL context. A core purpose of the MDL process is to promote uniformity.[87] Further, structural features of MDLs make it more difficult for appellate review to serve as a meaningful tool to address conflicting decisions.

Rule 702 decisions by district courts in MDLs—particularly those permitting expert testimony—are largely insulated from review. This is because there is no practical mechanism for appealing such rulings.[88] When an MDL decision misstates the law, an aggrieved party faces "an expensive and risky trial conducted under the wrong legal standard" with the potential for liability multiplied by the number of aggregated claims.[89] Because a decision allowing an expert to testify is not subject to interlocutory review, "the lack of an immediate appellate safety valve ensures that the claimed legal

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don't think that's true at all"). Relatedly, courts have permitted experts to analogize between different types of illnesses. *See, e.g., In re Johnson & Johnson Talcum Powder*, No. 3:16-MD-2738(FLW), Slip Op. at 89 n.39 ("[W]hile there are no studies linking these specific metals to ovarian cancer, . . . these metals have been linked to [other] specific types of cancer.").

[87] *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PENN. L. REV. 1669, 1682 (2017) ("One of the main problems MDLs aim to solve is therefore horizontal federal duplication and disuniformity.").

[88] *See id.* at 1706 (noting that "the inability for error correction relating to pretrial rulings . . . can have enormous significance for many litigants").

[89] Pollis, *supra* note 7, at 1668.

errors will be repeated in multiple trials in the MDL proceeding."[90] These factors make it far less likely that a party will push on to trial and appeal following an adverse ruling.

Accordingly, few MDL decisions considering Rule 702 issues are ever appealed.[91] And to the extent that Rule 702 issues reach the Courts of Appeals from MDLs, they are highly asymmetrical. Of the decisions we reviewed, only four were appellate rulings, all of which considered district courts' exclusion of expert testimony.[92] Appellate review under current law is thus unlikely to resolve the lack of uniformity we have identified.[93]

IV. THE ADVISORY COMMITTEE SHOULD AMEND RULE 702.

In light of the problems we have identified in some MDL courts' application of Rule 702's core requirements, we urge the Advisory Committee to act. The Committee has considered an amendment to the introductory language of Rule 702 clarifying that "the court must find the following requirements to be established by a preponderance

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[90] U.S. Chamber, Institute for Legal Reform, *supra* note 8, at 9.

[91] Although parties can pursue interlocutory review under 28 U.S.C. § 1292(b), that option has largely proven illusory. A review of 127 mass tort MDL proceedings found no instances in which a court granted a defendant's request for certification of a ruling potentially dispositive of a large number of claims. Letter from John H. Beisner to Rebecca A. Womeldorf 2 (Nov. 21, 2018), https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf.

[92] *In re Lipitor*, 892 F.3d at 629 (appeal by plaintiffs from decision excluding expert testimony); *In re Mirena IUD*, 713 F. App'x at 13 (same); *In re Zoloft*, 858 F.3d at 789 (same); *In re Nexium*, 662 F. App'x at 529 (same).

[93] Legislative and rules-based solutions expanding interlocutory review for certain types of MDL decisions have been proposed. *See* The Fairness in Class Action Litigation Act, H.R. 985, 115th Cong. § 105 (2017) (proposed amendment to 28 U.S.C. § 1407); Agenda Book, Advisory Committee on Civil Rules (Apr. 2-3, 2019, meeting) at 212-13 (MDL Subcommittee Report considering amending rules to permit interlocutory review of some MDL decisions).

of the evidence."[94] Our review demonstrates that such clarification is necessary. A specific amendment and an accompanying Committee Note detailing the rationale for the amendment would clarify the courts' gatekeeping responsibilities and encourage them to apply Rule 702 as intended. Similarly, including language specifying that Rule 702's requirements are mandatory and specifically identifying the preponderance standard will focus the courts on their gatekeeping role.

We also support amending the Rule and adding a Committee Note to highlight that an expert's factual basis and applied methods are matters that go to admissibility rather than weight. Specifically, we encourage inclusion of the following proposed language in a Committee Note:

> 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).[95]

In addition, we recommend that the Advisory Committee identify the types of rote language that often accompany misapplications of Rule 702. Examples of such language, indicating that an expert's factual basis or application of methodology are matters of weight rather than admissibility, have already been cited to the Committee by Professor Capra.[96] A Note that identifies with particularity the type of problematic analysis the Committee has in mind will best aid courts in applying Rule 702. Regardless of whether the introductory language of Rule 702 is amended, such a

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[94] Capra, *supra* note 1, at 26.
[95] Capra, *supra* note 24, at 34.
[96] *See* Capra, *supra* note 1, at 6, 12-13, 15-16.

Committee Note will encourage courts to make the required reliability findings before permitting an expert to testify.[97]

As the Supreme Court warned in *Daubert*, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."[98] Permitting junk science in the courtroom invites verdicts based on inadequate or non-existent supporting science. For this reason, courts cannot delegate to juries their gatekeeping duties. Yet recent MDL decisions suggest that some courts may not be sufficiently guided by Rule 702, leading to a misunderstanding of its essential provisions. Advisory Committee action is needed to correct this misunderstanding and provide courts and parties alike with much needed predictability in the application of Rule 702.

Sincerely,

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[97] A Committee Note to this effect could be added if Rule 702 is amended to include a new subdivision on "overstatement" of expert opinions, which the Advisory Committee is also considering. *See* Capra, *supra* note 24, at 31.

[98] 505 U.S. at 595 (quotation omitted).

June 30, 2020

Submitted via Email: RulesCommittee_Secretary@ao.uscourts.gov

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
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Attention: Rebecca A. Womeldorf, Secretary

Re: Comment on Potential Amendment to Federal Rule of Evidence 702

The Federation of Defense & Corporate Counsel (FDCC) is advised that the Advisory Committee on Evidence Rules is considering potential amendment to Federal Rule of Evidence 702 and a Committee Note on that rule. The purpose of this correspondence is to provide the FDCC's comments on the specific need for such amendments and Committee Notes to Rule 702.

Introduction

The FDCC is comprised of over 1,400 members who work in private practice, as in-house counsel, and as insurance-claims professionals and executives. Membership is limited to attorneys and insurance professionals nominated and then vetted by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. The FDCC constantly strives to provide access to and protect the American system of justice and to improve its efficiency. Its members have established a strong legacy of leadership in representing the interests of civil defendants.

FDCC members are some of the most-experienced litigators in America. They are on the front lines of complex and multi-district litigation (MDL) defending businesses and individuals in civil actions. As a result, FDCC members are intimately familiar with Rule 702 and its real-world applications and varying interpretations by the Courts. They know its strengths and weaknesses and bring a practical perspective on improving the Rule in manner consistent with the rule of law. Based upon that perspective, the FDCC believes that two aspects of Rule 702, and its existing committee notes, should be clarified by amendment.

I. Rule 702 Should Provide that the Proponent of Expert Testimony Bears the Burden of Establishing Admissibility.

Rule 702 is silent on the burden for establishing admissibility of expert testimony. This absence of guidance has led to the unfortunate circumstance of inconsistent interpretation and application of the Rule, as well as the resulting unsettled framework of varying opinions in which expert testimony has been either admitted or excluded. Admittedly, the Advisory Committee Notes on the 2000 amendments recognize that admissibility is governed by Rule 104(a). And, it is well-established under Rule 104(a) that the proponent of any evidence "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[1] Nevertheless, in the experience of FDCC members, trial courts considering the admissibility of expert testimony regularly overlook the weight and significance of that burden.

Many decisions recognize the burden, but immediately lighten it with statements that are unsupported by the law. For example, trial courts throughout the country espouse the principle that there is a "presumption of admissibility" for expert opinions.[2] A related proposition is the maxim that "rejection of expert testimony is the exception and not the rule."[3] Yet, presuming admissibility is a "paradoxical position" in light of the burden placed on the offeror of expert testimony.[4] Under *Daubert* and Rule 702, trial judges are charged "with the responsibility of acting as gatekeepers to *exclude* unreliable expert testimony …."[5]

This unfounded presumption achieves the exact opposite result -- encouraging trial courts to throw-open the gates of admissibility. The dangers of this were properly stated by the Reporter to the Advisory Committee on Evidence Rules in 2019, "…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."[6]

Trial courts trumpeting a presumption of admissibility frequently buttress that presumption by claiming that Rule 702 has a "liberal standard of admissibility."[7] That standard is not grounded in the reality of any facts or justification. Nothing in Rule 702, its comments, *Daubert*, *Kuhmo*

[1]Rule 702 advisory committee's notes, 2000 amend.

[2]*See*, *e.g.*, *Cates v. Trustees of Univ. of Columbia*, No. 16 Civ. 6524 (GBD) (SDA), 2020 WL 1528124 at *6 (S.D.N.Y. Mar. 30, 2020); *Maes v. Lowe's Home Ctrs.*, LLC, EP-17-CV-00107-FM, 2018 WL 3603114 at *4 (W.D. Tx. May 25, 2018); *Metro Sales, Inc. v. Core Consult. Group, LLC*, 275 F.Supp.3d 1023, 1053 (D. Mn. 2017) (finding rule 702 "favors admissibility over exclusion"); *Chapman v. Tristar Products, Inc.* No. 1:16–CV–1114, 2017 WL 1718423 at * 1 (N.D. Ohio Apr. 28, 2017); *Ass Armour, LLC v. Under Armour, Inc.*, No. 15-cv-20853-Civ-COOKE/TORRES, 2016 WL 7156092 at * 2 (S.D. Fla. Dec. 8, 2016).

[3]*Finch v. City of Wichita*, No. 18-1018-JWB, 2020 WL 3403121 at *21 (D. Kan. Jun. 19, 2020)In *re: Niaspan Antitrust Litigation*, MDL NO. 2460, 2020 WL 2933824 at *5 (E.D. Pa. Jun. 2, 2020); *Koenig v. Johnson*, . No. 2:18-cv-3599-DCN, 2020 WL 2308305 at *2 (D.S.C. May 8, 2020).

[4]5 Mod. Sci. Evidence § 37:5 (2019-2020 Edition).

[5]Rule 702 advisory committee's notes, 2000 amend. (emphasis added).

[6] Minutes of the Judicial Conference Advisory Committee on the Federal Rules of Evidence, May 3, 2019, p.23.

[7]*See*, *e.g.*, *United States v. Napout*, No. 18-2750 (L), 2020 WL 3406620 at *18 (8th Cir. Jun. 22, 2020); *United States v. Fernandez*, 795 Fed.Appx. 153, 155 (3d Cir. 2020).

Tire or other Supreme Court precedent endorses liberal admission of expert testimony.[8] To the contrary, the only presumption that should exist is exclusion of unreliable expert testimony under the trial court's gatekeeping function.

From a practical standpoint, these newfound rules improperly shift the burden of proof under Rule 702. The proponent no longer bears the burden of demonstrating by a preponderance of the evidence that expert evidence and testimony should be admitted. Instead, the opponent must overcome "presumptions" and "liberal standards" to show that the evidence ought to be excluded. This standard is, in our humble view, the antithesis of what the drafters of Rule 702 had intended.

Accordingly, the FDCC endorses any action by the Committee that will provide explicit direction to litigants, counsel and trial courts that: (a) the proponent of expert testimony bears the burden of proving each subsection within Rule 702 (including the basis and reliability requirements) by a preponderance of the evidence; and, (b) there is no presumption or other standard that favors admissibility. That direction can be accomplished by an amendment to Rule 702 and a Committee Note. The rule itself should define the admissibility burden:

> 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 the proponent of the testimony establishes by a preponderance of the evidence…:***[9]

Thus, an amendment to the rule will plainly establish that admissibility must be proven by a preponderance of the evidence. In conjunction with that amendment, a Committee Note will dispel any thoughts of a "liberal" admissibility standard. The FDCC suggests the following addition to the draft Committee Note submitted by the Committee's reporter on October 1, 2019:

> 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***: (a) Rule 702 adopts a "liberal standard" requiring a presumption of admissibility; or, (b)*** the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of

[8]*Daubert* recognizes that the basic standard of relevance under Rule 401 is a "liberal one," but does not attribute any such liberality to Rule 702. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993).
[9]*Cf.* Fed. R. Evid. 702 (suggested addition ***emphasized***).

> weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).[10]

These two additions to Rule 702 will help focus litigants and trial courts on the appropriate and more uniform standards for admission of expert testimony.

II. The FDCC Supports the Proposed Committee Note Regarding Weight/Admissibility under Rule 702.

In "a disturbing number of cases," courts make the broad misstatement that "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility."[11] That misstatement is equivalent to a punt on third down – conceding a result when confronted with difficult circumstances. Yet, the difficult task of determining expert validity is unquestionably the role of the trial court and not the jury. And, experienced federal judges are in a far better position to accomplish that task than lay jurors.

These trial courts effectively shift *Daubert*'s gatekeeping requirement to counsel opposing the expert testimony. Any failure by the court to conduct a thorough Rule 702 analysis can supposedly be remedied by vigorous cross-examination.[12] Yet, once the expert is allowed to testify, the horse is out of the barn. Indeed, there are at least two instances where cross-examination of an expert will be insufficient to remedy a failure to conduct a comprehensive Rule 702 analysis.[13]

- First, the significance of cross-examination might "go over the heads" of jurors where expert testimony deals with complex and difficult subject matter.[14] This is the very reason for *Daubert*'s gatekeeping requirement.[15]
- Second, even successful cross-examination of an expert can be ineffective if the expert's opinion is unfairly prejudicial, touching upon sensitive or emotion-laden subjects.[16]

[10] *Cf.* Daniel Capra, *Memorandum to Advisory Committee on Evidence Rules re: Possible Amendment to Rule 702*, (Oct. 1, 2019)(Agenda Book, Advisory Committee on Evidence Rules (Oct. 25, 2019 meeting) at 163-64)(suggested addition ***emphasized***).

[11] *Id.* at 160.

[12] *Johanessohn v. Polaris Indust., Inc.*, No. 16-CV-3348 (NEB/LIB), 2020 WL 1536416 (D. Minn. Mar. 31, 2020)(finding that criticisms of expert's methodology are matters for cross-examination); *United States v. Symantec Corp.*, No. 12-800 (RC), 2020 WL 1508904 at *10 n.5 (D.D.C. Mar. 30, 2020)("expert testimony with a weak basis in fact can be addressed through cross-examination."); *Clark v. Travelers Comps., Inc.*, No. 2:16-cv-02503 (ADS)(SIL), 2020 WL 473616 at * 5 (E.D.N.Y. Jan. 29, 2020).

[13] *See* 29 WRIGHT & GOLD, Federal Practice & Procedure § 6294. Wright & Gold discuss Rule 705 and the general weaknesses in cross-examining experts. Rule 702 is woven throughout that discussion.

[14] *Id.*

[15] *Id.*

[16] *Id.*

Such an opinion should be inadmissible in the first instance because it does not help the trier of fact under Rule 702(a).[17] "The whole point of Rule 702 – and the *Daubert*-Rule 104(a) gatekeeping function – is that these issues *cannot* be left to cross-examination."[18]

The FDCC knows that the Committee has been wrestling with its considerations pertaining to the weight/admissibility dilemma.[19] It appears that the Committee is "receptive" to a Committee Note addressing the issue and the Committee's Reporter has supplied a proposed note.[20] The FDCC fully supports that Committee Note so far as it addresses the weight/admissibility issue and urges its adoption in order to provide greater clarity and consistent interpretation of Rule 702 by the Courts. As succinctly noted in the Washington Legal Foundation's recent Working Paper, the intent of Rule702 was – and remains – to establish rather than evade a uniform standard courts will use to scrutinize an expert's basis, methodology and application.[21] The Committee must now issue necessary clarification so that the Rule can function as intended and safeguard the trial process against misleading and unqualified opinion testimony.

Conclusion

Thank you very much for your time and valuable consideration on these important issues. We stand ready to provide any further advice or input and look forward to the opportunities to further engage with the committees regarding the importance of Rule 702. We also respectfully endorse and adopt the Comments advanced on this issue by the Lawyers for Civil Justice, as though set forth fully herein.

Respectfully submitted,

(b)(6) per EOUSA

Elizabeth Lorell
FDCC President

[17] *See id.*
[18] Capra, *supra* note 9 at 141.
[19] *Id.* at 159-161.
[20] *Id.* at 161, 163-164.
[21] Mickus, G*atekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence,* Washington Legal Foundation, Critical Legal Issues Working Paper Series, Number 217 (May 2020).

July 29, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: **Amending Federal of Evidence 702 – Comments from the Coalition of Litigation Justice, Inc. Supporting Stronger Gatekeeping in Federal Courts**

Dear Ms. Womeldorf:

The members of the Coalition for Litigation Justice, Inc. (the "Coalition") have an interest in ensuring that the rules and legal obligations applied in asbestos and other toxic tort litigation are consistently applied in conformity with sound science and public policy.[1] The Coalition regularly files *amicus* briefs that address legal and scientific issues in toxic tort litigation. The Coalition submits these comments in regard to proposed amendments to Rule 702. We urge the Committee to consider the dramatic impact on the rule of law when judges do not apply the strictures of Rule 702 correctly or with sufficient vigor. We further urge the Committee to modify the Rule and its comments to ensure full and effective application of the gatekeeping obligations by all federal court judges.

INTRODUCTION

The Coalition's members regularly submit *amicus* briefs urging courts to apply expert gatekeeping rules in a manner that prevents unsupported and speculative expert testimony to influence jury decisions. Many of those cases are decided under federal Rule 702. The Coalition's efforts to ensure that courts are utilizing reliable science depends heavily upon the manner in which federal courts interpret and apply Rule 702.

I. The Committee Should Direct Trial Judges to Investigate the Underlying Bases for the Opinion as a Mandatory Element of Rule 702 Review

The Coalition's experience in the last ten years in regard to the application of Rule 702 has been decidedly mixed. Many federal court judges have applied the Rule with sufficient rigor to look behind the expert's claims and statements by reviewing the scientific articles and other

[1] The Coalition consists of its members Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc. a third-party administrator for numerous insurers; and TIG Insurance Company.

claimed support for the opinions. In many instances, as a result of that review, these courts have found that the expert's statements are often unsupported in the literature, or in some cases are outright misrepresentations of the science.

At the same time, there are federal court judges whose inclination is to "let it all in," despite the codification of *Daubert* in Rule 702. These judges studiously avoid examining the expert record other than to cite to the expert's own statements in support of their opinions. This shallow approach to gatekeeping has a predictable outcome – every such opinion allows the expert to testify. These opinions stand in sharp contrast to those by more rigorous judges, who frequently read the cited studies, examine the underlying scientific data, and challenge the expert's logic and overstatements – and then where necessary find that the experts are out of step with the science they claim to rely on.

To illustrate one such instance, the federal MDL judge overseeing a large docket of asbestos cases, despite performing an enormous benefit by dismissing many cases and clearing out that docket, allowed plaintiff experts to testify repeatedly that each and every exposure to asbestos, regardless of degree or dose, is a cause of disease. This "every exposure" theory has been rejected repeatedly by many courts.[2] The MDL court's rulings illustrate the problem – the opinions contain references to the experts' testimony – "Dr. Hammar opines…", "Dr. Hammar relies on…", Dr. Hammar notes …", etc. – with no investigation into the validity of those statements.[3] After remand of one of these cases to its home court in Utah, the Utah federal judge excluded the same experts, finding in part that the experts' statements were not supported by the cited studies.[4]

In a state court example, the intermediate Ohio appellate court decision in *Schwartz v. Honeywell Int'l., Inc.,* 66 N.E.3d 118, 125-128 (Ohio Ct. App. 2016), repeatedly referred to statements made by plaintiffs' experts as support for the reliability of their own testimony. Over *forty times* in the *Schwartz* opinion, the panel simply restated the expert's testimony by noting that the expert "testified," "opined," "found," "discussed," "considered," or "stated" certain opinions. *Id*. at 125-128. Not once did the court actually examine the basis for those statements or decide whether they were credible and derived from a scientific methodology. The Ohio Supreme Court reversed the ruling after determining that the expert testimony was in fact unsupported and unreliable. *Schwartz v. Honeywell Int'l, Inc.,* 102 N.E.2d 477 (Ohio 2018).

[2] For a discussion of the court rulings on the "every exposure" theory, as well as a discussion of the rigor needed for judicial review of low dose cases, *see* William Anderson & Kieran Tuckley, *How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation,* 42 Am. J. Trial Advoc. 39 (2018).

[3] *See e.g., Anderson v. Saberhagen Holdings, Inc*., 2011 WL 605801 (E.D. Pa. Feb. 16, 2011).

[4] *Anderson v. Ford Motor Co*., 950 F. Supp. 2d 1217, 1223 (D. Utah 2013) ("Plaintiff's experts are unable to point to any studies showing that "any exposure" to asbestos above the background level of asbestos in the ambient air is causal of mesothelioma.").

Virtually every court that has admitted similar "every exposure" forms of testimony has made the same error – accepting the *ipse dixit* of the expert to self-qualify the expert's reliability.[5] If the court declines to pull back the curtain, the serious problem goes unchecked. In sharp contrast stand the many federal court opinions rejecting "every exposure" testimony, and every one of them includes significant discussion of the bases of the opinions – i.e., the complete lack of support in the cited studies, logic, and literature.[6]

The Coalition supports an amendment to the comments of Rule 702 instructing trial judges that a review under Rule 702(b) is insufficient if it merely cites to the experts' self-serving testimony as a basis for letting the expert testify. Examples of courts that perform the analysis correctly – including a review of cited scientific support – should be included in the comment to provide illustrations of a proper application of Rule 702 gatekeeping.

II. The Review Requirements of *Daubert* and Rule 702 Must Be Strengthened and Consistently Enforced in Federal Courts in Light of the Dramatic Increase in Trial Verdict Damages

In the last few years, plaintiffs have sought, and often received, enormously high damages awards in product liability and tort cases. This escalation creates massive pressure on the court's Rule 702 review – any error by the judge in letting in nonscientific evidence is far more damaging today than it was a few years ago. The Committee must not allow trial judges to relax their guard over "shaky" or insufficient science.

[5] *See, e.g., Neureuther v. Atlas Copco Compressors, L.L.C.*, 2015 WL 4978448, at *4 (S.D. Ill. Aug. 20, 2015) (citing only to expert's own statements before finding "nothing invalid" about the testimony); *Waite v. AII Acquisition Corp.*, 194 F. Supp. 3d 1298, 1314-17 (S.D. Fla. 2016), *aff'd on other grounds*, 901 F.3d 1307 (11thh Cir. 2018), *cert. denied*, 139 S. Ct. 1384 (2019) (repeated references to expert's own testimony); *Davis v. Honeywell Int'l Inc.*, 245 Cal. App. 4th 477, 487 (2016) (citing only to expert's own explanation).

[6] Federal and state decisions under Rule 702 or state equivalents include *Flores v. Borg-Warner*, 232 S.W.3d 765, 765 (Tex. 2007); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 321 (Tex. Ct. App. 2007); *In re W.R. Grace & Co*., 355 B.R. 464, 476 (Bankr. D. Del. 2006); *Martin v. Cincinnati Gas & Elec. Co*., 561 F.3d 439, 443 (6th Cir. 2009); *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829, 834 (Tex. Ct. App. 2010); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 552 (Ga. Ct. App. 2011); *Wannall v. Honeywell Int'l, Inc*., 292 F.R.D. 26, 43 (D.D.C. 2013), *aff'd*, 775 F.3d 425 (D.C. Cir. 2014); *Moeller v. Garlock Sealing Techs*., 660 F.3d 950, 950–55 (6th Cir. 2011); *Smith v. Ford Motor Co.*, 2013 WL 214378, at *5 (D. Utah Jan. 18, 2013); *Anderson v. Ford Motor Co*., 950 F. Supp. 2d 1217, 1225 (D. Utah 2013); *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016); *Estate of Barabin v. AstenJohnson, Inc*., 740 F.3d 457 (9th Cir.), *cert denied*, 135 S. Ct. 55 (2014) (returning case for more stringent *Daubert* review); *Stallings v. Georgia-Pacific Corp.*, 675 F. App'x 548, 549 (6th Cir. 2017); *Scapa Dryer Fabrics, Inc. v. Knight*, 788 S.E.2d 421, 425 (Ga. 2016); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 338 (Tex. 2014); *Comardelle v. Pennsylvania Gen. Ins. Co.,* 76 F. Supp. 3d 628, 634 (E.D. La. 2015); *Sclafani v. Air & Liquid Sys. Corp.*, 2013 WL 2477077, at *4 (C.D. Cal. May 9, 2013); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 849 (E.D.N.C. 2015), *reconsideration denied*, 143 F. Supp. 3d 386 (E.D.N.C. 2015); *Vedros v. Northrup Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556, 565 (E.D. La. 2015); *Davidson v. Georgia Pacific LLC,* 2014 WL 3510268, at *5 (W.D. La. July 14, 2014), *vacated and remanded on other grounds*, 819 F.3d 758 (5th Cir. 2016); *Crane Co. v. DeLisle*, 206 So. 3d 94, 106 (Fla. Ct. App. 2016); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207-08 (W.D. Wis. 2016); *Doolin v. Ford Motor Co.*, 2018 WL 4599712, at *12 (M.D. Fla. Sept. 25, 2018); *Krik v. Exxon Mobil Corp.,* 870 F.3d 669, 677 (7th Cir. 2017).

A list of jury verdicts and damages since 2016 in talc and Roundup™ litigation alone demonstrates the escalation in verdict amounts (some were reversed on appeal or are on appeal):

- $80.27 million – *Hardeman* (Roundup™ MDL, reduced to $25 million post-trial)
- $289 million - *Johnson* (Roundup™, California), reduced to $78.5 million post-trial, then to $20.5 in intermediate court of appeal
- $2.055 billion - *Pilliod* (Roundup™, California), reduced to $86.7 million post-trial
- $37.2 million - *Barden* (talc, New Jersey, 4 plaintiffs)
- $70 million - *Giannecchini* (talc, Missouri)
- $29.4 million - *Leavitt* (talc, California)
- $4.69 billion – *Ingham* (talc, Missouri), 22 plaintiffs
- $25.75 million – *Anderson* (talc, California)
- $117 million – *Lanzo* (talc, New Jersey)
- $55 million – *Reistesund* (talc, Missouri)
- $72 million – *Fox* (talc, Missouri)

These verdicts are mostly in state court, but they illustrate the trend, and federal courts are not immune. The experience in the Roundup™ federal MDL trial noted above demonstrates the problem. Judge Chhabria, in his pretrial ruling on summary judgment and *Daubert* motions, found that the admissibility of the plaintiffs' expert evidence was "a very close question," and that the "evidence of a causal link between glyphosate exposure and NHL in the human population seems rather weak."[7] He further concluded that "[t]he evidence, viewed in its totality, seems too equivocal to support any firm conclusion that glyphosate causes NHL. This calls into question the credibility of some of the plaintiffs' experts, who have confidently identified a causal link."[8] In this opinion, the court characterized the plaintiffs' evidence as "shaky."[9] The judge then declared that "plaintiffs appear to face a daunting challenge at the next phase,"[10] and again found that "it is

[7] *In re Roundup Prods. Liab. Litig*., 390 F. Supp. 3d 1102, 1108 (N.D. Cal. 2018).

[8] *Id.* at 1109.

[9] *Id.* at 1151.

[10] *Id.* at 1109.

a close question whether to admit the expert opinions"[11] of even the best of plaintiff's five experts. In a later ruling, the judge found that the plaintiffs' experts "barely inched over the line."[12]

Despite these obvious problems, the court held that, under Ninth Circuit law, he was only allowed to exclude true "junk science," and thus he permitted four of the experts to testify. The result, as noted above, was an $80 million verdict based on "shaky" science. The case is on appeal.

Our system of justice can no longer afford to allow such marginal testimony under Rule 702. Verdicts in the hundreds of millions or even billions of dollars must be based on, if anything, significantly more reliable testimony than even *Daubert* itself would require today. For this reason, the Coalition urges the Committee to continue to enhance court gatekeeping authority under Rule 702, and to include any necessary provisions and comments to ensure that federal verdicts cannot be premised on "shaky" science that barely gets over an extremely low bar.

The Coalition thus supports the comments of Lawyers for Civil Justice and enhancements to increase judicial emphasis on Rule 702(b) and (d) as noted above and as submitted by other commenters.[13]

Respectfully submitted,

The Coalition for Litigation Justice, Inc.

[11] *Id.* at 1151.

[12] *In re Roundup Prods. Liab. Litig*., 358 F. Supp. 3d 956, 957 (N.D. Cal. 2019).

[13] *See* Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Subcommittee on Rule 702, In Support of Amending Rule 702 to Address the Problem of Insufficient Basis for Expert Testimony (Oct. 10, 2018); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation (Mar. 2, 2020).

From: Anderson, William
To: RulesCommittee Secretary
Subject: Comments on Rule 702 Amendment
Date: Wednesday, July 29, 2020 4:56:19 PM
Attachments: Coalition for LItigation Justice Rule 702 Comments.pdf

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Ms. Womeldorf, I represent the Coalition for Litigation Justice, Inc. Please find attached the comments of the Coalition for consideration by the Committee on possible amendments to Rule 702. Thank you for your attention.

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COMMENT TO THE

ADVISORY COMMITTEE ON EVIDENCE RULES AND ITS RULE 702 SUBCOMMITTEE

IN SUPPORT OF AMENDING RULE 702 AND ITS COMMENTS TO ACHIEVE MORE ROBUST AND CONSISTENT GATEKEEPING

July 31, 2020

The International Association of Defense Counsel ("IADC") respectfully submits this Comment in support of amending Federal Rule of Evidence 702 and its comments to achieve more robust and consistent judicial gatekeeping.

The IADC is an invitation-only, peer-reviewed membership organization of approximately 2,500 of the world's leading corporate and insurance defense lawyers and insurance executives. The IADC has been serving its members for a century. Its core purpose is to enhance the development of skills and professionalism of its members to benefit the civil justice system, the legal profession, and society in general. IADC members handle cases in all federal jurisdictions and have been involved in many precedent-setting decisions and appeals.

Rule 702 is a rule more often misunderstood by some courts than followed over the last twenty years.[1] As the Advisory Committee notes to the 2000 Amendments to the Rule state clearly, "the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[2]

Too many courts misunderstand this clearly-articulated standard. In fact, at least two appellate circuits—the Eighth and the Ninth Circuits—have expressly adopted standards for admissibility that defy the Advisory Committee's 2000 Comment. In addition, numerous trial courts throughout the nation frequently admit flimsy expert evidence, usually by reasoning that challenges to an expert's methods are challenges to the weight the evidence should receive rather than its admissibility. The Standing Committee is aware of this specific problem, lamenting that "crafting an amendment that essentially tells federal courts to 'apply the rule' may be challenging."[3]

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[1] *See, e.g.*, Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *And The Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 127 (2006).

[2] Advisory Committee Notes on Rule 702—2000 Amendment (citing *Bourjaily v. United States,* 483 U.S. 171 (1987)).

[3] Agenda Book for June 12, 2018, Standing Committee Meeting, at 433.

I. The Eighth Circuit Refuses Only "Fundamentally Unsupported" Expert Testimony

The Eighth Circuit has interpreted Rule 702 to admit evidence wherever possible rather than as a tool to exclude evidence that will not help the trier of fact.[4] As a result, the court has held that an expert's opinion should be excluded "only if it is so fundamentally unsupported that it can offer no assistance to the jury."[5] These standards originate in opinions that predate not only the 2000 Amendments to Rule 702, but the Supreme Court's announcement of new standards for admitting expert testimony in *Daubert.*[6]

To give an idea of the pernicious effects this legacy standard for admitting expert testimony has imposed, one need only look at the case that served as the origin point for mass litigation over talcum powder: a trial in the District of South Dakota in *Berg v. Johnson & Johnson.*[7] In *Berg,* the plaintiff sued Johnson & Johnson, alleging that its talc products had caused her ovarian cancer.

In preparing to move for summary judgment, Johnson & Johnson challenged the testimony of the various experts Ms. Berg had indicated she would employ, including an epidemiologist who had conducted a prior study of ovarian cancer, but whose methodology was severely flawed. Among other problems, the epidemiologist did not rule out alternative causes of ovarian cancer,[8] his testimony conflicted with the existing scientific literature,[9] his data was "'cherry-picked' … solely for purposes of litigation,"[10] and his conclusions conflicted with his non-litigation research and with each other internally.[11]

Despite conceding the existence of these problems, the trial court admitted the expert's testimony, relying heavily on the highly permissive standard the Eighth Circuit had articulated.[12]

Post-*Berg*, plaintiffs across the country filed nearly identical talc lawsuits against Johnson & Johnson and other defendants. Those copycat suits have produced dramatically different results.[13] At one extreme, a twenty-two plaintiff case in the City of St. Louis produced a $4.69 billion verdict, reduced to $2.12 billion by the Missouri Court of Appeals.[14] There have been several multi-million dollar verdicts in various jurisdictions, including California.[15] Despite these

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[4] *See, e.g., Sappington v. Skyjack, Inc.,* 512 F.3d 440, 448 (8th Cir. 2008); *Lauzon v. Senco Prods., Inc.,* 270 F.3d 681, 686 (8th Cir. 2001); *Arcoren v. United States,* 929 F.2d 1235, 1239 (8th Cir.), *cert. denied*, 502 U.S. 913 (1991).

[5] *Wood v. Minn. Mining & Mfg. Co.,* 112 F.3d 306, 309 (8th Cir. 1997).

[6] *Daubert v. Merrell Dow Pharms., Inc.*509 U.S. 579 (1993).

[7] 940 F. Supp. 2d 983 (D.S.D. 2013).

[8] *Id.* at 991.

[9] *Id.*

[10] *Id*.

[11] *Id.* at 992.

[12] *Id.* at 991-92.

[13] *See* Nicole Prefontaine, *Talcum Powder & Expert Power: Admissibility Standards of Scientific Testimony*, 59 Jurimetrics J. 341 (2019).

[14] *See Ingham v. Johnson & Johnson*, 2020 WL 3422114 (Mo. Ct. App. June 23, 2020). J&J has said it will appeal to the Missouri Supreme Court.

[15] *See* William L. Anderson & Kieran Tuckley, *How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos & Tort Litigation,* 42 Am. J. Trial Advoc. 39 (2018).

verdicts, New Jersey courts have dismissed similar cases,[16] and Johnson & Johnson has won others at trial.[17]

In May 2020, Johnson & Johnson announced it was discontinuing North American sales of its talcum-based baby powder.[18] Among other reasons, the company attributed the decision to declining demand caused by misinformation from a "constant barrage of litigation advertising."[19]

In contrast to the inconsistent rulings in the courts, the scientific consensus supports Johnson & Johnson. For example, in January, the *Journal of the American Medical Association* published the results of an original investigation in which it announced that, after examining four cohort populations involving more than 250,000 women, "there was not a statistically significant association between use of [talcum] powder in the genital area and ovarian cancer."[20]

II. The Ninth Circuit Admits Everything Short of "Unreliable Nonsense"

The Ninth Circuit has interpreted Rule 702 past the bounds of its text, impacting cases such as the litigation involving the popular herbicide Roundup™.[21] That litigation has taken a finding by the International Agency for Research on Cancer (a watchdog group tasked with identifying novel potential carcinogens for further study) that the active ingredient in Roundup™ (glyphosate) has the potential to cause cancer, and expanded it into a wholesale challenge to the sale of glyphosate in the United States.

The scientific consensus remains that glyphosate does not pose cancer risks at human-level doses.[22] Nonetheless, in the years preceding the Roundup™ litigation, the Ninth Circuit had decided a series of cases in which various panels of the appellate court had—in a series of admitted "close calls"—allowed the admission of "shaky" expert evidence to the jury, citing the "interests of justice" over those of accuracy.[23]

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[16] *See* Prefontaine, *supra* note 13, at 341.

[17] *See, e.g.*, Tina Bellon, *Jury Clears J&J of Liability in New Jersey Talc Cancer Case*, 41 No. 1 Westlaw J. Asbestos 5 (2018); Tina Bellon, *New Jersey Jury Finds J&J Not Liable in Talc Cancer Trial; Company Settles Three Other Cases*, 41 No. 13 Westlaw J. Asbestos 2 (2019); Nate Raymond, *Johnson & Johnson Wins California Lawsuit Claiming Asbestos in Talc Caused Cancer*, 28 No. 11 Westlaw J. Prod. Liab. 5 (2017); Nate Raymond, *Johnson & Johnson Wins Trial in Talc Product Liability Lawsuits*, 28 No. 2 Westlaw J. Prod. Liab. 4 (2017).

[18] *See* Tiffany Hsu & Roni Caryn Rabin, *Johnson & Johnson to End Talc-Based Baby Powder Sales in North America,* N.Y. Times, May 19, 2020, *at* https://www.nytimes.com/2020/05/19/business/johnson-baby-powder-sales-stopped.html.

[19] Amanda Bronstad, *Expert Ruling Was 'Tipping Point' for J&J's Talc Withdrawal, Lawyers Say*, Law.com, May 22, 2020, *at* https://www.law.com/2020/05/22/expert-ruling-was-tipping-point-for-jjs-talc-withdrawal-lawyers-say/?cmp=share_twitter.

[20] Katie M. O'Brien, *et al*., *Association of Powder Use in the Genital Area with Risk of Ovarian Cancer*, 323 JAMA 49, 49-59 (2020).

[21] *See In re Roundup Prods. Liab. Litig*., 390 F. Supp. 3d 1102, 1108 (N.D. Cal. 2018).

[22] *See Nat'l Ass'n of Wheat Growers v. Becerra*, 2020 WL 3412732, at *2 (E.D. Cal. June 22, 2020) (stating that, in contrast to IARC, "several other organizations, including the EPA, other agencies within the World Health Organization, and government regulators from multiple countries, have concluded that there is insufficient or no evidence that glyphosate causes cancer.").

[23] *See Wendell v. GlaxoSmithKline LLC,* 858 F.3d 1227, 1237-38 (9th Cir. 2017), *cert. denied sub nom. Teva Pharms. USA, Inc. v. Wendell*, 138 S. Ct. 1283 (2018) (reversing exclusion of expert evidence as abuse of discretion; "interests of justice favor leaving difficult issues in the hands of the jury," even when they involve "shaky" expert evidence);

In the Roundup™ litigation, the trial court admitted the testimony of an epidemiologist who testified that there was a specific relationship between exposure to glyphosate and non-Hodgkin's lymphoma, despite the admittedly "valid" critique that she did not adequately adjust her data to account for use of other pesticides,[24] and an outright admission that "this portion of her presentation calls her objectivity and credibility into question."[25]

The court ultimately admitted her testimony because—quoting the Ninth Circuit—it did "not rise to the level of an 'unreliable nonsense opinion.'"[26] The trial court conceded that the Ninth Circuit's permissive standard "has resulted in slightly more room for deference to experts in close cases than might be appropriate in other circuits," which is "a difference that could matter in close cases."[27]

That difference has mattered a great deal. There have been three trials in cases alleging that plaintiffs developed Non-Hodgkin's lymphoma from exposure to Roundup™, one in San Francisco federal court and two in Bay Area state courts.[28] The trials resulted in plaintiff verdicts totaling $2.4 billion before post-trial reductions and received national media attention because of their enormity.[29] The cases are on appeal and there are reports that Bayer may be working toward a resolution of the litigation at a cost of up to $9.6 billion for the current claims alone. The *Wall Street Journal* called the potential settlement "a shakedown for the history books,"[30] after describing "the entire Roundup litigation" as "a stickup."[31]

Like the talc litigation, the science in the courtroom in Roundup™ does not match the scientific consensus in the real world.

For example, EPA publicly reiterated in January 2020 that the agency had "thoroughly evaluated potential human health risk associated with exposure to glyphosate and determined that there are no risks to human health from the current registered uses of glyphosate and that

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Messick v. Novartis Pharms. Corp., 747 F.3d 1193, 1198-99 (9th Cir. 2014) (reversing summary judgment; trial court erred in excluding expert testimony as scientifically unreliable, not recognizing that "[m]edicine partakes of art as well as science"); *Alaska Rent-a-Car, Inc. v. Avis Budget Group, Inc.,* 738 F.3d 960, 969 (9th Cir.), *cert. denied*, 571 U.S. 1024 (2013) (reversing exclusion of expert: "Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.").

[24] *In re Roundup Prods. Liab. Litig.,* 390 F. Supp. 3d 1102, 1140 (N.D. Cal. 2018).

[25] *Id*. at 1109.

[26] *Id.* at 1113 (quoting *Alaska Rent-a-Car, Inc.,* 738 F.3d at 969); *see also In re Roundup Prods. Liab. Litig*., 358 F. Supp. 3d 956, 957 (N.D. Cal. 2019) (stating that plaintiffs' experts "barely inched over the line.").

[27] *In re Roundup Prods. Liab. Litig.,* 390 F. Supp. 3d at 1113.

[28] *See* Editorial, *The Roundup Settlement*, Wall St. J., June 29, 2020, at A14, *at* https://www.wsj.com/articles/the-roundup-settlement-11593212426.

[29] Sara Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits*, Wall St. J., Nov. 25, 2019, *at* https://www.wsj.com/articles/inside-the-mass-tort-machine-that-powers-thousands-of-roundup-lawsuits-11574700480; *see also Johnson v. Monsanto Co*., 2020 WL 4047332 (Cal. Ct. App. July 20, 2020).

[30] *See* Editorial, *The Roundup Settlement*, *supra* note 28.

[31] Editorial, *The Roundup Stickup,* Wall St. J., Dec. 25, 2019, *at* https://www.wsj.com/articles/the-roundup-stickup-11577299381. Bayer's CEO told Fox Business, "I would say that the country's in dire need of tort reform." *Werner Baumann, CEO of Bayer, is Interviewed on Fox Business*, CQ-Rollcall Pol. Transcriptions, 2020 WLNR 17711970 (June 25, 2020).

glyphosate is not likely to be carcinogenic to humans."[32] EPA's position is consistent with other international authorities, including the Canadian Pest Management Regulatory Agency, Australian Pesticide and Veterinary Medicines Authority, European Food Safety Authority, European Chemicals Agency, German Federal Institute for Occupational Safety and Health, New Zealand Environmental Protection Authority, and the Food Safety Commission of Japan.[33]

In June of 2020, a California federal district court permanently enjoined the state from requiring a "Proposition 65" cancer warning on glyphosate-based herbicides because "the great weight of evidence indicates that glyphosate is not known to cause cancer."[34]

III. Other Courts Do the Same, Even Without Explicit Appellate Guidance

Other courts also misunderstand the rule's requirement that the plaintiff bears the burden of establishing admissibility. As a result, we see cases where courts push off valid questions about methodology—which is supposed to determine reliability—as questions of weight of the evidence. This allows the courts to avoid difficult decisions about whether scientific evidence is appropriate. But those decisions will be equally—if not more—difficult for juries to make, especially with the knowledge that the appointed gatekeeper found the evidence appropriate for them to hear. As several commentators have noted, courts conflate the concepts of sufficiency and weight in ways that keep scientifically dubious cases alive.[35]

- In *Zollicofer v. Gold Standard Baking, Inc.,*[36] the defendants challenged the admissibility of a rebuttal declaration by an economist purporting to show that certain policies were discriminatory in effect. The trial court admitted his testimony over objections about his failure to vet the data used, because questions of proper vetting of data went to the "weight" of testimony, not its admissibility.[37]
- In *Hospital Authority of Metropolitan Government of Nashville and Davidson County, Tenn. v. Momenta Pharmaceuticals, Inc.,*[38] the defendants challenged the admissibility of a report from an economist because it was unreliable given the expert's failure to perform the usually required statistical analysis. The trial court admitted the testimony anyway, holding that the use of statistical analysis (a methodological question) went to "weight," not admissibility.[39]

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[32] U.S. Envtl. Prot. Agency, Glyphosate Interim Registration Review Decision, Case No. 0178, at 10 (Jan. 2020), *at* https://www.epa.gov/sites/production/files/2020-01/documents/glyphosate-interim-reg-review-decision-case-num-0178.pdf.

[33] Letter from Michael L. Goodis, P.E., Dir., Registration Div., Office of Pesticide Programs, EPA to Glyphosate Registrants (Aug. 7, 2019), *at* https://www.epa.gov/sites/production/files/2019-08/documents/glyphosate_registrant_letter_-_8-7-19_-_signed.pdf.

[34] *See Nat'l Ass'n of Wheat Growers*, 2020 WL 3412732, at *8.

[35] *See, e.g.,* David L. Faigman, *et al., Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony,* 110 Nw. U. L. Rev. 859, 862 (2016) (noting persistent confusion between admissibility and weight in federal courts).

[36] 2020 WL 1527903 (N.D. Ill. Mar. 31, 2020).

[37] *Id.* at *15.

[38] 333 F.R.D. 390, 400 (M.D. Tenn. 2019).

[39] *Id.* at 402.

- In *In re National Prescription Opiate Litigation,*[40] the court denied the defendant's Rule 702 challenge to an expert who had "failed to adequately consider econometrics concepts such as nonstationarity and endogeneity in her analysis."[41] The court held that "the significance of endogeneity goes to the weight, not the admissibility" of the testimony.[42]
- In *Taylor v. Trapeze Management, LLC,*[43] the court rejected a challenge to a proposed marketing research expert, holding that challenges to survey design and population went to weight, not admissibility.

Each of these opinions represents a judge's misunderstanding that a jury is the best arbiter of the methodology for difficult questions. Rule 702 should be clear that it is the court's responsibility to decide question such as the appropriate method of vetting data or the proper role of nonstationarity and endogeneity in econometrics research, to use examples from the cases mentioned above.

Leaving these questions to the jury is not just abdicating the judge's gatekeeping role, it is privileging persuasiveness—which can depend on a number of non-rational factors such as narrative framing, cognitive bias, and outright prejudice—over accuracy. These decisions do not meet the requirements of Rule 702. They also conflict with the purpose of the federal rules, which are meant to "ascertain[] the truth and secur[e] a just determination."[44]

IV. Proposed Amendment

Reform does not require revolutionary changes to the Federal Rules of Evidence. Rule 702 already requires a preponderance of proof standard. Currently, the 2000 Committee Notes state that, consistent with Rule 104(a) "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[45]

Not all rulings admitting experts based on a preponderance of the available evidence will be free from criticism. However, each of the various holdings listed above—which defer questions of methodology to the jury or knowingly admit faulty findings—lacked any mention of this standard, or any finding which would meet it.[46]

Therefore, we propose the following amendment to Rule 702:

> 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, after findings consistent with Rule 104, the court determines:".

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[40] 2019 WL 3934597, *10 (N.D. Ohio Aug. 20, 2019).

[41] *Id.* at *10.

[42] *Id.*

[43] 2019 WL 1977514, *3 (S.D. Fla. Feb. 28, 2019).

[44] *See* Fed. R. Evid. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

[45] Fed. R. Evid. 702, Committee Notes on Rules – 2000 Amendment.

[46] *See Zollicofer,* 2020 WL 1527903, at *15 (no mention of preponderance standard); *Hosp. Auth. of Nashville,* 333 F.R.D. at 402; *In re Nat'l Prescription Opiate Litig.,* 2019 WL 3934597, at *10; *Taylor,* 2019 WL 1977514, at *3.

Adding language to Rule 702 specifically referencing this standard, instead of leaving it in the Notes, should prevent courts from continuing to misunderstand the preponderance standard. It should also encourage both sides to brief the issues in terms of the preponderance of available evidence and encourage courts to make findings on each factor.

V. Conclusion

The IADC appreciates the opportunity to share its views. We are particularly concerned about mass tort litigations in which the science in the courtroom seems increasingly divorced from the mainstream scientific consensus outside the courtroom. The rule of law and credibility of the civil justice system will suffer along with the nation's competitiveness if outcomes in the courts appear arbitrary. We encourage the Committee to adopt amendments to address this problem including the approach we have outlined here and those submitted by other commenters.[47]

[47] *See* Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Subcommittee on Rule 702, In Support of Amending Rule 702 to Address the Problem of Insufficient Basis for Expert Testimony (Oct. 10, 2018); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation (Mar. 2, 2020).

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March 2, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

The National Association of Mutual Insurance Companies ("NAMIC") respectfully offers these comments to the Advisory Committee on Evidence Rules ("Committee"), which is entrusted with the essential task of ensuring the Federal Rules of Evidence ("FRE") are fair, plainly understood, and uniformly applied.

NAMIC is the largest and most diverse national property/casualty insurance trade and political advocacy association in the United States. Its 1,400 member companies write all lines of property/ casualty insurance business and include small, single-state, regional, and national carriers accounting for 50 percent of the automobile/ homeowners' market and 31 percent of the business insurance market. NAMIC has been advocating for a strong and vibrant insurance industry since its inception in 1895.

In our own capacity and representing the legal officers of our member companies that are frequently engaged with the American civil justice system, we represent stakeholders who rely on the federal courts to be a st forum for the resolution of legal disputes on the merits.

We compliment the Committee on its diligence in evaluating practices under Rule 702, but we are concerned that, contrary to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, some courts may not sufficiently fulfilled their obligation to fully execute or enforce their requirement to ensure the role of expert witnesses.

In a growing number of cases, there appear to be courts deferring their responsibility to determine that a proposed expert's opinions have the requisite scientific support by first ensuring that the testimony is the product of reliable principles and methods and is reliably applied. Other courts seem to presume, rather than require the establishment of, expert's qualifications, opinions and methodologies.

We support the Committee's general caution about amendments that clarify rather than change standards; address problems of adherence to, rather than understanding of, the rule; and affect the development of legal principles in a way perhaps better left to case law.

We do respectfully suggest that the Committee consider amendments to Rule 702 that would remedy the potential inconsistency in practice by clarifying that the proponent of an expert's testimony bears the burden of establishing its admissibility, by demonstrating to the presiding judge the sufficiency of the basis and reliability of the expert's methodology and its application. Further, the court should not permit an expert to assert a degree of confidence in an opinion that is not itself derived from sufficient facts and reliable methods.

Thank you for your consideration.

Sincerely,

(b)(6) per EOUSA

Thomas J. Karol
General Counsel Federal
National Association of Mutual Insurance Companies.

August 31, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Amending Federal Rule of Evidence 702

Dear Ms. Womeldorf:

In 2015, we co-authored the article *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57(1) William & Mary Law Review 1 (2015). In our article, we reviewed the drafting history of the 2000 amendments to Rule 702, the new language that resulted, and the many ways in which federal courts have either completely ignored or misinterpreted the standard for expert admissibility that was codified in the amended rule.

We have been gratified by the serious attention this article has garnered from the Advisory Committee on Evidence Rules ("Committee"), and we commend the Committee for the further analyses it has conducted on this issue, much of which is set forth in Judge Schroeder's recent article, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95(5) Notre Dame Law Review 2039 (2020). While the Committee has focused on different proposed language for an amended Rule 702 than we proposed in our 2015 article, we believe that the language being considered by the Committee, along with further guidance in an accompanying Committee note, would address many of the more significant problems of judicial recalcitrance noted in our article.

We write now in response to arguments that – notwithstanding clear examples of judicial misapplication of Rule 702 – the Committee should forswear any amendment to the Rule and rely instead on judicial education in the hope that this will persuade recalcitrant courts to more faithfully fulfill their gatekeeping responsibility.

As the Committee may recall, similar arguments were made prior to the 2000 amendments. Now, as then, "[a] number of public commentators asserted that Rule 702 should not be amended because it is currently working well" and that "courts are reaching conformity over the meaning of *Daubert*."[1] In response, Committee Reporter, Professor Capra explained that opponents to a revised Rule "tend[ed] to overstate the existence of post-*Daubert* uniformity" and cited to cases that has misapplied the admissibility standard in the very same ways that many courts continue to misapply the standard today:

[1] *See* March 1, 1999 Memorandum from Dan Capra, Reporter, to Advisory Committee on Evidence Rules, re: *Public comments on, and possible revisions to, Proposed Amendments to Evidence Rule 702*, at 47 ("March 1, 1999 Memo"), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV1999-04.pdf.

(1) improperly applying the Rule 104(b) standard to questions of expert admissibility,
(2) failing to follow the rule set forth in *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994) that requires courts to analyze each step in an expert's analysis including that the expert's methods are reliably applied to the facts of the case,
(3) drawing too strong a distinction between methodology and conclusions, and
(4) applying a non-rigorous approach to expert admissibility and improperly relegating the issue to a jury's consideration on the grounds that it can be subject to cross-examination and contrary proof."[2]

The persistence of these conflicting understandings of Rule 702 over the past 20 years speak strongly to the need for the Advisory Committee to amend the rule once more to secure uniformity and proper application of the expert admissibility standard. As Professor Capra recently noted: "[W]hen a conflict is long-standing, shows no signs of being resolved, and creates divergent standards for litigants operating within the same court system, *it is a drafting committee's responsibility to resolve the impasse*."[3] Professor Capra continued: "Indeed, one of the main reasons that the Advisory Committee was reconstituted in 1992 was to assist in the resolution of conflicts in the application of the Rules. In the context of damaging and unresolved conflicts, the benefits of uniformity and fairness outweigh the potential costs of dislocation and unintended consequences."[4]

Given these long-standing conflicts, it is sophistry to suggest that further efforts to educate the judiciary on the meaning of a rule that they have been applying for the past twenty years will somehow lead to an evolution in the views of recalcitrant judges. Moreover, such judicial training efforts will do little in the face of a large body of existing precedent misinterpreting amended Rule 702, nor will it address the confusion that this case law has engendered in attorneys and parties to disputes. Judges and litigators naturally rely on precedents from their own circuits, in the absence of a new rule superseding those precedents. Relevant decisions by all parties should be informed by an accurate and consistent application of the expert admissibility standards, not by erroneous precedents that ignored the clear wording and intent of a federal rule of evidence.

Similarly unpersuasive are two additional arguments that have been raised against the currently-proposed amendment to expressly incorporate the Rule 104(a) standard into Rule 702. First, opponents argue that the amendment is unnecessary because the 104(a) standard is referenced in *Daubert* itself and further set forth in the Committee's notes to the 2000 amendment to Rule 702. But with the 2000 Amendment, it is the language of Rule 702 that governs expert admissibility. As Judge Schroeder has recognized, "some courts have defaulted to [other language in *Daubert*] that Rule 702 is not meant to prohibit 'shaky but inadmissible' evidence" as grounds to improperly apply Rule 104(b)'s standard for admissibility.[5] Further, while the Committee's efforts to provide guidance with the Note to the 2000 amendment was admirable,[6] Committee notes are not legally binding and have often been ignored entirely in the context of interpreting Rule 702. .

[2] *Id.* at 47-48; *compare Toward a More Apparent Approach*, at 2042-43 (noting similar problems with post-2000 opinions).
[3] Capra DJ & Richter LL, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. Rev. 1873, 1886 (2019) (emphasis added).
[4] *Id.* at 1886-87.
[5] *Toward a More Apparent Approach*, at 2042-43.
[6] *See Poetry in Motion*, at 1921-22

Second, considerable effort has been taken to reanalyze the record in some of the cases that misapplied Rule 702 to suggest that those cases might have been resolved similarly under the correct standard.[7] Respectfully, we believe this effort is fundamentally misguided. As none other than the Ninth Circuit recognized in response to a similar argument in the context of a flawed trial court expert admissibility decision, "A post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization. This is hardly the gatekeeping role the Court envisioned in *Daubert* and its progeny."[8] In any event, speculation over whether a court would have reached the correct result if it had applied the right standard in an individual case is irrelevant to the legal hazard created by the continued entrenchment of the incorrect legal standard, which may be viewed as binding in subsequent cases.[9]

Finally, as we noted in our 2015 article and Judge Schroeder notes in his article as well, the courts that have been misapplying Rule 702 are not only misinterpreting the Rule's requirements, they are in many instances completely disregarding the work this Committee did in 2000 to more clearly define the expert admissibility standard. These courts repeatedly rely on case law pre-dating the 2000 revisions (and in some instances predating *Daubert* itself). They quote from the prior language of Rule 702. They blatantly contradict the guidance provided in the Advisory Committee note to the 2000 amendment. The Committee should not allow courts to rewrite federal rules to revert back to standards that this Committee and the Federal Rules have rejected. The rules drafted by the Committee – reviewed by the Standing Committee, adopted by the Judicial Conference, approved by the U.S. Supreme Court, and enacted by Congress – are the law, and they must be respected as such.

The proper application of Rule 702 should not depend on the happenstance of where an individual litigant lives or which federal court is called upon to preside over their claim. After twenty years of continued confusion, there is no realistic hope that this confusion will be resolved through developing precedent. As we stated in 2015, it is time to amend Rule 702.

Sincerely,

David E. Bernstein
University Professor
Antonin Scalia Law School
George Mason University

Eric G. Lasker
Partner
Hollingsworth LLP

[7] *See Towards a More Apparent Approach*, at 2044 ("A closer look at the facts of these cases suggests that some courts may be hewing closer to the Rule 7032 standard than the decisions suggest.")
[8] *Mukhtar v. Cal. State Univ.*, 319 F.3d 1073, 1074 (9th Cir. 2003)
[9] *See Towards a More Apparent Approach*, at 2050-51 & n. 85 (citing district court *Daubert* opinion that relied on what it concluded was binding 9th Circuit authority, despite the fact that the 9th Circuit's application of Rule 702 is "facially wrong").

BAKER WOTRING LLP

DEBRA TSUCHIYAMA BAKER
MANAGING PARTNER

DIRECT DIAL: (b)(6) per EOUSA
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September 3, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Amending Federal Rule of Evidence

Dear Ms. Womeldorf:

The Advisory Committee on Evidence Rules is considering an amendment to Federal Rule of Evidence 702 and a Committee Note to clarify that problems with the basis of an expert's opinion or the application of an expert's methodology are threshold issues of admissibility.[1] I write in support of that amendment and a clarifying Committee Note.

I am the managing partner in the Baker • Wotring LLP law firm in Houston, Texas. My firm primarily practices environmental litigation and complex commercial litigation, both of which involve extensive use of expert witnesses. My firm's experience with court application of the rules regarding expert witnesses leads me to believe that an amendment to Rule 702 and a clarifying Committee Note are essential to ensure that the trial court is the gatekeeper and that juries are not asked to consider expert evidence that is not supported by a proper factual basis and proper methodology.

My firm has been involved in various litigation in which a clarifying Committee Note and amendment to Rule 702 would have been relevant and helpful. For example, in cases where statistical methods are to be used in determining financial decisions and amounts in controversy, parties differ greatly in the determination of which statistical methodology should be used to determine the appropriate amounts. In some cases, trial courts have left it to the jury to decide which statistical methodology was proper. A clarification to the rules would clarify the court's gatekeeping responsibilities and what is appropriate for juries to consider.

The Advisory Committee has considered an amendment to the introductory language of Rule 702 clarifying that "the court must find the following requirements to be established by a preponderance of the evidence."[2] Based on our experience, we believe that such clarification is necessary. A specific amendment and an accompanying Committee Note detailing the rationale for the amendment would clarify the courts' gatekeeping responsibilities and encourage them to apply Rule 702 as intended. Similarly, including language specifying that Rule 702's requirements

[1] *See* Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) —Weight and Admissibility Questions*, at 1 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 19, 2018, meeting) at 171) ("Capra").

[2] Capra at 26.

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are mandatory and specifically identifying the preponderance standard will focus the courts on their gatekeeping role.

Thank you for your consideration and the opportunity to provide comments on this issue.

Sincerely,

(b)(6) per EOUSA

Debra Tsuchiyama Baker

FORD MOTOR COMPANY'S COMMENTS TO THE ADVISORY COMMITTEE ON EVIDENCE AND ITS RULE 702 SUBCOMMITTEE

September 26, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Amending Federal Rule of Evidence 702

Ford Motor Company ("Ford") appreciates the opportunity to submit its Comments to the Advisory Committee on Evidence and its Rule 702 Subcommittee ("Subcommittee") in support of amending Federal Rule of Evidence 702.

INTRODUCTION

Ford urges the Subcommittee to recommend an amendment to Rule 702 that would add explicit direction that trial courts must determine, by a preponderance of the available evidence, whether each of the admissibility requirements set forth in Rule 702(b), (c) and (d) have been met before an expert's opinions may be presented to the jury. In concluding that Rule 702 needs to be amended, Ford draws on its extensive litigation experience. Over the past 20 years Ford has tried to verdict more than 1,000 cases, including product liability, personal injury, employment, class actions, intellectual property, commercial, and consumer warranty. Ford has seen that many judges fail to recognize the courts' obligation to determine if an expert's analysis meets all elements of Rule 702.

FORD'S EXPERIENCE WITH RULE 702

Ford's experience shows that even appellate decisions giving strong direction about the courts' gatekeeping duties have been insufficient to impress upon trial judges what they must do to fulfill their role under Rule 702. *Nease v. Ford Motor Co*., a recent product liability lawsuit, illustrates the point. The plaintiffs in that case offered expert testimony that contaminants caused the subject vehicle's speed control cable to bind, leaving the throttle stuck in the open position and causing a crash.[1] Ford challenged the admissibility of these opinions due to the expert's insufficient factual basis and unreliable methodology as applied to the facts of the case:

[1] *Nease v. Ford Motor Co*., Case No. 3:13 – 29840, 2015 WL 4508691, at *2 (S.D. W.Va. July 24, 2015).

- inspections of the vehicle showed the speed control cable was not bound up and no materials were actually found wedged between the components at issue;
- the expert's borescope examination of the subject vehicle's components could not be distinguished from a different vehicle that was known not to have experienced a stuck throttle event;
- the expert never demonstrated speed control cable binding on the subject vehicle;
- the expert did not conduct any tests showing that accumulation of contaminants could ever overcome the spring pressure to cause a throttle to remain in the open position.[2]

The district court rejected Ford's motion to exclude this opinion testimony, declaring – despite the directives of Rule 702(b) and (d) – that "[e]very argument raised by Defendant goes to the weight, not admissibility, of his testimony."[3] The viability of the plaintiffs' case depended entirely on this opinion testimony. The lawsuit went to trial and the jury returned a verdict for the plaintiffs.

The Fourth Circuit, after reviewing how the district court addressed this key opinion testimony, concluded that "the court abandoned its gatekeeping function[.]"[4] The expert's opinions were not "based upon sufficient facts or data or the product of reliable principles and methods applied reliably to the facts of the case,"[5] and the district court's unconsidered dismissal of Ford's motion to exclude reflected a failure to understand the court's duty under Rule 702:

> For the district court to conclude that Ford's reliability arguments simply "go to the weight the jury should afford Mr. Sero's [plaintiff's expert witness] testimony" is to delegate the court's gatekeeping responsibility to the jury. The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. The district court's "gatekeeping function" under *Daubert* ensures that expert evidence is sufficiently relevant and reliable <u>when it is submitted to the jury</u>. Rather than ensure the reliability of the evidence on the front end, the district court effectively let the jury make this determination after listening to Ford's cross examination of Sero.[6]

Despite the clear guidance that the Fourth Circuit provided, Ford observes that even in the immediate aftermath of *Nease,* courts within that circuit do not grasp that fulfilling Rule

[2] *Id*.

[3] *Nease v. Ford Motor Co*., Case No. 3:13 – 29840, 2015 WL 1181643, at *1 (S.D. W.Va. March 13, 2015). *See also Nease*, 2015 WL 4508691, at *3 (denying Ford's Rule 50(b) post-trial motion, stating "[t]he Court finds that Ford's arguments go to the weight the jury should afford Mr. Sero's testimony, not its admissibility.").

[4] *Nease v. Ford Motor Co*., 848 F.3d 219, 230 (4th Cir. 2017).

[5] *Id*. at 232.

[6] *Id*. at 231(emphasis original)(quotation omitted).

702's obligations demands that courts assess as a preliminary admissibility question whether the requirements of Rule 702(b), (c) and (d) are established by a preponderance of the evidence.[7] Three rulings exemplify this point. In *Sardis v. Overhead Door Corp*., the court rejected a motion to exclude based on the inadequacy of the expert's factual basis without finding that the expert had a sufficient foundation. The court declared that "a lack of testing, however, affects the weight of the evidence, not its admissibility" and noted that the defendant could address the expert's deficiencies with "vigorous cross-examination[.]"[8] Similarly, in *Patenaude v. Dick's Sporting Goods, Inc.*, the court dismissed a challenge aimed at the inadequacy of an expert's factual basis by stating, in contradiction to Rule 702(b), "it is well settled that the factual basis for an expert opinion generally goes to the weight, not admissibility."[9] Most recently, the court in *Rhyne v. U.S. Steel Corp*. repeatedly brushed aside arguments about the foundational deficiency of an expert's differential diagnosis, indicating that the factual basis is a matter solely for the jury to assess when deciding the weight to be given the opinions.[10] In doing so, the *Rhyne* court quoted a Fourth Circuit opinion issued just two months after the *Nease* decision that controverts both Rule 702(b) and the core *Nease* holding: "questions regarding the factual underpinnings of the expert witness' opinion affect the weight and credibility of the witness' assessment, not its admissibility."[11]

In Ford's view, the bewildering situation in the Fourth Circuit reveals the depth of ongoing judicial confusion about the courts' role in gatekeeping. Even following the *Nease* ruling and its unambiguous directive that "Rule 702 imposes a special gatekeeping obligation on the trial judge," many trial judges still will not evaluate the sufficiency of an expert's factual foundation or the reliability of the expert's methodological application to the facts of the case.[12]

[7] The Fourth Circuit is certainly not unique in this regard, although Ford will confine its comments to the caselaw of the Fourth Circuit as a concise example of the widespread judicial inconsistency.

[8] Case No. 3:17-CV-818, 2019 WL 560273, at *3 (E.D. Va. Feb. 12, 2019)(quotation omitted).

[9] Case No. 9:18-CV-3151-RMG, 2019 WL 5288077, at *2 (D.S.C. Oct. 18, 2019).

[10] Case No. 3:18-CV-00197-RJC-DSC, at *11, *16, *17-18 (W.D.N.C. July 23, 2020).

[11] *Bresler v. Wilmington Trust Co*., 855 F.3d 178, 195 (4th Cir. 2017). Notably, this statement quotes *Structural Polymer Grp. v. Zoltek Corp*., 543 F.3d 987, 997 (8th Cir. 2008), but that opinion discloses that the proposition actually comes from a pre-*Daubert* ruling, *South Cent. Petroleum, Inc. v. Long Bros. Oil Co.,* 974 F.2d 1015, 1019 (8th Cir.1992). This is a common occurrence. *See* Lee Mickus, "Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstandings about Expert Evidence," Washington Legal Foundation Working Paper No. 217, at 25 n.77 (May 2020)("Pronouncements that challenges to an expert's factual basis or application of the methodology bear only on the weight of the testimony, not its admissibility, consistently stem from pre-*Daubert* decisions."). The tendency of some courts to structure their expert assessments around stale caselaw statements contributes to the courts' inconsistency and confusion about the admissibility standard. *Id*. at 24-25.

[12] Remarkably, district courts in recent cases such as *Rhyne*, *Patenaude* and *Sardis* have quoted the *Bresler* statement that "questions regarding the factual underpinnings of the expert witness's opinion affect the weight and credibility of the witness's assessment, not its admissibility" even though that language was specifically identified as an example of "wayward case law" that disregards Rule 702(b). Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 44-45 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018). *Rhyne* even post-dates Judge Schroder's identification of the *Bresler* statement as "effectively

The lack of uniformity in the treatment of opinion testimony leaves litigants guessing about how courts will address evidence critical to the viability of claims and defenses.

If a circuit ruling like *Nease* will not focus the attention of judges within that same circuit on the findings the court must make when applying Rule 702, then an amendment to Rule 702 is necessary to re-align the courts with the intended operation of the rule and bring consistency to the gatekeeping function. An amendment should add direction that the court must find by a preponderance of the evidence that the requirements of Rule 702(b), (c) and (d) have been established.[13] This change to the rule should be accompanied by a detailed Committee Note indicating that prior cases declaring an expert's factual foundation or methodological application to be questions of weight solely for the jury to determine do not reflect the Rule 702 standard. Ford expects that these actions would bring court approaches to expert admissibility in line with the intended operation of Rule 702.

CONCLUSION

Ford appreciates the Subcommittee's interest in examining Rule 702 practice and the beneficial effect an amendment would have to address ongoing court confusion about the expert admissibility standard. Please do not hesitate to contact Ford if the Subcommittee would like Ford to provide further information or assistance.

Ford Motor Company

(b)(6) per EOUSA

John Mellen
General Counsel

vitiat[ing] the application of Rule 104(a) to Rule 702(b)." Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2050 (2020).

[13] *See*, *e.g.*, International Association of Defense Counsel, In Support of Amending Rule 702 and Its Comments to Achieve More Robust and Consistent Gatekeeping at 6 (July 31, 2020)(suggesting language for amendment). In other contexts, Federal Rules of Evidence specify that judges must determine particular issues and incorporate the burden of production. *E.g.*, Fed. R. Evid. 411(b)(2)("In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."); Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following. . .").

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September 30, 2020

Via Federal Express

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Amending Federal Rule of Evidence 702

Dear Ms. Womeldorf:

It is my understanding that the Advisory Committee on Evidence Rules (the "Committee") is considering amendments to Federal Rule of Evidence 702. On behalf of Ballard Spahr, LLP, and as a commercial litigator who had addressed myriad issues arising under Rule 702 over the past 42 years of practice in numerous federal courts around the country, I am writing to point out some of the conflicting positions taken by various Circuits in interpreting and applying Rule 702.

Expert testimony is often critically-important in cases involving complex or technical subject matter, as it carries great weight with juries. The standards applied by the courts in determining the admissibility of expert testimony often play a significant, if not determinative, role in the outcome of numerous high-stakes cases. However, in the many years since the Committee last amended Rule 702 in 2000, and the Supreme Court last addressed Rule 702 in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), uncertainty and confusion have been engendered by conflicting decisions of the appellate and trial courts on various issues arising under Rule 702. The Committee should consider adopting amendments to the Rule to provide courts and practitioners with additional clarity and to promote much-needed uniformity in the application of the Rule.

In particular, an amendment is needed to resolve a circuit split in which some courts have improperly limited a trial court's gatekeeping function under *Daubert* to a review of the reliability of an expert's methodology under Rule 702(c), without regard to whether the expert reliably applied this methodology based upon sufficient facts or data.

For example, in *City of Pomona v. SQM North America Corp*., 750 F.3d 1036, 1048 (9th Cir. 2014), the Ninth Circuit held that "only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony." The Court of Appeals held that the trial court abused its discretion in excluding the proposed expert testimony, declaring that defendant's reliability challenges to the expert's testimony "is an issue for the jury" and "go to the weight that a fact finder should give to his expert report." *Id.* at 1047-1048.

The Court made no effort to reconcile this holding with Rule 702's requirement that the expert "has reliably applied" his or her chosen "principles and methods to the facts of the case" and that the testimony be "based upon sufficient facts or data." Fed.R.Evid. 702(b), (d). Moreover, the Court expressly acknowledged (*id*. at 1047) that its rule conflicts with the Third Circuit's oft-quoted holding in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994) (*Paoli II*), that "*any step* that renders the expert's testimony unreliable under the *Daubert* factors renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." (emphasis added). Significantly, *Paoli II's* "any step" approach was cited with approval in the Advisory Committee's Note to the 2000 amendment.

In a memorandum sent by Professor Daniel Capra to the Rule 702 Subcommittee on October 1, 2018, he discussed the conflict between *SQM* and *Paoli II*; emphasized that "the language used by the court [in *SQM*] is definitely at odds with Rule 702(d);" and commented that the *SQM* decision was one of "a fair number of courts [that] appear to have not read the Rule as it is intended." *See* Daniel Capra, Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) — weight and admissibility questions, at 1, 12-13 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules Oct. 19, 2018, meeting) at 171, 182-83.

The Ninth Circuit's "faulty methodology" rule also conflicts with rulings by the Second, Fifth, Sixth, Tenth, and Eleventh Circuits, each of which have endorsed the Third Circuit's "any step" requirement. *See Amorgianos v. Nat'l R.R. Passenger Corp*., 303 F.3d 256, 267 (2d Cir. 2002) (quoting *Paoli II*); *Curtis v. M&S Petroleum, Inc*., 174 F.3d 661, 670-71 (5th Cir. 1999) (same); *Tamraz v. Lincoln Electric Co.*, 620 F.3d 665, 670 (6th Cir. 2010) (same); *Attorney General of Oklahoma v. Tyson Foods, Inc*., 563 F.3d 769, 779-81 (10th Cir. 2009) (same); *McClain v. Metabolife Int'l, Inc*., 401 F.3d 1233, 1245 (11th Cir. 2005) (same).

On the other hand, decisions from other circuit courts are more closely aligned with the position adopted by the Ninth Circuit. For example, the First Circuit has held that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact." *Milward v. Acuity Specialty Prods. Grp., Inc*. 639 F.3d 11, 22 (1st Cir. 2011). Similarly, the Seventh Circuit has stated that "[t]he reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury; the court's role is generally limited to assessing the reliability of the methodology – the

framework – of the expert's analysis." *Manpower, Inc. v. Ins. Co. of Pennsylvania*, 732 F.3d 796, 808 (7th Cir. 2013).

And the Eighth Circuit has concluded that "the factual basis of expert testimony goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Bonner v. ISP Techs., Inc*., 259 F.3d 924, 929 (8th Cir. 2001). These appellate courts take the position that "[t]he district court usurps the role of the jury, and therefore *abuses its discretion*, if it unduly scrutinizes the quality of the expert's data and conclusions rather than the reliability of the methodology the expert employed." *Manpower, Inc*., 732 F.3d at 806 (emphasis added).

The foregoing conflict in the circuits has been discussed in numerous articles. *See, e.g*., "Defendant's Chances on *Daubert* May Vary By Circuit," Law360, Oct. 1, 2019; "High Court Ensures Split Over Gatekeeping Role Persists," Law360, Feb. 10, 2015 (noting that the Supreme Court denial of certiorari in *City of Pomona v SQM* "leaves open the question of whether faults in an expert's methodology require the wholesale exclusion of their proffered opinions or merely go to the weight of those opinions. As a result, *Daubert* challenges will continue to be governed by a more permissive standard in the Seventh, Eighth and Ninth Circuits and a more restrictive analysis in the Second, Third, Sixth and Tenth Circuits.")

Unfortunately, as exemplified by the *City of Pomona* decision by the Ninth Circuit, courts are all too frequently abdicating their gatekeeping responsibility under Rule 702 and *Daubert*. They are allowing the admission of unreliable expert testimony, based on the flawed assumption that a jury can properly understand and evaluate it with the benefit of competing expert evidence and vigorous cross-examination. The Ninth Circuit's "faulty methodology" rule creates a great risk that liability determinations will be based upon unsound science and too often leads to coercive settlements and substantial jury verdicts, which appellate courts are loathe to second-guess.

Thus, an amendment to Rule 702 is needed to resolve the conflicts and disarray in the circuit courts over the proper treatment of the factual foundations of expert testimony. Litigants should not be subjected to different admissibility standards under Rule 702 based upon the vagaries of where their case was brought.

Very truly yours,

DocuSigned by:
Burt Rublin
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BMR/sdm

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September 30, 2020

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Via E-Mail: *RulesCommittee_Secretary@ao.uscourts.gov*

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
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RE: Proposed Amendments to Federal. R. Evid. 702 Commentary

Dear Committee Members:

We understand that your committee is considering a Rule 702 amendment to clarify that sufficiency of an expert's opinion testimony is a threshold issue for the court rather than a question of weight to be decided by the jury. Confusion on that point is widespread among federal courts, and a review of inconsistent rulings within the Fifth Circuit alone underscores that revisions are badly needed to bring clarity to the law. Absent such clarification, practitioners face ongoing uncertainty and unpredictability concerning key admissibility determinations as they prepare evidence for trial. Please allow this comment to be considered in your analysis:

I. The language of and comments to Rule 702 require trial courts to determine the sufficiency of an expert's testimony as a threshold question of admissibility.

Rule 702 requires, as a prerequisite to the admission of expert testimony, that "the testimony is based on sufficient facts or data." Fed. R. Evid. 702(b). The 2000 comments to Rule 702 underscore that courts "must" assess factual basis as a component of reliability: "The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Fed. R. Evid. 702, 2000 comments. The burden of demonstrating a sufficient factual basis for expert testimony, moreover, is placed squarely on its proponent: "[T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987)." Fed. R. Evid. 702, 2000 comments.

II. The Fifth Circuit has provided conflicting directives about the trial court's role in resolving challenges to the sufficiency of an expert's testimony.

Notwithstanding the language of Rule 702 and associated comments, practitioners are faced with conflicting directives from the Fifth Circuit. On the one hand, the Fifth Circuit has recognized that "an opinion based on 'insufficient, erroneous information,' fails the reliability standard." *Moore v. Int'l Paint, L.L.C.*, 547 F. App'x 513, 151 (5th Cir. 2013) (quoting *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 389 (5th Cir. 2009)). "The existence of sufficient facts and a reliable methodology is in all instances mandatory." *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007). Thus, as required by the language of Rule 702, challenges to the factual basis for an expert's testimony are to be decided by the trial court as a threshold to admissibility.

On the other hand, however, the Fifth Circuit Court of Appeals has also stated:

> As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility… As the Supreme Court explained, "[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*, 509 U.S. at 596, 113 S.Ct. 2786; *see also Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002). While the district court must act as a gatekeeper to exclude all irrelevant and unreliable expert testimony, "the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory committee's notes (2000) (internal citations omitted).

Puga v. RCX Solutions, Inc., 922 F.3d 285, 294 (5th Cir. 2019).

Lacking clear guidance, the generalities stated in *Puga* have paved the way for many district courts within the Fifth Circuit to by-pass the requisite Rule 702 inquiry concerning (i) the factual basis for expert testimony, and (ii) whether the methodology has been reliably applied. These decisions reflect widespread confusion about the proper inquiry under Rule 702.

III. District courts have declined to conduct a Rule 702 inquiry into the factual basis of expert testimony.

Rule 702 states that trial courts must determine whether an expert's testimony is based on "sufficient facts and data." Nonetheless, courts have passed reliability questions on to juries without resolving a requisite threshold inquiry for the court: whether the underlying testimony is based on sufficient facts and data. Courts have deferred that question to the jury based on a mistaken belief that the "bases and sources" of expert testimony go to its weight rather than its admissibility:

- A Texas federal district court declined to resolve objections that an expert had "no support" for his opinions, and that use of and reliance on particular data inputs "rendered his opinions unreliable and speculative." According to the court, whether the expert used "arbitrary inputs" was "an issue for trial." *Innovation Sciences, LLC v. Amazon.com, Inc.*, Civ. No. 4:18-cv-474, 2020 WL 4201925, *8 (E.D. Tex. Jul. 22, 2020)

(quotation omitted). The court also stated that even "[i]f the underlying reasoning" for the expert's methodology was "flawed, absurd, or even irrational," nonetheless "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof' will serve as the proper antidote for attacking these potentially 'shaky' arguments." *Id.* And even if the expert's "claims are as unsupported or conclusory as [Defendants] claim[ ], then 'vigorous cross examination' will reveal that." *Id.*

- A district court in Louisiana held that: "To the extent [the defendant] questions otherwise the content of and support for [an expert's] report, including the bases and sources of his opinions, [the defendant] can address its concerns at trial through cross-examination of [the expert] and the presentation of countervailing testimony, as those issues go to the weight, not the admissibility, of [the expert's] testimony." *Compton v. Moncla Companies, LLC*, Civ. No. 17-2258, 2020 WL 1638287, *4 (E.D. La. Apr. 2, 2020).

- Another court declined to address an objection that the expert's damages assessment included improper assumptions and ignored key facts, stating that: "If [the expert] missed any important facts, the oversight should go to the weight of his opinions, not to their admissibility." *United States v. City of Houston, Texas*, Civ. No. H-18-0644, 2020 WL 2516603, *12 (S.D. Tex. May 15, 2020).

IV. District courts have declined to conduct a Rule 702 analysis into methodological gaps in expert testimony.

Under Rule 702, "the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "any step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." Fed. R. Evid. 702, 2000 Comment.

Nonetheless, federal district courts within the Fifth Circuit have characterized methodological challenges to gaps in expert testimony as matters of weight that may properly be deferred to the jury:

- Citing the Fifth Circuit's decision in *Puga*, a Texas federal district court permitted expert testimony over an objection that the expert failed to explain how each of his four premises validated his conclusion, and therefore that an analytical gap existed between the premises and the conclusion. "[W]hether [the expert's] testimony is supported by his premises is a question that should be determined by a jury because it attacks the weight of his testimony. The exclusion of expert testimony is the exception rather than the rule. *Puga v. RCX Sols., Inc.*, 922 F.3d 285 (5th Cir. 2019). Because the admissibility is not in question, the Court finds no reason to depart from the general rule of allowance." *Citizens State Bank v. Leslie*, Civ. No. 6-18-CV-00237, 2020 WL 3582665 (W.D. Tex. Apr. 9, 2020).

- Another Texas federal district court declined to address an objection that an expert did not "sufficiently explain the connection between her experience and her conclusions," concluding that the matter was "better left for cross examination, not a basis for exclusion." *AmGuard Insurance Companegal Aid*, 2020 WL 60247, *7, 111 Fed. R. Evid. Serv. 279 (S.D. Tex. Jan. 6, 2020). The 2000 comments to Rule 702, in contrast, specifically state: "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'"

- A Louisiana federal district court declined to substantively address an objection that an expert's lost wages assessment was "not the product of reliable principles and methods and is based on unsupported assumptions and incorrect facts and data," characterizing the objection as an attack on the "basis and sources" of the expert's calculations and concluding that, as such, it went to weight rather than admissibility. *Janania v. Old Republic Insurance Co.*, Civ. No.19-12773, 2020 WL 4500160, *8 (2020).

- A Mississippi federal district court rejected an argument that the expert's opinions were based on nothing more than unsupported ipse dixit, stating simply: "[The expert] cited some basis for his opinions. Therefore, they are not wholly unreliable." *John C. Nelson Construction, LLC v. Britt, Peters and Associates, Inc.*, Civ. No. 2:18-CV-222, 2020 WL 2027218, *5 (S.D. Miss. Apr. 27, 2020).

V. Examples of Unsatisfactory Rule 702 analysis

Example 1

In an asbestos exposure matter, the Court refused to limit the expansive opinions of plaintiff's proffered "Insulation Expert" based on a lack of qualifications and inadequate methodology. The proffered expert had a high school diploma and his sole relevant experience was (1) working as an insulator in shipyards for the majority of his working career; and (2) working as a California Certified Asbestos Consultant, which advises construction companies on issues relating to asbestos remediation in building materials. Despite being tendered as an "insulation expert," the witness offered opinions regarding the asbestos content of a host of products with which the plaintiff worked, including automotive brakes, clutches, engine gaskets, materials with which he has no relevant personal or professional experience. In addition, he offered opinions regarding the ability of these products to release respirable asbestos fibers when subjected to manipulation. To support these opinions, the expert testified that he performed various at-home "tests" on these products, but that he failed to keep records of these tests, including the testing protocol, or the results of the test. He was also unable to describe the methodology he employed in conducting his tests or measuring fiber release during the tests. The expert testified that he specifically does not rely on peer reviewed literature regarding fiber release, and instead relies on his own at-home tests.

We sought to limit the expert's testimony to matters on which he possessed the requisite training and experience, which were insulation and building materials, and excluding the expert's opinions relating to automotive products, with which he had no experience. We also sought to exclude the expert's reliance on his at-home "tests." After entertaining argument and acknowledging that the expert lacked the requisite training and experience with automotive products, the Court denied the motion and instructed the parties to raise it again after void dire on qualifications during the course of the trial.

Example 2

In another asbestos exposure case, the Court refused to exclude the testimony of an expert industrial hygienist regarding estimates of asbestos exposure a claimant received from various activities at our client's facility. The industrial hygienist relied on five studies approximating asbestos exposure from various activities involving insulation products, including cutting with a saw, tearing with a hammer, and mixing dry cement. Unfortunately, the evidence in the case failed to support a contention that any of these activities occurred at our client's facility, whether in the presence of the claimant or not. In fact, the available evidence indicated that at least some of these activities affirmatively did not occur. We filed a motion to exclude the expert's opinions as having been based on an inadequate foundation and contradictory to the available evidence.

The Court entertained extensive argument from us on the motion, agreeing with the fundamental premises of the motion that the studies relied upon by the expert were inapplicable to the case. After we completed our argument, the Court announced that the motion would be denied, without explanation and without ever hearing from plaintiff's counsel.

Conclusion

As these cases demonstrate, there is widespread confusion among federal courts about the proper role of courts in assessing the basis for an expert's testimony and the reliable application of the expert's methodology. Resulting inconsistencies in the case law all but assure that proper challenges to expert testimony under Rule 702 will nonetheless be characterized as matters of "weight and sufficiency" that the trial court need not address. In turn, divergent court rulings make it difficult if not impossible to predict the likelihood that such challenges will succeed. As a consequence, parties face not only increased costs associated with arguing matters that should be well-settled based on the language of Rule 202, but more importantly decreased certainty about threshold admissibility questions as they prepare evidence to support their claims and defenses for trial.

We appreciate your consideration of this comment and look forward to the results of your committee's final recommendation.

Respectfully submitted,
KUCHLER POLK WEINER LLC

By: */s/ Dawn R. Tezino*
Dawn R. Tezino

TAB 3

TAB 3A

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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, 2020

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, misleading presentation of a document or statement. The possible benefit in such a presentation is not limited to criminal cases.

Judge Grimm in *United States v. Bailey,* 2017 WL 5126163 (D.Md.), sets forth the following hypothetical to illustrate the need for a rule of completeness: 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 implicitly admitted owning the gun at the time of the robbery, when in fact he did no such thing.[1]

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.[2] 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 that the text of Rule 106 does not provide for completion of 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) or the common law by the party seeking completion.[3]

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 Fall 2019 Meeting indicate the position of the Committee on Rule 106 coming into the next meeting:

- The sense of the Committee is to retain the "fairness" language in the Rule and therefore the criteria for invoking the rule of completeness will remain the same. The amendment, if proposed, would address how a completing statement may be used.

- The Reporter is to provide two alternatives for addressing the hearsay issue: 1) allowing completion "over a hearsay objection" and 2) adding a second sentence to Rule

[1] 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 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."

[2] *See, e.g., United States v. Sanjar,* 853 F.3d 190, 204 (5th Cir. 2017): "When offered by the government, a defendant's out-of-court statements are those of a party-opponent and thus not hearsay. Rule 801(d)(2)(A). When offered by the defense, however, such statements are hearsay."

[3] 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).

106 stating that "The court may admit the statement to prove the truth of the matter asserted in it, if it is admissible for context."

● The Reporter is to provide two alternatives regarding oral statements. One is to make no change to the existing rule, so oral statements would remain uncovered by Rule 106. The other is to specifically include unrecorded oral statements within the protection of Rule 106.

● The amendment, if proposed, would not change the existing rule with respect to the timing of completion.

This memo is in four parts.[4] Part One discusses how and when Rule 106 applies, emphasizing that the requirements of the rule regarding the need for completion (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: 1) whether the rule operates as a hearsay exception, and 2) whether oral unrecorded statements are covered in one way or another. Part Three 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 Four 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 statements. The memo addresses concerns that including unrecorded statements in the rule of completeness will raise special difficulties.[5]

[4] Some passages from this memo are unchanged from the memo submitted for the Fall, 2019 meeting. But there are 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.

[5] Professor Richter's memo was provided in the agenda book for the last two meetings. It is reproduced for the convenience of the Committee.

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 the Committee has agreed that the "fairness" language of the existing Rule 106 is being retained.[6]

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. Mere relevance is definitely not enough. 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. The portion chosen by the government creates an inaccurate picture 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 a misleading impression about what the defendant said.

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 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 misleading impression.

[6] Note that there is language in the proposed Committee Note that emphasizes that nothing in the amendment will change the strict threshold requirements for invoking the rule.

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 completion requests. The D.C. Circuit Court of Appeals held that Rule 106 allows the use of hearsay evidence to complete a partial, misleading presentation, and in response to a "floodgates" argument the court stated that "[i]n almost all cases we think Rule 106 will be invoked rarely and for a limited purpose." *United States v. Sutton,* 801 F.2d 1346, 1369 (D.C.Cir. 1986). There is nothing in the reported cases in the D.C. Circuit, nor in other circuits following the same rule, to indicate that the floodgates have been opened on Rule 106 completeness arguments.

It is notable that during the drafting process on Rule 106, the Department of Justice opposed the fairness standard currently employed in Rule 106. The Department argued that the "fairness" standard was too vague, and that completeness should instead be limited to "the same subject matter." The Department urged that the fairness language would allow defense counsel to "usurp the function of cross-examination" and "disrupt the orderly presentation of evidence." 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. The DOJ's argument was rejected, and the Rule passed with the fairness standard intact. 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.

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* knowing about a gun. So the portion offered by the government was misleading. The Seventh Circuit held that once the prosecution elicited testimony that the defendant admitted knowing about the drugs, the defendant should have been allowed to elicit the part about not knowing the gun was there. Otherwise the jury would use the statement as if the defendant implicitly admitted to having a gun, when that was not the case.

- *United States v. Sweiss,* 800 F.2d 684 (7th Cir. 1986): The government admitted a recording of a conversation between the defendant and an informant, which indicated that the defendant knew in advance of the conversation about a plot to obstruct justice. The government argued that this showed the defendant knew independently about, and so was connected to, the plot. But a prior recording of a conversation between the defendant and the same informant indicated that the defendant had been told about the plot *by the informant*. In effect, the government split up the statements "yes I know" and "because you told me." 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 (11th 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. Altvater,* 954 F.3d 45 (1st Cir. 2020): In an insider trading prosecution, the government offered portions of the defendant's deposition before the SEC. The defendant argued that the government offered a "massaged" portion, edited to do as much damage as possible to the defendant's position at trial that he traded on publicly

available information based on his own idiosyncratic views. The defendant contended that Rule 106 required admission of all the redacted portions of the deposition. But the court held that the defendant had the burden of showing just how the portions offered by the government were misleading, and just how the redacted portions were necessary to correct any misimpression. The court stated that the defendant failed to "engage in the granular level of analysis" necessary to succeed on the completeness challenge. He requested that all redacted material be admitted "without attempting to meet his burden to explain why it would be necessary to admit into evidence each and every statement contained in the redacted material to dispel some alleged distortion caused by the government's redactions." Thus Rule 106 cannot be used for broadside claims that when portions are admitted, redactions must be admitted as well.

● *United States v. Williams,* 930 F.3d 44 (2nd Cir. 2019): 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. 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.Thiam,* 934 F.3d 89 (2nd Cir. 2019): The defendant was convicted for receiving bribes as a public official. He made inculpatory statements in his post-arrest interview, regarding his acceptance of bribes, that were admitted against him. He argued

that the trial court erred in refusing to admit other excerpts of that interview under Rule 106. These excluded portions related to the role that other government officials played in the bribery scheme, and to personal loans that the defendant had received from other third parties. But these statements, while exculpatory, related to matters other than the defendant's activity. The court stated that "[b]ecause the rule of completeness is violated only where admission of the statement in redacted form distorts its meaning . . . it was within the district court's discretion to exclude these statements."

- *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 (3rd 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 (4th 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. Nor 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 (5th Cir. 1996): After the disaster at the Waco compound, Castillo was charged with using or carrying a firearm during a crime of violence. He confessed to donning battle dress and picking up guns when he saw ATF agents approaching. He also stated that he never fired a gun during the raid. The 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. Importantly, 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. * * * [But] 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. Portillo,* 969 F.3d 144 (5th Cir. 2020): This is a case in which the government sought to introduce completing statements, but the admission of the statements was found to be error. The government's cooperating witnesses were impeached with inconsistencies, and the trial judge admitted some accompanying consistent statements under Rule 106. The court's analysis is as follows:

> The government cites pages from the record where the defendants referred to specific portions of the statements that were later introduced at trial. But the government does not clearly explain why this questioning created a misleading impression about the entirety of the prior consistent statements. We have explained that the rule of completeness justifies admission of a statement only where it is necessary to qualify, explain, or place into context the portion already introduced. [citing cases]. The government has not demonstrated that the statements admitted into evidence were necessary to correct any misleading impressions created by the defendants' references to the prior statements.

- *United States v. Dotson,* 715 F.3d 576, 581 (6th Cir. 2013): In a trial on charges of child pornography and exploitation of a minor, the trial judge admitted portions of a written statement given by the defendant to authorities following his arrest in which he stated that he made videos and photos of the victim; but the court rejected the defendant's request to admit the entire statement. The 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 (6th 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 evidence proffered to complete contradicts the opponent's evidence.*

● *United States v. Lewis,* 641 F.3d 773 (7th Cir. 2011): Billingsley, charged with firearm possession and conspiracy to possess cocaine, confessed in an interview. He sought to complete by eliciting testimony from the agent who interviewed him about how he had never mentioned any of his co-defendant's criminal associates by name. The court found that although this remainder could rebut the government's theory about the level of the defendant's involvement in the conspiracy, and could help to explain the defendant's theory of the case in general, it did not affect the meaning of any of the defendant's statements to which the agent had already testified. Accordingly, no remainders were necessary. Thus, a remainder under the fairness test has to be explanatory *of the portion that it completes*. *See also United States v. Li,* 55 F.3d 325, 330 (7th Cir. 1995) (noting that "the trial judge need not admit every portion of a statement but only those needed to explain portions previously received," and reasoning that "[t]o determine whether a disputed portion is necessary, the district court considers whether (1) it explains the admitted evidence, (2) places the admitted evidence in context, (3) avoids misleading the jury, and (4) insures fair and impartial understanding of the evidence").

● *United States v. 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 is relevant to 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. Santos,* 947 F.3d 711 (11th Cir 2020): Appealing his conviction for obtaining naturalization wrongfully, the defendant argued that the trial court erred in excluding an exculpatory part of his confession. The court found no error. It noted that "Rule 106 does not automatically make the entire document admissible once one portion has been introduced." In this case, "the later exculpatory part of Santos's statement does not explain or clarify the earlier inculpatory part. In the first part, Santos admitted to Special Agent Laboy that he was arrested, convicted, and imprisoned for manslaughter in the Dominican Republic in the 1980's. This admission proved the fact of Santos's prior conviction. That is a separate and different topic from why Santos failed to mention his criminal history . . . on his Form N-400 application."

● *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 he had with a co-defendant, then all 13 hours ot tapes 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 did not 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.

● *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 Robinson's district. Thus, excluding the latter part of the interview did not distort the meaning of the admitted portion."

Of all the reported Rule 106 cases in federal district courts, the ratio of "completion required" to "completion not required" is about 1/15.[7] 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 is relevant for the opponent.

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. For example, in *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988), it was the prosecutor who offered prior statements of a witness on redirect examination in order to complete what had been selectively adduced on cross-examination; the court found no error in the trial court's allowing completion. And in *United States v. Maccini*, 721 F.2d 840 (1st Cir. 1983), the court held it proper to permit a prosecutor to have additional portions of a witness's grand jury testimony read, after defense counsel introduced a misleading portion of that testimony. Similarly, in *United States v. Mosquera,* 866 F.3d 1032, 1049 (11th Cir. 2018), the court held that Rule 106 applied when the defendant selectively admitted portions of an interview that a witness had with a government agent. The court noted that additional portions of the interview were properly admitted "to avoid misrepresentation."

For other examples of the prosecution benefiting from Rule 106, *see United States v. Rubin,* 609 F.2d 51 (2nd Cir. 1979): The defense counsel selectively quoted interview notes in cross-examining an officer. The court found that the remainder was admissible in the government's behalf under Rule 106: "The notes had been used extensively and quoted from copiously by Rubin's counsel * * * possibly leaving a confusing or misleading impression that the portions quoted out of context were typical of the balance. We have repeatedly recognized that where

[7] Of course reported cases, while relevant, do not tell the whole story of how Rule 106 is used.

substantial parts of a prior statement are used in cross-examination of a witness, fairness dictates that the balance be received so that the jury will not be misled." *Accord United States v. Gravely,* 840 F.2d 1156, 1163 (4th Cir. 1988) (government allowed to complete with portions of the grand jury testimony of a witness, even though the statements were hearsay); *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 (2nd Cir. 1995) (when financial statements prepared by an accountant 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 (8th Cir. 1983): In a product liability action, "the appellant was free to introduce the film containing the jeep rollovers but only upon the condition that the written study explaining these graphic scenes also be offered. The trial court's order required only that the complete report be admitted, the mundane as well as the sensational. In this the trial court was fair and its exercise of discretion was not an abuse."

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).

Similarly, in *Kinney v. Porterfield*, 2020 U.S. Dist. LEXIS 140405 (D. Mont. Aug. 5, 2020), a civil case involving an alleged sexual assault, the defendant moved to exclude the video footage of a bar that depicted the plaintiff and the defendant a few hours before the alleged assault. The defendant argued that the video provided "an incomplete picture of the events that took place on the night in question" and so should be excluded under Rule 106. The court denied the motion as the defendant did not claim that the video was selective and did not offer any completing portions. The court declared that Rule 106 is used to present additional statements or recordings to a jury but "it does not inherently provide for the exclusion of incomplete statements or recordings."

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."); *Phoenix v. Esper,* 2020 U.S. Dist. LEXIS 118314 (W.D. Ky. July 6, 2020): The plaintiff relied on Rule 106 to "either seek to preclude Defendant from using her deposition testimony against her at trial or from playing only certain portions of her deposition at trial without greater context." The court stated that Rule 106 is not "a basis for excluding evidence but rather a tool that Phoenix can use to introduce evidence herself to give context to what Defendant seeks to use against her."

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). What follows is a short account of the common-law rule of completeness.

The common-law rule of completeness has been described as follows by the court in *United States v. Littwin,* 338 F.2d 141 (6th Cir. 1964):

> The general rule is that if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary.

This concept of completeness is one of fundamental fairness that courts have applied in some form since at least the 17th century. Wigmore characterized the doctrine as one of "verbal completeness" requiring that the whole of a "verbal utterance" on a single topic or transaction be taken together. Wigmore emphasized that verbal utterances are "attempts to express ideas in words" and that words may easily be distorted by presenting them in edited form.

Wigmore stressed that the principle of completeness "does no more than recognize the dictates of good sense and common experience," and laid out guidelines that courts could use to determine if the opponent should be allowed to introduce completing oral evidence. First, the remainder should not be allowed if it is irrelevant to the issue. 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. Second, only the remainder that "concerns the same subject, and is explanatory of the first part" is allowed for purposes of completeness.

Common law courts permitted completion of both written and oral statements, although they acknowledged the practical difficulties that might arise in determining the "whole" of an oral utterance.[8] Courts typically required completion of oral statements when needed to provide the true "substance or effect" of a conversation.[9] Wigmore supported completion with oral statements, concluding that any dispute about the accuracy of a witness's recollection of an oral statement would raise a question of credibility for the jury.

With respect to the timing of completion, Wigmore articulated two categories of completion: "compulsory" and "optional."[10] Compulsory completeness represented the root of the modern interruption rule --- requiring completion of a statement during the initial presentation. Optional completeness on the other hand permitted the opponent of the initial statement to present the completing remainder herself, either on cross-examination of the witness who testified to the partial statement, or later during her own case. Although there was some conflict in the cases concerning the proper timing of completion, optional completion of both written and oral statements by an opponent during cross-examination or her own case in chief was commonly allowed.[11] In contrast, courts were more reluctant to require "interruption" of a proponent's case to complete partially presented statements.[12]

[8] *See* Weinstein on Evidence at 106-4.

[9] Wigmore at § 2097, p. 609 ("The general rule, universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this substance as best he can from the impression left upon his memory. He may give his "understanding" or "impression" as to the net meaning of the words heard.").

[10] Wigmore at § 2095, p. 607.

[11] Wigmore at § 2099, p. 618 (noting the "copious rulings allowing the opponent afterwards to put in the remainder" of an oral utterance and "the absence of rulings requiring the proponent to put in the whole at first").

[12] *Id.* (explaining that judges required a proponent to admit a remainder during its own presentation only in special circumstances, such as when presenting former testimony).

Common-law courts also grappled with the issue of completing statements that were otherwise inadmissible. For example, in *Rosenberg v. Wittenborn*, the plaintiff in an accident case elicited from a police officer the defendant's damning admissions at the scene of the accident that his light was "red" when he entered the intersection and that he was going approximately "thirty miles per hour."[13] When the defense sought to ask the officer on cross about the defendant's simultaneous explanation that he went through the red light *because his brakes failed*, the plaintiff raised a hearsay objection. The California Appeals Court found that completion with otherwise inadmissible hearsay was necessary to provide a fair depiction of the defendant's statements at the scene of the accident:

> Considerations of fair play demanded that the portion of the conversation placed in evidence by plaintiffs be supplemented by the qualifying and enlightening portions of the conversation which gave it a very different complexion than that which the plaintiffs' segregated passages bore.

Wigmore recognized that remainders such as this one ordinarily would constitute inadmissible hearsay if offered to prove the truth of the completing statement and suggested that the remainder should be used only to give "context" to the portion of the statement already admitted and should *not* be used as substantive evidence.[14] *But most common-law courts disagreed with this "context only" approach to the evidentiary value of a completing remainder*.[15] Courts frequently permitted completion with an otherwise inadmissible hearsay statement without limiting the purpose for which the completing remainder was admitted. For example, in *United States v. Paquet*, 484 F.2d 208, 211 (5th Cir. 1973), 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. The court noted that the rule could overcome a hearsay objection, as "[t]he prosecution cannot give its version of a matter and

[13] Rosenberg v. Wittenborn, 3 Cal. Rptr. 459, 463 (Ct. App. 1960).

[14] Wigmore, at § 2100, p. 626.

[15] *See* Wigmore at § 2113, p. 660 (noting that "it is not uncommon for courts to treat the remaining utterance, thus put in, as having a legitimate assertive and testimonial value of its own – as if, having once got in, it could be used for any purpose whatever."); Wright & Graham, at § 5072.1, p. 393 ("the major purpose of the common law completeness doctrine was to provide an exception to those rules that prevented the opponent from showing how the proponent had misled the jury"). *See also Storer v, Gowen*, 18 Me. 174, 176-77 (1841) ("Both are equally evidence to the jury"); *Williams v. State*, 231 S.W. 110, 113 (Tex. Crim. App. 1921) (holding that the defendant's right to introduce an explanatory remainder after the prosecution introduced an inculpatory part of a whole "could not be nullified by the claim of the state that the part of the transaction and conversation introduced … was exculpatory"); *Wescoatt v. Meeker*, 147 P.2d 41, 48 (Cal. App. 1944) ("If a party chooses to prove oral declarations against interest of a deceased person…, he cannot prevent the opposing party from bringing out all that was said… even though this may result in getting into the record statements that might otherwise be excluded as self-serving."); *Simmons v. State,* 105 So. 2d 691 (Ala. App. 1958) (completeness "makes admissible self-serving statements which otherwise would be inadmissible").

thereafter muzzle the defendant." Some courts went so far as to characterize the right to complete as supplying an "independent exception to the rule against hearsay."[16]

With respect to confessions of a criminal defendant, pre-Rules courts generally demanded admission of an entire statement made to the police when the prosecution sought to use some portions. In *United States v. Wenzel*, 311 F.2d 164 (4th Cir. 1962), the court described the rule regarding completion of a defendant's confession as follows:

> When a confession is admissible, the whole of what the accused said upon the subject at the time of making confession is admissible and should be taken together, and if the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time which bears upon the subject of controversy, including any exculpatory or self-serving declarations contained therewith.[17]

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 not always 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.

[16] *Rokus v. City of Bridgeport*, 463 A.2d 252, 256 (Conn. 1983). *See also Stevenson v. United States*, 86 F. 106, 108 (5th Cir. 1898) ("when the United States proved the conversations and declarations the accused was entitled to have the full conversation or conversations given in evidence"); California Law Revision Commission Tentative Recommendation and Study Related to Uniform Rules of Evidence, Article VIII, Hearsay Evidence, 599 (Aug. 1962) ("To the extent that this section makes hearsay admissible, we may regard the section as a special exception to the hearsay rule.").

[17] See also *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.").

Confusion Caused by Retaining the Common Law

The apparent viability of the common law underneath the codified rule of completeness is, without doubt, a source of confusion. In very large part, the Federal Rules of Evidence supplant the common law. The original Reporter, Professor Cleary, stated that the goal of the project was that after the Rules were enacted, there would be no common law. Thus there is no common law of hearsay that is retained.[18] The common law limitations on habit evidence have been specifically abrogated by Rule 406. It's hard to see why the common law should be left to operate behind Rule 106 where it appears to have been superseded by every other rule.[19]

There are cases that show this confusion. For example, in the recent case of *United States v. Oloyede,* 933 F.3d 302 (4th Cir. 2019), one defendant, speaking to a police officer, made statements that inculpated him and others that exculpated other defendants. Those other defendants moved for completion. Because the statements were oral, they recognized that Rule 106 did not apply, but maintained that "there is a still-viable common law on the rule of completeness" that should have allowed the entire statement to come in. The court responded:

> ***"While we doubt that a common law rule of completeness survives Rule 106's codification, we hold that any such common law rule cannot be used to justify the admission of inadmissible hearsay. See Federal Rule of Evidence 802 (Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules proscribed by the Supreme Court)."***
>
> There are several takeaways from this pithy remark:
>
> 1. The Court was apparently unaware of the Supreme Court's statement about partial codification in *Beech Aircraft.* If the Fourth Circuit can't get this right, how can we expect regular lawyers to do so?
>
> 2. While not citing *Beech Aircraft,* maybe the court just disagreed with the *Beech* declaration. After all, the *Beech* declaration was not a holding. And on the merits, for the reasons stated, it is far better to have a system with no residual common law lurking beneath the code --- where the whole point was to have a federal code of evidence *rather than* the murky common law.
>
> 3. The court is not saying that the common law did not allow completion with hearsay. (That would be wrong to say, as discussed above). Rather it is saying that the common law cannot be a source of *admitting* hearsay. Under Rule 802, *common law is not listed as one of the sources for admitting hearsay*. This makes sense from the Advisory Committee's position, as the Committee was trying to supplant the common law of hearsay --- the last

[18] See Rule 802, which provides that hearsay is inadmissible unless there is an exception --- and specifically not relying on common law as the source of any exception.

[19] Of course, privileges are an exception, but that is because Rule 501 (drafted by Congress over the opposition of the Advisory Committee) specifically provides that the federal common law of privilege is applicable. Rule 106 does not make a specific provision for common law.

thing it wanted was a bunch of common law hearsay exceptions being used to muck up the Rule 803/804 exceptions. But it does present a problem if a party is relying on the common law to offer hearsay under the rule of completeness. (Though why could it not be argued under *Beech Aircraft* that the common law survives Rule 802 as well? Let's hope not.).

4. Why did nobody argue Rule 611(a) for admitting the oral statements? I think the answer is that the whole area of "completeness" is just too complicated right now. There are too many sources to keep track of. Here was a case where the defense counsel was diligent --- counsel had done enough work to realize that a common-law argument remained (which means counsel did better research than the court did) --- but counsel didn't pick up the scent on Rule 611(a).[20] That is just a sad state of affairs. It calls strongly for all completeness issues to be decided under one rule.

In sum, it is pretty clear that we would all be better off without a common law backstop to Rule 106. This is especially so because unlike some evidentiary questions that can be raised *in limine*, completion questions are usually raised at trial when a proponent offers just a portion of a statement. At that time, it is hard to expect the parties to have both the common law and Rule 611(a) in mind when they are seeking to solve a completion problem. It would clearly be *much better* if all completion issues were covered in a single rule.

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,

[20] It's hard to criticize counsel about not raising Rule 611(a). That rule is a broadly written grant of authority that gives the judge a bunch of discretion to control the presentation of evidence. It doesn't say anything about completion. When there is already a rule that specifically governs completion, one might be excused for not considering Rule 611(a).

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 located in Article VIII, where all the hearsay stuff is supposed to be. 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. *See, e.g., Gudava v. Ne. Hosp. Corp.*, 2020 U.S. Dist. LEXIS 25151 (D. Mass.) ("Regardless of whether it satisfies an exception to the hearsay rule, defendant cannot simultaneously rely on evidence of the First Warning it issued to Gudava and bar Gudava from introducing evidence of her written appeal of that warning. Fairness dictates that either all or none of the entire record of Gudava's First Warning, including her appeal, will be admitted.").

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 (1st Cir. 2008) ("Case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.").

- *United States v. Williams,* 930 F.3d 44 (2nd 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 (2d Cir. 2007) (under Rule 106, "even though a statement may be hearsay, an omitted portion of the statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion").

- *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988): The *government* sought to complete with portions of the grand jury testimony of a witness. The defendant argued that the portions were hearsay. The court responded:

> The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. Fed.R.Evid. 106 allows an adverse party to introduce any other part of a writing or recorded statement which ought in fairness to be considered contemporaneously. The rule simply speaks to the obvious notion that parties should not be able to lift selected portions out of context. *United States v. Sutton,* 801 F.2d 1346, 1366–69 (D.C.Cir.1986).

- *United States v. Portillo,* 969 F.3d 144 (5th Cir. 2020) (stating in dictum that Rule 106 allows the admission of statements necessary to complete "even when they are otherwise barred by the hearsay rule" and citing a Fourth Circuit case for the proposition).

- *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1983): "Ordinarily a defendant's self-serving, exculpatory, out of court statements would not be admissible. But here the exculpatory remarks were part and parcel of the very statement a portion of which the Government was properly bringing before the jury, i.e. the defendant's admission about the marijuana. * * * The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence."

- *United States v. Harry,* 816 F.3d 1268 (10th 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 (10th Cir. 2010) (completing hearsay was found admissible, the court reasoning that a party who introduces a misleading portion opens the door to a fair completion).

Cases holding or stating that Rule 106 cannot be used to admit evidence that is not otherwise admissible:

- *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) ("Rule 106 does not render admissible evidence that is otherwise inadmissible."); *Accord, United States v. Coplan,* 703 F.3d

46 (2nd Cir. 2012); *United States v. Nixon,* 779 F.2d 126 (2nd Cir. 1985); *United States Football League v. National Football League,* 842 F.2d 1335 (2nd Cir. 1988)("The doctrine of completeness, Rule 106, does not compel admission of otherwise inadmissible hearsay evidence.").

- *United States v. Hassan,* 742 F.3d 104 (4th Cir. 2014) (defendant's web postings were not admissible under Rule 106 because they were hearsay); *United States v. Lentz,* 524 F.3d 501 (4th Cir. 2008) ("Rule 106 does not render admissible the evidence which is otherwise inadmissible under the hearsay rules."). ***Accord*** *United States v. Oloyede,* 933 F.3d 302 (4th Cir. 2019).

- *United States v. Wandahsega,* 924 F.3d 868, 883 (6th Cir. 2019) (Rule 106 "does not transform inadmissible hearsay into admissible evidence."); *United States v. Costner,* 684 F.2d 370, 373 (6th Cir. 1982) ("The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded."); *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013) (discussed infra, 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. McQuarrie*, 2020 WL 2732226 (6th Cir.) ("We have held that the rule of completeness reflected in Rule 106 covers an order of proof problem; it is not designed to make something admissible that should be excluded. Although we have sometimes been critical of the rule, we have repeatedly held that exculpatory hearsay may not come in solely on the basis of completeness.").

- *United States v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012) ("a party cannot use the doctrine of completeness to circumvent Rule 803' s [sic] exclusion of hearsay testimony.").

- *United States v. Woolbright,* 831 F.2d 1390 (8th Cir. 1987): "Neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the 'ascertainment of the truth' empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception."

- *United States v. Hayat,* 710 F.3d 875, 896 (9th Cir. 2013) ("Rule 106 does not compel admission of otherwise inadmissible hearsay evidence."); *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); *United States v. Encinas Pablo,* 2020 WL 516608 (D. Ariz.) (rejecting the defendant's argument that his hearsay

statements should be admitted under the rule of completeness because "out of court statements not falling within an exception to the hearsay rule are inadmissible regardless of Rule 106").

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 disagreement 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 (2nd 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.* In other words, *Williams* is dicta while the holdings are that the completing statement can be offered 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.* For example, the *Haddad* court, supra, says 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." But this reference to "context" is about the trigger for completion in the first place --- the completing statement is not admissible at all unless it puts the admitted statement in context. The separate question is: how is the statement to be used once it *is* admitted? That separateness is seen in *Haddad,* where the court is stating that the remainder should have been admitted to prove, as a fact, that the defendant didn't know the gun was there.

It is perfectly consistent to say that completion is allowed when a proffered statement must be put in context, but that fairness requires the completing statement, once allowed, 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 hold that the completing statement may not be used for the truth, if the only way it provides context *is if it is true*.

Note that the "context" standard for completion under Rule 106 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.[21] 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

[21] 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 party would be able to complete contemporaneously, and wouldn't have to wait until its case to admit the excited utterance.

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."

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.

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 --- and this makes good sense because, as Judge Grimm stated, there is no rational basis for a categorical distinction between an oral statement and a recorded statement if each meets the fairness requirement of Rule 106.

One possible way to allow oral statements where necessary to complete is to resort to the common law rule of completeness. As stated above, 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 (5th 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 --- probably because, like the Fourth Circuit in *Oleyede, supra,* they don't think that a common law of evidence exists after the enactment of the Federal Rules of Evidence. 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 held that 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 (2nd 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, weirdly, not under the very rule that governs completeness.

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"). *Compare United States v. Altvater,* 954 F.3d 45 (1st Cir. 2020) ("We note that Rule 106, by its text, does not apply to unrecorded oral statements. As such, Rule 106 could not be used to justify the admission of the unrecorded statements, . . . though other non-constitutional requirements might.").

- *United States v. Holden,* 557 F.3d 698, 704 (6th Cir. 2009): "The common law version of the rule was codified for written statements in Fed.R.Evid. 106, and has since been extended to oral statements through interpretation of Fed.R.Evid. 611(a). Courts treat the two as equivalent. *United States v. Shaver*, 89 Fed.Appx. 529, 532 (6th Cir.2004)."

- *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1993) (exculpatory portion of an oral confession should have been admitted to complete; declaring that Rule 611(a) gives the judge the same authority regarding unrecorded statements as Rule 106 grants regarding written and recorded statements).

- *United States v. Woolbright,* 831 F.2d 1390 (8th Cir. 1987) (stating that Rule 611(a) supports a rule of completeness for 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 (10th 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 (11th 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. 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 (3d Cir. 1989) (dictum; the court finds that the rule of completeness applies to unrecorded

statements, relying on Second Circuit authority, but finds the offered portion in this case to be not necessary for completion).[22]

Besides the user-unfriendliness of having 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), there is another important reason to consider amending Rule 106 to include coverage of unrecorded oral statements: There are some cases in which courts faced with a completeness argument as to unrecorded oral statements **simply say 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 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 (5th 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 precluded 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." That was the end of that.

It is likely that counsel in *Gibson* never raised Rule 611(a) or the common law rule of completeness with regard to unrecorded oral statements offered to complete. 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. Again, arguments about completeness usually arise right at the trial, when it is unlikely that most lawyers (or judges) will be thinking about sources of law outside Rule 106 when faced with a completeness problem.

[22] The Fifth Circuit in *United States v. Sanjar,* 876 F.3d 725, 739 (5th 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]

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 Rule 106 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.[23]**

[23] It should be noted that *Ramirez-Perez* is inconsistent with other authority in the 11th Circuit. See *United States v. Baker,* supra (applying Rule 611(a) to an oral statement offered to complete). But that inconsistency would seem to

- *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).

To clarify, none of the above case law holds that Rule 611(a) and the common law *cannot* be used for completion of oral statements. These cases immediately above stop at Rule 106 and do not reach the Rule 611(a) question – perhaps because the party seeking completeness never asked the court to do so (though as seen above the Ninth Circuit recognizes the Rule 611(a) case law and does not follow it). 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 many 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. 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.

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.

A third possibility --- which can be combined with either of the above options, is to expand the coverage of Rule 106 to include unrecorded oral statements.[24]

These options are discussed below, and analysis is directed toward some of the arguments that have been raised at previous meetings with respect to these options.

A. Providing that a Statement that is Necessary to Complete is Admissible over a Hearsay Objection

As stated above, many courts have found that even if a statement qualifies under the Rule 106 fairness standard --- that is, even if it ought in fairness to be admitted contemporaneously with the portion admitted by the adversary --- it is nonetheless subject to exclusion as hearsay. These courts view Rule 106 to be merely a timing rule for evidence that is otherwise admissible. The contrary view, of a number of courts, is best set forth in *United States v. Sutton,* 801 F.2d 1346 (D.C.Cir. 1986), where the court held that Rule 106 is by its terms not limited by other rules of admissibility, and concluded that "Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously."

This is a conflict in the courts about an important and oft-recurring matter. It is a conflict that has existed for more than thirty years. One of the strongest reasons for amending an Evidence Rule has traditionally been that to do so will resolve a longstanding conflict --- resolving such a conflict is at the heart of codification of a uniform set of Federal Rules of Evidence.

It seems pretty unlikely that the Supreme Court will resolve the conflict. The Supreme Court has only reviewed Rule 106 once – in *Beech Aircraft v. Rainey,* 488 U.S. 153 (1988). The *Beech Aircraft* Court could have resolved the conflict in the rule, but pointedly refused to do so: it stated that "[w]hile much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106." 488 U.S. at 175.

If the conflict on Rule 106 is to be resolved, it seems apparent that it must be resolved in favor of admissibility (in *some* form) of the completing evidence – again assuming that the strict requirements for completion under Rule 106 are established. It seems simply wrong to hold that the adverse party can introduce a misleading portion of a statement, and then turn around and object to evidence that would fairly be offered to rectify the misleading impression. Professor

[24] Other options have already been rejected by the Committee at previous meetings and will not be discussed here:
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."
5. Providing a separate subdivision for oral statements with a different test for admissibility.
6. Providing for flexibility in the timing of completion by adding to the text of the Rule.

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."[25]

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 the defendant's testimony raises a tension with the defendant's constitutional right *not* to testify. The Seventh Circuit recognized the

[25] *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.").

unfairness of the testimony alternative in *United States v. Walker,* 652 F.2d 708, 713 (7th Cir. 1981):

> In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no "repair work" which could remedy the unfairness of a selective presentation later in the trial of such a case. While certainly not as egregious, the situation at hand does bear similarity to "[f]orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of [a] confession [which] is a denial of his right against self-incrimination." [quoting Weinstein's Evidence].

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 to a police officer). In those cases, it is hard to see how the defendant can testify his way out of a third party's 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 (9th Cir. 1986) ("the plain language of Rule 801(d)(1)(B) does not suggest that where a party inquires into part of a conversation, the opposing party may introduce the whole conversation as substantive evidence under the Rule"). So the best that defendant could do is to testify that "I sold the gun" --- which, in light of the litigation, is not at all the same as "I told the officer that I sold the gun." 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.) (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 if the statement that needs to be completed is from a third party.

2. Argument Against Amendment: Parties Wouldn't Risk Being Rebutted by Completing Evidence

At a previous Committee meeting, 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 consequence of those cases --- the misleading statement is admitted, without ever being rebutted because the misleading party raises a hearsay objection to the remainder.

Is it really possible that a court would allow a party to admit a misleading portion of the statement, but then prevent a completion on hearsay grounds 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 unrebuttable because the completing party seeks to complete with hearsay. The leading example of this troubling result is *United States v. Adams,* 722 F.3d 788, 827 (6th Cir. 2013). Defendant Maricle, a state court judge, was accused of conspiring to buy votes and to help appoint corrupt members of the Clay County Board of Elections. The government was allowed to present portions of a phone recording in which a cooperating witness (White) told Maricle about questions she had been asked during her grand jury testimony. White

told Maricle that she had been asked 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.[26]

It should be noted that *Adams* was written seven years ago; the Sixth Circuit has not sat en banc on the Rule 106 question. And it continues to apply the rule as it did in *Adams. See, e.g., United States v. McQuarrie*, 2020 WL 2732226 (6th Cir.) ("Although we have sometimes been critical of the rule, [citing *Adams*] we have repeatedly held that exculpatory hearsay may not come in solely on the basis of completeness.").

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

[26] 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.").

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 (and not Woolbright's). But in another part of the statement, Randle said that she and Woolbright were on a honeymoon --- thus leading to an inference that Woolbright constructively possessed the drugs in the bag. The trial judge admitted the remainder under Rule 106, because Randle's statement that the drugs were hers led to a misleading inference that they were hers *alone*. But the court held that "neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the 'ascertainment of the truth' empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception." Thus the misleading impression created by the defendant should have gone unrectified in the absence of a hearsay exception, according to the court.[27]

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 --- and leaving it to the constitution would lead to a case-by-case approach rather than a rule.

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.

[27] 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.

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-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 allowing completing hearsay from a defendant, there are at least two reasons to prefer a rule change 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 who assume (reasonably) that 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 misleading 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 rather 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 misunderstands 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 --- they are free to forego the initial misleading statement instead of seeking to admit it. They are also free to argue to the factfinder that the completing remainder is a lie. What they should not be able to do is introduce misleading (and often unreliable) 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 over a hearsay objection appears to be consistent with legislative intent. This argument is based on two separate points about the drafting of the rule:

1. The rule was patterned after (though admittedly not the same as) the California rule, which has always been held to allow for completion with hearsay evidence.

2. When the rule was being considered in Congress, the DOJ sought to add language that completing evidence had to be independently admissible. During hearings on the Federal Rules of Evidence, Assistant Attorney General W. Vincent Rakestraw specifically requested that the Senate Judiciary Committee amend Rule 106 to permit the introduction of "any other part or any other writing or recorded statement *which is otherwise admissible.*" But Congress did not add that language.[28]

There is a contrary textual argument, however --- that Rule 106 cannot and should not operate as a hearsay exception because it is not placed with the other hearsay exceptions in Article 8. If the drafters had wanted a "rule of completeness hearsay exception" why wouldn't they put it with the rest of the hearsay exceptions?

There are three pretty good responses to the location argument, however. First, Rule 802, which is the operative rule against hearsay[29], 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 (8th Cir. 2018) (holding that Rule 32 authorizes admissibility of deposition hearsay even though it is not admissible under the Article 8 exceptions;

[28] Letter from Rakestraw to Senate Jud. Comm., 93rd Congress, 121-23.

[29] Rule 801 provides the definition of hearsay; Rule 802 is the source of exclusion of hearsay.

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 outside Article 8.[30]

The third responsive argument regarding placement of Rule 106 is set forth by the D.C. Circuit in *United States v. Sutton,* 801 F.2d 1346, 1368 (D.C. Cir. 1986). The court found the placement of Rule 106 to be a point *in favor* of finding a hearsay exception:

> The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof. Rule 106 is found not in Rule 611, which governs the "Mode and Order of Interrogation and Presentation," but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules. See C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5078, at 376 (1977 & 1986 Supp.).
>
> Moreover, every major rule of exclusion in the Federal Rules of Evidence contains the proviso, "except as otherwise provided by these rules," which indicates that the draftsmen knew of the need to provide for relationships between rules and were familiar with a technique for doing this. There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed.

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

6. Justifying a Rule 106 Hearsay Exception as a Matter of Forfeiture or "Opening the Door"

When a party makes a misleading presentation, it has been held in many circumstances that the party forfeits 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 (8th 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*.").

[30] 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.

It has been held, for example, that a defendant who selectively reveals only the helpful parts of a testimonial statement forfeits the right to complain that the remainder is testimonial hearsay that violates the right to confrontation. The New York Court of Appeals, in *People v. Reid,* 19 N.Y.3d 382, 948 N.Y.S.2d 223, 227 (2012), put it this way:

> If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury by selectively treating only those details of a testimonial statement that are potentially helpful to the defense * * *. A defendant could do so with the secure knowledge that the concealed parts would not be admissible under the Confrontation Clause. To avoid such unfairness and to secure the truth-seeking goals of our courts, we hold that the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission.

If forfeiture-by-misleading is sufficient to overcome a *constitutional* objection, it certainly should be sufficient to overcome a hearsay objection.

Notably, the California Supreme Court has applied the *rule of completeness* to operate as a forfeiture provision where the proponent offers a misleading portion of a statement and objects to the admissibility of the remainder--- and in so doing it specifically rejected any concerns about admitting unreliable statements for completion purposes. 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 . . . to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood*."

It is 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 forfeiture 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.[31] So it would appear

[31] 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 forfeiture of evidentiary protections is found in these rules but not in Rule 106.

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. *See, e.g., Jokich v. Rush Univ. Med. Ctr.,* 2020 WL 1548955, at *2 (N.D. Ill.) (noting, in the context of an argument over the scope of attorney-client privilege, that "[t]he language concerning subject matter waiver —'ought in fairness'— is taken from Rule 106 because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation").

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 the Second Circuit 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.[32]

Consequently, if the Committee determines that the completeness-hearsay problem is correctly resolved by admitting the completing portion for context, a rule amendment should be proposed to make that explicit. The question is whether that amendment goes far enough --- or whether it is necessary to provide that the completing portion can be offered as proof of a fact.

[32] The Rule 702 amendment that would add a preponderance of the evidence standard to the text, included in this agenda book, is another example.

There are some pretty serious problems with a rule that allows completing statements to be admitted *only* for "context":

1. If the completing statement can be used by the jury only for context and never as proof of a fact, the result will be 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. The "context" solution can result in a *confusing limiting instruc*tion and a 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, but 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 completing statement's 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,* 7th 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.

In the end, there is much 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.

Professor Dan Blinka, an important evidence scholar, explains the proper approach 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 statements 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.[33]

[33] 7 Wisconsin Practice, Evidence § 107.2 (4th ed. August 2019 update).

C. The Alternative of Including Unrecorded Oral Statements in the Text of Rule 106

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.[34]

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.[35] Another possibility is that the drafters had it most prominently in mind

[34] 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.

[35] 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.

to draft a rule requiring contemporaneous completion, and might have thought that contemporaneous completion for every conversation would be unduly disruptive.[36] But any concern about disruption hasn't played out, because the vast majority of courts *are in fact allowing oral statements for completion* --- under Rule 611(a).

So whatever the rationale for excluding oral conversations from Rule 106, the fact is that most courts *are* admitting oral statements if the strict grounds for completion under Rule 106 are met. 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; or unringing a bell; or uncracking an egg. Courts are generally (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 still 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 --- as Judge Grimm has argued. Under this view, the fairness rationale of Rule 106 would 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*---such as an oral unrecorded declaration against interest or excited utterance. 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. What was said

[36] 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 could 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.

becomes a question of credibility. 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 106 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 now possible with unrecorded oral completing statements, because looking at Rule 106, 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 courts 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 many 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. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("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.").

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.

IV. Drafting Alternatives

Three drafting alternatives are presented:

1. An amendment that would allow admission of a completing remainder over a hearsay exception.

2. An amendment that would allow the completing remainder to be admitted only for context.

3. An amendment that covers oral unrecorded statements ---which is added to alternatives 1 and 2, as the Committee has decided that if any change is to be made, the top priority is the hearsay/context question --- so an amendment that would only deal with oral statements is not on the table.

What follows, therefore, are four drafting alternatives, with Committee Notes that are obviously similar but with differences tailored to the alternative.

A. Draft One --- Admissibility of Completing Statement Over a Hearsay Objection, and Including Oral Unrecorded Statements.

Rule 106. Remainder of or Related ~~Writings or~~ ~~Recorded~~ Written or Oral Statements

If a party introduces all or part of a ~~writing or~~ ~~recorded~~ written or oral statement, an adverse party may require the introduction, at that time, of any other part — or any other ~~writing or~~ ~~recorded~~ written or oral statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Draft Committee Note[37]

Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion 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 on hearsay grounds to evidence that would correct the misimpression. *See 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 implied that he owned the weapon at the time of the crime, when that is not what he said. 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 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 usually 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

[37] 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. In either case the statement would be admissible "over a hearsay objection."

completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it 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 some 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 it is offered for its truth. 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.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("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."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of written or oral 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 --- Completing Statement Admissible Over a Hearsay Objection (Oral Statements Not Covered).

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 adverse party may do so over a hearsay objection.

Draft Committee Note

Rule 106 has been amended to provide that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion 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 on hearsay grounds to evidence that would correct the misimpression. *See 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 implied that he owned the weapon at the time of the crime, when that is not what he said. 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 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 usually 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 for the proponent of the completing statement if it 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 some 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 it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

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 rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("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."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of all writings and recordings. 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: Admissibility for Context—Oral Statements Covered

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Written or Oral Statements

If a party introduces all or part of a ~~writing or recorded~~ written or oral statement, an adverse party may require the introduction, at that time, of any other part — or any other ~~writing or recorded~~ written or oral statement — that in fairness ought to be considered at the same time. A statement qualifying under this rule is admissible for the non-hearsay purpose of providing context.

Draft Committee Note

Rule 106 has been amended in two 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.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("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."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of written or oral 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: Admissibility for Context (and not Including Oral Statements)

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. A statement qualifying under this rule is admissible for the non-hearsay purpose of providing context.

Draft Committee Note

Rule 106 has been amended to clarify that if evidence is found necessary to 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.

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 rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("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."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of writings and recordings. 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.

TAB 3B

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

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."[1] 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).[2] 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

[1] Fed. R. Evid. 106.

[2] *United States v. Holden*, 557 F.3d 698, 704 (6th Cir. 2009) ("The common law version of the rule was codified for written statements in Fed. R. Evid. 106, and has since been extended to oral statements through interpretation of Fed. R. Evid. 611(a).").

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

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."[3] 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

[3] *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*.[4] 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.[5] 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."

[4] *People v. Mendoza,* No. G055457, 2018 WL 6565927, at *1 (Cal. Ct. App. Dec. 13, 2018), *review filed* (Dec. 14, 2018).
[5] *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.[6] 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.[7] 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.[8] 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

[6] *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).
[7] *People v. Lopez*, No. G050281, 2015 WL 264577, at *16–17 (Cal. Ct. App. Jan. 20, 2015).
[8] *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.[9] 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. [10] 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

[9] *Carson v. Facilities Dev. Co.,* 36 Cal. 3d 830, 850–51, 686 P.2d 656, 668 (1984).
[10] *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*.[11] 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.[12] 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.[13] 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.[14] 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

[11] *People v. Hernandez*, No. A117006, 2008 WL 1736061, at *11–12 (Cal. Ct. App. Apr. 16, 2008).
[12] Hearsay issues were apparently satisfied by California hearsay exceptions.
[13] *People v. Harrison* (2005) 35 Cal.4th 208, 25 Cal.Rptr.3d 224, 106 P.3d 895.
[14] *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.[15] 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.[16]

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

[16] 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. *Tropiano*, 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)."[17] 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.[18] 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."[19] 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.[20] 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.

[17] Commentary to Conn. Code Evid. Sec. 1-5.
[18] *State v. Jackson*, 257 Conn. 198, 211, 777 A.2d 591, 601 (2001).
[19] *Id.*
[20] *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.[21] 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.[22] 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.[23] 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."

[21] *State v. Savage*, 161 Conn. 445, 447–48, 290 A.2d 221, 223 (1971).
[22] *State v. Falcon*, No. CR10072831, 2012 WL 6846406, at *2 (Conn. Super. Ct. Dec. 14, 2012).
[23] *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.[24] 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.

[24] *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.[25] 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.[26]

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.[27] 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.[28] 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

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

[26] 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.

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

[28] *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.[29] 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.[30] The trial court allowed the defense to play some portions of the recorded statement

[29] *Jackson v. State*, 804 S.E.2d 367, 370–71 (Ga. 2017).

[30] *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.[31]

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

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

[31] *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.[32] 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.[33] 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.

[32] *State v. Turecek*, 456 N.W.2d 219, 225–26 (Iowa 1990).
[33] *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*.[34] 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.[35] 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

[34] *State v. McLachlan*, 856 N.W.2d 382 (Iowa Ct. App. 2014).
[35] *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.[36] 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:[37]

> 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).[38] 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.

[36] 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.
[37] *State v. Austin*, 585 N.W.2d 241, 243 (Iowa 1998).
[38] 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.[39] 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*.[40] 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.[41] 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

[39] *Territory v. Clayton*, 8 Mont. 1, 19 P. 293, 296–97 (1888).
[40] *State v. Le Duc*, 89 Mont. 545, 300 P. 919, 925 (1931).
[41] *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.[42] 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.[43] 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

[42] *State v. Elliott*, 43 P.3d 279, 287 (Mont. 2002).
[43] *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.[44] 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.[45] 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

[44] *State v. Molina*, 271 Neb. 488, 510–11, 713 N.W.2d 412, 435 (2006).
[45] *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.[46] 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.[47] 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

[46] *State v. Swenson*, No. A-12-277, 2013 WL 2106773, at *7 (Neb. Ct. App. May 7, 2013).
[47] *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)."[48]

[48] 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.[49] In that case, the defendant was prosecuted for stabbing and killing his brother-in-law during a domestic dispute. The defendant had an oral conversation with the arresting officer shortly after the killing in which he told the officer that he and the victim were fighting, that the victim pulled a knife, and that he did not know where the knife was and was sorry for the killing. Before trial, the court granted a prosecution motion *in limine* to exclude the defendant's oral assertion that the victim had pulled a knife as hearsay. At trial, the prosecution called the arresting officer to the stand and elicited from him defendant's statement of remorse for killing the victim. Thereafter, the defendant sought permission to ask the officer about the defendant's assertion that he and the victim had been fighting and that the victim had pulled a knife pursuant to the doctrine of verbal completeness. The court denied the request. Because the defendant's oral exculpatory statements served to place his expression of remorse in context and were part of the same conversation, the New Hampshire Supreme Court held that these oral statements should have been admitted under the doctrine of completeness. The court first addressed the applicability of the doctrine of completeness to oral statements:

> By its express terms, Rule 106 applies only to writings or recorded statements. The common law rule, however, applied to conversations as well as to writings and recorded statements. …The defendant argues that while Rule 106 permits a party in certain circumstances to require an opponent to introduce simultaneously with a writing or recorded statement other related writings or recorded statements, the completeness doctrine applies to any verbal utterance. We agree. We note that nothing in Rule 106 appears to alter or conflict with the common law doctrine as applied to conversations. *See N.H. R. Ev.* 100 (rules of evidence govern to extent they alter or conflict with common law evidence doctrines). Indeed, the Reporter's Notes to Rule 106 state that while "[c]onversations are not accorded similar treatment, ... [t]he adverse party may ... present related parts of conversations by way of cross-examination or as part of his own case." *N.H. R. Ev.* 106 Reporter's Notes (quotation omitted). Accordingly, we conclude that Rule 106 has not replaced the common law rule of verbal completeness as applied to conversations. *Cf. United States v. Haddad,* 10 F.3d 1252, 1258 (7th Cir.1993) (finding that Federal Rule of

> ***The adverse party may, however, present related parts of conversations by way of cross-examination or as part of his own case.*** He may, of course, also present the remainder of a writing in the same fashion *if he* wishes.

See generally, Federal Advisory Committee's Note to Rule 106; McCormick, *Evidence* 130-131 (2d Ed.1972)." (emphasis added). This timing concern was managed in New Hampshire by the adoption of a separate subsection of the completion rule relating to oral statements. The working draft of an amended Fed. R. Evid. 106 would also handle this concern by leaving the timing of completion to the discretion of the court.

[49] *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.[50] 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.

[50] *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.[51] 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.[52] 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

[51] *State v. Lopez*, 156 N.H. 416, 420, 937 A.2d 905, 908–09 (2007).
[52] *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.[53] 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.[54] 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

[53] *State v. Mitchell*, 166 N.H. 288, 94 A.3d 859 (2014).
[54] *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.[55] 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.*[56] 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.

[55] *State v. Tooley*, 265 Or. App. 30, 47, 333 P.3d 348, 357 (2014).
[56] *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.[57] 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

[57] *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.[58] 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.[59] 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.

[58] *Washington v. State*, No. 14-17-00595-CR, 2018 WL 6684294, at *13 (Tex. App. Dec. 20, 2018).
[59] *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.[60] 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.[61] 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.

[60] *Mares v. State*, 52 S.W.3d 886, 890 (Tex. App. 2001).
[61] *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.[62] 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.[63] 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.[64]

[62] *Hernandez v. State*, No. 74,401, 2004 WL 3093221, at *2 (Tex. Crim. App. May 26, 2004).
[63] *Wright v. State*, 28 S.W.3d 526, 535–36 (Tex. Crim. App. 2000).
[64] Wis. Stat. Ann. § 901.07 (West).

Although the Wisconsin rule of completeness originally mirrored Federal Rule 106,[65] it was amended in 2017 to bring oral statements expressly within its reach.[66] 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.[67] In 1998, the Wisconsin Supreme Court in *State v. Eugenio*,[68] 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.*"[69] Instead, the court found a right to complete oral statements to prevent distortion in Wisconsin's counterpart to Federal Rule of Evidence 611(a).[70] 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.[71] 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.[72]

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

[65] *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).
[66] 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.").
[67] *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).
[68] 579 N.W.2d 642.
[69] *Id.* at 650.
[70] *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").
[71] *Id.* (quoting Daniel D. Blinka, *Wisconsin Practice: Evidence* § 107.1, at 32 (1991)).
[72] *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."[73] 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.[74] 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.[75]

[73] *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.

[74] *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.'").

[75] *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 reminder 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.[76] 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.[77] 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."[78] 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.[79]

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.[80] 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]

7 *Wisconsin Practice, Evidence* § 107.2 (4th ed. August 2019 update).

[76] 511 N.W.2d 316, 322 (Wis. App. 1993).

[77] *Id.*

[78] *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.

[79] *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.

[80] *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.[81] 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.[82]

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.

[81] *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.").
[82] *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.[83] In *State v. Johnson*, the court also affirmed the trial court's refusal to allow the defendant to complete.[84] 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.[85] 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.[86] 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.[87] 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.

[83] 604 N.W.2d 33 (Wis. Ap. 1999).
[84] *State v. Johnson*, 616 N.W.2d 923 (Wis. App. 2000).
[85] *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.").
[86] *State v. Briggs*, 571 N.W.2d 881 (Wis. App. 1997).
[87] *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) .

TAB 3C

MEMORANDUM

TO: Professor Richter

FROM: Taylor Peshehonoff

DATE: February 5, 2020

RE: Updated State Cases for Rule of Completion (Cases Updated as of 02/01/2020)

Professor Richter,

Of the ten relevant state statutes discussed in your memo, four states have not cited their particular statute at all since January 1, 2019. Those states are (1) Connecticut, (2) Montana, (3) New Hampshire, and (4) Wisconsin. Georgia has one new case that only discusses the rule in the context of a writing/recording.[1] Iowa's Court of Appeals discussed the issue in relation to a video.[2] Nebraska's courts decided three new cases dealing with the rule of completion, but all instances dealt with written or recorded conversations.[3] Oregon evaluated whether the rule of completion applied to actions, such as a defendant wanting the jury to know that he tried to withdraw his guilty plea.[4]

The two states with the most analysis on their respective rules of completion are California and Texas. Texas's cases are fairly straightforward, and twelve total cases cited to Rule 107 in the last year. Most dealt with recorded or written records and provided no new analysis on this evidentiary rule.

[1] Castillo-Velasquez v. Georgia, 827 S.E.2d 257 (Ga. 2019).
[2] Lane v. Iowa, No. 18-2085, 2019 WL 6893942 (Iowa Ct. App. Dec. 18, 2019) (slip opinion).
[3] Nebraska v. Jackson, 923 N.W.2d 97 (Neb. 2019) (video); Nebraska v. Mrza, 926 N.W.2d 79 (Neb. 2019) (Snapchat messages); Schuemann v. Menard, Inc., No. A-18-1021, 2020 WL 283880 (Neb. Ct. App. Jan. 21, 2020) (recorded conversation).
[4] Oregon v. Smith, No. A160838, 2019 WL 6044654 (Or. Ct. App. Nov. 14, 2019).

One Texas case did, however, allow into evidence oral conversation to provide necessary context. In *Barlow v. Texas*, the defendant sought to prevent an officer from testifying as to what he learned while interviewing two other men on the scene.[5] On cross-examination, defense counsel asked the officer "whether the accounts [from the men] . . . 'sort of matched[?]' The deputy testified 'No[,]' and he explained that [the men's] accounts differed on the subject of why they were at the house without providing the jury with any additional detail."[6] On redirect, the state asked what the officer learned from the two men that night, and the defense objected on hearsay grounds.[7] The trial court allowed the hearsay into evidence in order to "complete [the officer's] testimony about whether their stories matched."[8] The appellate court held that because "the trial court could have believed that [the officer's] response (No) to the question . . . created the possibility the jury might have considered his response to mean their 'stories' did not match at all," the additional hearsay statements might have cleared up any false impression.[9] Thus, there was no abuse of discretion in allowing the statements into evidence.[10]

California courts have been much more active in evaluating the proper role of its rule of completion, with thirty-nine cases citing to the relevant statute. The majority of these cases only evaluated the rule of completion in the context of recorded or written statements. The courts did make a few substantive comments on the use of this rule, confirming the generally limited framework that must exist in order to exercise it. For instance, when the state entered several minutes of a prior recorded conversation into evidence, the court of appeals commented that the trial court should not have used the rule of competition to bring in the rest of the recording

[5] 586 S.W.3d 17, 21–22 (Tex. App. 2019).
[6] *Id.* at 21.
[7] *Id.* at 21–22.
[8] *Id.* at 22.
[9] *Id.* at 26.
[10] *Id.*

because "[t]he rule of completeness cannot be invoked after a witness is impeached with one or more inconsistencies within a statement to show the remainder of the witness's testimony was consistent with that statement."[11]

The California Court of Appeals has also affirmatively indicated that one cannot invoke the rule of completion unless the conversation or recording to be completed is actually admitted into evidence. In *California v. Scarber*, a recorded conversation was at issue but had never been offered into evidence.[12] "Evidence that there was such a recording and that the voices thereon were extremely loud and yelling, and the fact the subject of the recording was introduced through testimony, do not satisfy the threshold requirement of the statute."[13] Thus, the proponent for completion must actually seek to complete *admitted* evidence.

A recent example of the California Supreme Court finding the rule of completion to be applicable is in *California v. Armstrong*.[14] The defendant gave a statement to police in which he recounted that he approached the victim only after she had hurled racially-motivated statements at him.[15] The state sought to redact the racial comments from the police interview, arguing that it was layered hearsay, and the trial court agreed.[16] The California Supreme Court disagreed, finding that "[t]he yelling prompted [the defendant] to cross the street and confront the person who had shouted," and "[t]he redaction . . . allowed the prosecution to create a misleading impression" as to why the defendant crossed the street.[17]

[11] California v. Larin, F074997, 2019 WL 101855, *3 (Cal. Ct. App. Jan. 4, 2019).
[12] F068908, 2019 WL 5958004 (Cal. Ct. App. Nov. 13, 2019).
[13] *Id.* at *46.
[14] 433 P.3d 987 (Cal. 2019).
[15] *Id.* at 785.
[16] *Id.* at 786.
[17] *Id.*

One case that seemed to deal with oral statements but was never clear as to whether the statements were memorialized in some form is *California v. Quezada*.[18] The statement reviewed at the appellate level dealt with the defendant's supposed reasoning for punching the victim.[19] Evidently, the defendant disclosed this statement to the officer during a conversation after the incident,[20] but the opinion does not make clear whether the officer recorded the conversation at issue. The trial court precluded this statement from admission under the rule of completion because it did not contextualize anything for the jury.[21] The defendant argued on appeal that this statement contextualized his state of mind at the time of the incident and thus was admissible under the rule of completion.[22] Without determining whether the trial court properly excluded the statement, the court of appeals found that the "defendant ha[d] failed to establish that the error was prejudicial under state law."[23]

In *California v. Salvador Espinoza*, the evidence at issue was an oral conversation that occurred between the witness and the defendants immediately after a shooting.[24] The trial court decided a motion in limine, preventing the witness from testifying that one of the defendants implicated the other in the shooting.[25] The witness was allowed to share that one of the defendants "told her 'that's what [we] do,' and also that he told her not to say anything, and if questioned by the police to say her car had been stolen by a rival gang member."[26] The witness also "testified that [the defendant] never said anything about being the shooter, only that he had

[18] H044717, 2019 WL 397734 (Cal. Ct. App. Jan. 31, 2019).
[19] *Id.* at *5.
[20] *Id.*
[21] *Id.*
[22] *Id.* at *7.
[23] *Id.*
[24] B288107, 2019 WL 3821795, *9 (Cal. Ct. App. Aug. 15, 2019).
[25] *Id.*
[26] *Id.*

been at the scene when the shooting occurred."[27] The defendant wished to have the witness testify that part of the conversation included him saying that he had only been walking down the sidewalk when the shooting took place.[28] The appellate court acknowledged that this statement "related to the same subject matter but was not necessary to make the admitted portion of the conversation understandable."[29] Thus, it was not error for the court to exclude this additional statement.[30]

Finally, the California Court of Appeals reviewed another instance of non-recorded conversation in *California v. Gardner*.[31] The defendant was charged with theft after walking out of a retail store with supposedly stolen shoes.[32] The defendant's conversation with the officer on the scene invoked the rule of completion issue, as defense counsel wished to inquire on cross-examination whether the defendant had stated that he was "hoping to return the shoes."[33] The defendant maintained that the trial court's exclusion of this statement violated Evidence Code Section 356 "because he claim[ed] it was in response to Bays's question about whether he had a receipt, suggesting it was offered as an explanation and thus had some bearing upon or connection with the admitted statement appellant did not have a receipt."[34] The court held that the statement at issue had no "bearing upon or connection with the statement he did not have a receipt based on the context of the entire exchange between" the defendant and the officer.[35] After reviewing the information available in the record (from the first trial and the probation report), "[t]he record shows the statements regarding the return were not, as appellant claims,

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] F076553, 2020 WL 57882 (Cal. Ct. App. Jan. 6, 2020).
[32] *Id.* at *2.
[33] *Id.* at *3.
[34] *Id.* at *4.
[35] *Id.*

'apparently immediate . . . follow-up responses' to the questions regarding whether appellant had a receipt or money."[36]

[36] *Id.*

TAB 4

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FORDHAM

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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 615
Date: October 1, 2020

The Committee has been reviewing a possible change 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).[1]

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.

At its 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 --- but must explicitly enter an order if it wishes to do so.

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.

Another problem for discussion arose at the last Committee meeting: whether a sequestration order prohibiting access to trial testimony outside the courtroom could or should apply to lawyers preparing witnesses. The Reporter's memo for that meeting surveyed the case law and concluded that there is a conflict in the courts over whether lawyers can be barred from preparing witnesses with trial testimony.

The Minutes of the Fall, 2019 meeting reflect the Committee's discussion about amending Rule 615 to address counsel's use of trial testimony to prepare witnesses:

> The Reporter explained that the three drafting alternatives for an amendment to Rule 615 included in the agenda materials varied only with respect to the treatment of counsel. One amendment option would prohibit counsel from conveying trial testimony to sequestered witnesses. Another would exempt counsel from any prohibition on conveying trial testimony to sequestered witnesses outside the courtroom. The third amendment alternative is silent as to the treatment of counsel, leaving courts to determine how to supervise counsel on a case-by-case basis.

[1] 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; they gave conflicting stories about the event. Susanna was acquitted. If the second Elder had been in the courtroom while the First testified, he could have avoided an inconsistency by tailoring his testimony. He could also have avoided death. Both Elders were beheaded for giving false testimony.

The Reporter explained that counsel's preparation of sequestered witnesses presents issues of professional responsibility as well as the Sixth Amendment right to effective counsel --- topics that are typically beyond the ken of the Evidence Rules. An amendment that is silent with respect to counsel was included as an alternative because it would be most hands-off as to the complicated policy issues. The Reporter explained that bracketed material was included in the draft Advisory Committee note to this third option to alert the parties and the court to the issues regarding counsel, but to take no position in the rule on counsel's use of trial testimony to prepare witnesses. * * *

The Federal Public Defender suggested that the Sixth Amendment right to confront witnesses should be added to the bracketed language in the draft Advisory Committee note discussing the issues raised by counsel's communication of trial testimony to sequestered witnesses --- and the Reporter agreed to add such language. * * *

Judge Campbell suggested that the amendment alternative that is silent as to counsel would address the current concerns about sequestration without getting embroiled in the counsel question. The Chair agreed, as did another Committee member. * * *

This memo is in four parts.[2] 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 a draft amendment and Committee Note, and it also sets forth an alternative draft of the discretionary provision for the Committee to consider. Part Four discusses the possibility of an "add-on" amendment to clarify the right of entity-parties to designate an agent who is excepted from exclusion is limited to one agent.

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

[2] Most of the material is from prior memos, but there are updates and adjustments to respond to comments from the prior meeting and the Standing Committee meeting. There is also a new drafting alternative. And Part IV is new.

other outside the courtroom; and nothing prevents an excluded prospective witness from obtaining, or being provided, the trial testimony.

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):

> 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 problem of outside access to trial testimony by prospective witnesses is exacerbated by the ease with which a witness can, if so inclined, access that testimony. In the days of internet and social media, access to trial testimony is a snap. Moreover, even if a witness is not inclined toward such access, those who are at the trial can easily send that witness the trial testimony --- by email, etc. And now, when at least some trial proceedings might be virtual, the risks of disclosure are heightened even more. For example, Law 360, on August 6, 2020, reported that "McDermott Will & Emery LLP mistakenly allowed a restricted Zoom link for its client's trial to be distributed to individuals outside of the case."

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 to disclosure of trial testimony outside the courtroom 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.

Several other circuits are in agreement with the First Circuit's view that anything other than exclusion of witnesses from the courtroom must be regulated by a specific court order to that effect. See *United States v. Collier,* 932 F.3d 1067, 1077 (8th Cir. 2019) ("While Federal Rule of Evidence 615 authorizes the district court to sequester witnesses, sequestration orders do not forbid all contact with all trial witnesses at all times, *unless otherwise specified*.") (emphasis added); *United States v. Brown*, 547 F.2d 36, 37 (3d Cir. 1976) ("Rule 615 relates exclusively to the time testimony is being given by other witnesses. Its language is clear and unambiguous."). [3]

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 explicitly state that its order extends outside the courtroom --- that is, a statement that the court is invoking "the rule" or "Rule 615" is not enough. 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 a majority of 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. *United States v. Robertson*, 895 F.3d 1206, 1214 (9th 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 stated that most of the circuits agreed with the court's position:

> In our view, an interpretation of Rule 615 that distinguishes between hearing another witness give testimony in the courtroom and reading the witness's testimony from a transcript runs counter to the rule's core purpose—"to prevent witnesses from tailoring their testimony to that of earlier witnesses." *Larson v. Palmateer*, 515 F.3d 1057, 1065 (9th

[3] See also *United States v. Teman*, 2020 U.S. Dist. LEXIS 99193 (S.D.N.Y. June 5, 2020) ("the Second Circuit has not held that Rule 615 extends beyond the courtroom to preclude out-of-court communications between witnesses during trial"). Though there is Second Circuit case law appearing to indicate that Rule 615 orders extend outside the courtroom. *United States v. Friedman*, 854 F.2d 535, 568 (2d Cir. 1988)(recognizing that "the reading of testimony may violate an order excluding witnesses issued by a district court under Rule 615")

> Cir. 2008). The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript. An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing. Therefore, we join those circuits that have determined there is no difference between reading and hearing testimony for purposes of Rule 615. *See United States v. McMahon*, 104 F.3d 638, 642–45 (4th Cir. 1997) (affirming the district court's conclusion that a witness violated a Rule 615 exclusion order by reading daily trial transcripts); *United States v. Friedman*, 854 F.2d 535, 568 (2d Cir. 1988)(recognizing that "the reading of testimony may violate an order excluding witnesses issued by a district court under Rule 615"); *United States v. Jimenez*, 780 F.2d 975, 980, n.7 (11th Cir. 1986) (concluding that a witness violated a Rule 615 exclusion order by reading the testimony of another agent witness from a prior mistrial); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373–74 (5th Cir. 1981) (holding that providing a witness transcribed portions of another witness's testimony in preparation for his court appearance constitutes a violation of Rule 615). A trial witness who reads testimony from the transcript of an earlier, related proceeding violates a Rule 615 exclusion order just as though he sat in the courtroom and listened to the testimony himself.[4]

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 just an invocation of the rule, and is read not to prevent out-of-court

[4] 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 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). See also *United States v. Greschner,* 802 F.2d 373, 376 (10th Cir. 1986)(identifying a risk of reversal where sequestered witnesses discuss testimony); *United States v. Johnston,* 578 F.2d 1352, 1355 (10th Cir. 1978)(requiring that district courts give instructions "making it clear that witnesses are not only excluded from the courtroom but also that they are not to relate to other witnesses what their testimony has been and what occurred in the courtroom"); *United States v. Baca,* 2020 WL 1325118 (D.N.M.) ("The Court agrees with those courts taking broad approaches to rule 615. Permitting witnesses to overhear the substance of others' testimony in argument or any other form would defeat rule 615's anti-tailoring, anti-fabrication, and anti-collusion aims.").

On the other hand, the *Robinson* court'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 (4th 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.

That means that the 1st, 3rd, 4th and 8th circuits are on one side of the issue, while the 2nd, 5th, 9th, and 11th circuits are on the other).

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 ("I am entering a Rule 615 order") or vague. An example of vagueness is the order in *United States v. Rhynes*, 218 F.3d 310 (4th 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 a lack of clarity in the courts about how far Rule 615 extends. 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 or must extend outside the courtroom, to prevent excluded witnesses from being informed about or obtaining trial testimony. [5] 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 that is so 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 Evidence Rule.

If the Committee agrees that Rule 615 should address the question of out-of-court access to trial testimony, 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 many courts have so read it only means that they are going beyond the text to reach the better result. At any rate, some amendment would be necessary to resolve the conflict between the courts that read Rule 615 as it is written and those that do not.

Moreover, an amendment is necessary to assure that people subject to the order have notice about what the order entails. The Supreme Court has held that when a witness violates a sequestration order, the court may cite the witness for contempt. *Holder v. United States*, 150 U.S. 91, 92 (1893). Such a serious consequence must be contingent on clear notice. It follows that without an explicit statement of the extent of an order, the court will not be able to control out-of-

[5] 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."

court disclosures of trial testimony through the threat of sanction --- leading to the danger of tailoring that the Rule is designed to prevent.[6]

Comment by Standing Committee Member

After the January meeting of the Standing Committee, the Chair received a suggestion from a member of the Standing Committee, which he described as "just a thought." The member suggested that the rule could be amended to provide that exclusion would be the default rule --- in other words, in the *absence* of an order, the witnesses would be subject to an exclusion (unless excepted from exclusion under the Rule 615 exceptions). Under this suggestion, Rule 615 would provide that all witnesses are excluded from the courtroom unless the court orders otherwise.

The suggestion of exclusion by default runs contrary to the fact that enforceability of exclusion comes from a *court order* --- and sanctions for violation are grounded in the fact that the party or witness has violated a court order. The sanctions seem significantly less justified if a party violates a default rule. Moreover, how is a party to know, in the absence of a court order, whether any particular witness is within an exception from exclusion? Presumably that would come from a court order that provides an exception to the default rule. But what is the point of that? Why not just start with an order, that contains exceptions within the terms of the order?

Most importantly, the whole problem with the practice under Rule 615 is that parties and witnesses don't know the scope of an exclusion order. That problem would only be exacerbated if there is no order at all.

For all these reasons, it would appear that a default rule of exclusion would raise difficulties and is fundamentally inconsistent with the proposed amendment that the Committee has been considering for two years.

II. Case Law on an Order Preventing Counsel from Disclosing Trial Testimony to Prospective Witnesses?

As the court stated in *United States v. Rhynes,* 218 F.3d 310 (4th Cir. 2000), Rule 615 on its face does not apply to lawyers: "It is clear from the plain and unambiguous language of Rule

[6] *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).

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 can be subject to 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.[7] 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 explicitly disclosing trial testimony to a 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.

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 a lawyer from preparing a witness with trial testimony. The plurality held that a lawyer could not be prohibited from preparing an excluded witness with trial testimony.

The plurality confidently relied on authorities interpreting Rule 615, stating that "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." But a close look indicates that there is not much support in the cited authorities for the proposition that courts *may not* prevent counsel from disclosing trial testimony while preparing sequestered witnesses. The *Rhynes* plurality 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)).

[7] 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.

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 preventing disclosure of trial testimony 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. 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. [8]

- 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).

The treatise does not say that trial courts are *prohibited* from barring counsel from discussing trial testimony with sequestered witnesses. It says that orders usually allow it --- which implies that the matter is up to the court.

[8] Another case, *United States v. Guthrie,* 557 F.3d 243 (6th Cir. 2009), makes a similar distinction between talking to a witness and talking to them about prior trial testimony. In *Guthrie,* the defendant objected to a prosecutor talking to a victim during a break in the victim's testimony. He argued that this violated the Rule 615 order, or at least its "spirit." After stating that "[s]equestration orders, even when granted, do not prohibit witnesses from speaking with counsel" it emphasized that the prosecutor was instructed not to coach the witness or disclose 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 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 (5th 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 testimony. 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 (9th Cir. 2018), discussed *supra*: 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 (5th Cir.1987): Southeast invoked Rule 615, and all nonparty witnesses were ordered 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 witness's 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 are four reported cases that I could find on the *Rhynes* plurality's side of the issue:

● *R.D. v. Shohola, Inc.,* 2019 U.S. Dist. LEXIS 199841, at *3-4 (M.D. Pa. Nov. 19, 2019): The court ordered that all fact witnesses "shall be instructed not to discuss the case or their testimony with each other without the approval of the court" but declined to regulate witness preparation by counsel. The court did not say that it had no power to regulate counsel's use of trial testimony to prepare witnesses with trial testimony. It just declined to exercise its discretion to do so.

● *United States v. Cathey*, 2020 U.S. Dist. LEXIS 12932, at *7-8 (D.S.D. Jan. 27, 2020): The defendants moved for a new trial, alleging that the government violated the court's sequestration order by contacting one of its witnesses upon learning that she had offered false testimony. The court (citing *Rhynes,* a controlling precedent in the Fourth Circuit) stated that Rule 615 "does not by its terms forbid an attorney from conferring with witnesses during trial." In this case, contact with the witness was justified because "they were aimed at ensuring the government corrected the testimony it knew to be false." The court determined that "even if the conversation was improper under the sequestration order, the court would still have wide latitude in deciding how to respond to the impropriety." Here it did so by "limiting [the witness's] testimony to correcting her prior false

statements" in order to curtail any improper effects of the government's communication with the witness.

● *Cruz v. Maverick County,* 2018 WL 8897808 (S.D. Tex.): The court found no violation of Rule 615 even though witnesses on the second day of trial appeared to tailor their testimony based on testimony given on the first day of trial. The trial judge concluded that the excluded witnesses probably were apprised of the testimony after consulting with counsel. The court stated that "because the right to counsel, even in civil cases, is one of constitutional dimensions and should thus be freely exercised without impingement . . . [a]pplying FRE 615 to attorney-client communications would thus violate the Plaintiffs' due process right to retain counsel."

● *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.[9]

[9] *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*.").

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 and the other were pretty well vetted by the plurality and dissenting opinions in *Rhynes*.

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."[10]

[10] 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.

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 *Rhymes* was significantly milder. But finding it a violation would not necessarily, or even likely, result in exclusion of the witness after such a mild event. 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.

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 probably does not raise the same degree of 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, not related to Rule 615. 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 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 does not at all follow 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. At the last meeting there appeared to be agreement that issues grounded in professional responsibility and

the right to effective assistance of counsel are generally beyond the ken of evidence rulemaking. These sensitive issues are probably 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.

III. Draft of Proposed Amendment

As stated above, the Committee has rejected a draft that automatically extends Rule 615 protection outside the courtroom. Assuming an amendment is to be proposed, the Committee has opted for a provision referencing the court's discretion to extend protections outside the courtroom – if the court so specifies. ***(But see below for an alternative draft on the discretionary provision).***

On the counsel issue, the sense of the Committee at the last meeting (again, assuming an amendment is to be proposed) was that the text not be amended to discuss the applicability of Rule 615 to counsel, but that reference to the problem would be included in the Committee Note.

Rule 615. Excluding Witnesses<u>; Preventing Access to Trial Testimony by Excluded Witnesses</u>

<u>(a) Exclusion and Exceptions.</u> 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)**~~ **<u>(1)</u>** 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 prohibit excluded witnesses from learning about, obtaining or being provided with trial testimony.

Draft Committee Note

Rule 615 has been amended to clarify that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining access or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the 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 (9th 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 from the courtroom. Under the amendment, the court may by order prevent excluded witnesses from obtaining, learning about, or being provided with trial testimony --- but in the interest of fair notice, the court's order must so specify.

The amendment 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, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

Alternative Draft --- Requiring an Order Extending Beyond the Courtroom, but Giving the Court Discretion as to the Details

As discussed above, the Committee previously voted to leave it to the discretion of the court to extend Rule 615 protection outside the courtroom. Thoughts expressed by Committee members were that the question of access to trial testimony outside the courtroom were much more complex than the simple question and remedy of kicking prospective witnesses out of the courtroom. That is certainly true, but what was not considered was a middle ground: requiring the court to issue an order that extends outside the courtroom, but leaving it to the trial court to figure out the details of that order.

There are good reasons to consider this compromise approach, most of them already discussed. If the trial court imposes no restrictions on access outside the courtroom, then a prospective witness is free to access a live feed of the trial (which some courts are doing under Covid), or seek out information on social media, or simply take a witness who testified out to lunch. Most courts have recognized that Rule 615 is essentially toothless unless there are protections against access to trial testimony by prospective witnesses when outside the courtroom. Therefore there is much to be said for a requirement that the court at least address the risks of tailoring testimony after prospective witnesses are excluded.

There is also much to be said to leaving it up to the court to figure out the *details* of such an order. Anything in the rule as to those details is likely to be overinclusive and underinclusive. For example, adding language such as "the order must prevent prospective witnesses from talking to witnesses who have testified" 1) barely scratches the surfaces of all the risks to address, meaning that it would probably have to be part of a long laundry list, and 2) "talking" wouldn't prevent an email, but then again, preventing them from "having any contact" could be very overbroad. And allowing contact so long as it does not involve discussions about the testimony is a concept that is hard to draft and will create line-drawing questions. The whole concept of preventing access to testimony by prospective witnesses outside the court bespeaks a case-by-case approach and the use of judicial discretion.

What follows is a drafting alternative that requires the court to enter an order to control out of court access to trial testimony, but leaves it to the court to figure out the details.

Rule 615. Excluding Witnesses<u>; Preventing Access to Trial Testimony by Excluded Witnesses</u>

<u>(a) Court orders.</u> At a party's request, the court must<u>:</u>

<u>(1)</u> order witnesses excluded so that they cannot hear other witnesses' testimony<u>; and</u>

(2) order protections that the court finds necessary to prohibit excluded witnesses from learning about, obtaining or being provided with trial testimony.

(b) Court acting on its own. The court may issue orders on its own.
~~Or the court may do so on its own. But this rule does not authorize excluding:~~

(c) Exceptions from Exclusion. This rule does not authorize excluding the following persons from the courtroom:

~~**(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.

Draft Committee Note

Rule 615 has been amended to clarify that the court, in entering an order under this rule, must also enter an order to address the risk that excluded witnesses may obtain or be provided access to trial testimony during the time they are excluded. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining access or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the 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 (9th 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, 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 from the courtroom.

Under the amendment, the court in entering an order under the Rule must address both exclusion from the courtroom and the risks that an excluded witness may obtain or be provided access to trial testimony.

The actual risk that an excluded witness will hear about or be provided access to trial testimony will vary from case to case. Therefore, the rule leaves the details of the order to the discretion of the court. But the court must enter an order addressing the question of out-of-court access, because the risk of tailoring testimony is not fully addressed by simply excluding witnesses from the courtroom, and because parties and witnesses are entitled to fair notice of regulated conduct.

The amendment 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, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

IV. Postscript: A Possible Split of Authority Over Rule 615(b)

Rule 615 provides the following exceptions from exclusion:

> 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.[11]

There appears to be some confusion regarding subdivision (b), on whether the party-entity is limited to one immune representative or is allowed more than one.[12] That possible conflict is discussed by the United States District Court for the Middle District of Alabama in *United States v. McGregor,* 2012 WL 235519 (M.D.Ala. 2012), a case in which the government sought to designate multiple agents as immune from sequestration under subdivision (b):

> 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 say above that this is a possible conflict, because I am not sure that the *McGregor* court has it exactly right. The court cites the Second Circuit case of *Jackson,* but the court there holds 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). So I think that the Alabama court might be overstating the holdings of both cases. The *Pulley* case cites a case from

[11] This last provision was added in 1998 in response to victims' rights legislation in Congress that provided crime victims a statutory right to attend trial proceedings.

[12] References to "subdivision (b)" are to the current rule. If the amendment regarding the scope of a Rule 615 order were to be adopted, subdivision (b) would be renumbered to (a)(2). See the draft amendment above.

the Fifth Circuit in which two agents were allowed to testify, but the Fifth Circuit did not say that they were both allowed to testify under (b). Rather it said, confoundingly, that subdivision (b) allowed multiple representatives, within the discretion of the judge, but that the trial court did not abuse discretion because "adequate grounds existed for excusing both Clark and Beaupre *under the second and third excepti*ons to the rule." *United State v. Alvarado,* 647 F.2d 537 (5th Cir. 1981).

There is some wayward language in both the Second and Fifth Circuit cases --- for example, the *Jackson* court says that there is no bar on multiple representatives even though (b) is written in the singular --- but there is no actual holding that multiple witnesses can be designated under (b).

There are other cases that not only declare but seem to hold that (at least) two witnesses can be protected under (b). For example, in the unpublished decision of *United States v. Lach,* 1995 U.S. App. LEXIS 6064, at *9 (9th Cir. 1995), the court allowed two case agents to be exempt, in the following analysis:

> Lach first challenges the court's decision to permit two government agents to sit at counsel table. Lach concedes that the presence of one government agent is permissible under the exception to the mandatory exclusion rule for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." Fed. R. Evid. 615. We have read this provision, however, to permit two individuals to represent a party at counsel table. *Breneman,* 799 F.2d at 474; see also *United States v. Alvarado*, 647 F.2d 537, 540 (5th Cir. Unit A June 1981) (permitting more than one government agent at counsel table); *United States v. Spina*, 654 F. Supp. 94, 96 (S.D. Fla. 1987), aff'd 881 F.2d 1086 (11th Cir. 1989) (same).

The *Lach* court relied on *Breneman,* but the holding in that case was that the government could swap out one representative for another, after the designation had been made --- so it was not a case involving multiple representatives. *Lach* relied on the dictum in *Alvarado.* And it relied on *Spina,* where the court declared (relying on *Alvarado*) that it had the discretion to allow multiple representatives under (b), but then held that "Special Agents McBride and Mortellaro are not be sequestered pursuant to Rule 615(b) and (c)."

In other words, the case for finding a true conflict in Rule 615(b) regarding the number of representatives allowed is weak. A large majority of courts have applied Rule 615(b) the way it is read --- only one representative gets immunity from exclusion. [13]

[13] *See, e.g., United States v. Pulley,* 922 F.2d 1283 (6th Cir. 1991) (one representative only); *United States v. Green*, 293 F.3d 886, 892 (5th Cir. 2002) (multiple agents must be qualified as necessary under Rule 615(b)); *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986) (noting reliance on the singular phrasing of the Rule 615(b)); *Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co.,* 519 F. Supp. 668, 679 (D. Del. 1981) ("[T]he exception is clearly framed in the singular and the Court concludes, in the contextof this case, that it does not permit counsel to designate more than one person to be present as a corporation's representative."); *Capeway Roofing Sys. v. Chao,* 391 F.3d 56, 59 (1st Cir. 2004) ("[T]he bare language of Rule 615 suggests that only one [agent] should have stayed."); *United States v. Williams*, 1993 U.S. App. LEXIS 9786, at *5 (10th Cir.) (indicating that an entity party could only have designated one representative out of two potential witnesses); *United States v. White-Kinchion*, 2013 U.S. Dist. LEXIS 59201, *2-3 (D. Kan.) (refusing to permit multiple representatives under 615(b).

Nonetheless, it is fair to state that there is at least some inconsistency and confusion in the case law on Rule 615(b). That confusion is probably not in itself enough to warrant an amendment of Rule 615. For one thing, even if a court does designate more than one representative under (b), and assuming that is error, it would be harmless if the protected witness could fit the "necessary" requirements of (c), which will often be the case; therefore an amendment specifying that (b) is for one person only might not affect many cases as a practical matter.[14]

But the question at this point in the Committee's Rule 615 adventure is not whether an amendment to Rule 615(b) is justified on its own. The question is whether it is worth it to propose a "tag-along" improvement to the Rule if the Committee decides that it is going to propose an amendment regarding the extent of a Rule 615 order. There is a good deal of precedent for "tagalong" amendments. For example, the recent amendment to Rule 404(b) makes a change to the placement of the word "other" --- from "crimes, wrongs, or other acts" to "other crimes, wrongs, or acts." There is no way that this slight change would have been a standalone amendment. But it does represent an improvement to the Rule that was already being amended (because it emphasizes that Rule 404(b) applies only to acts other than those at issue). Tagalong amendments can make a lot of sense because you don't get to amend the same rule very frequently. You might as well do your best when you are amending it.

So let's assume that there is a problem worth amending in Rule 615(b). What should the amendment be? It seems clear that Rule 615(b) should be limited to one representative --- with the overflow allotted to (c). The only argument in favor of multiple representatives has been stated by Weinstein's treatise and a couple of courts cited above: "Courts should have discretion to allow for more representatives under (b)." [Which is not so much an argument as it is a conclusion.]

But there are a number of counterarguments to that conclusory statement:

● What does discretion mean in this circumstance? How is it to be guided, in terms of criteria to apply? *There are no standards in Rule 615(b) to apply* to determine whether a representative should be allowed to sit at trial. The party gets to designate and that is that. So if there is no specific numerical limit, how is a court to decide whether the entity-party can have two, or three, or 600 of its prospective witnesses sitting at trial and tailoring their

[14] *See, e.g., United States v. Cooper*, 949 F.3d 744 (D.C. Cir. 2020): The trial judge permitted one IRS agent, the lead investigator, to remain exempt from sequestration along with another agent who testified at trial. The court in a footnote stated the following:

> Rule 615 does not authorize excluding an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney. Fed. R. Evid. 615(b). This exception appears to cover Special Agent Milne [the lead investigator]. Another exception to Rule 615 allows a witness to attend the trial if the party shows that he is 'essential to presenting the party's claim or defense.' Fed. R. Evid. 615(c). It may be that the government intended Special Agent LaRose to be covered by this exception. See *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991) ('Where the government wants to have two agent-witnesses in attendance throughout the trial, it is always free to designate one agent as its representative under subpart [b] and try to show under subpart [c] that the presence of the second agent is 'essential' to the presentation of its case.'); *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986).

testimony? The Weinstein treatise says that the court should consider factors such as the importance of the agent and the risk of tailoring. But, first of all, these factors are just made up --- they do not stem from any language in the rule. And second, they make little sense. The importance of the agent is surely relevant to the "necessity" standard of (c) --- why not just apply it there? And as to the risk of tailoring, the main reason that the Advisory Committee (and Wigmore) gave for giving parties a right to sequestration is that it is the parties and not the court who is going to know about the risk of tailoring. Allowing court discretion as to Rule 615(b) designations is inconsistent with the subdivision's grant of a unilateral right to designate immunity.

● The policy justification for Rule 615(b) is that, for purposes of avoiding exclusion, entities should be treated the same as individual parties. Individual parties cannot be excluded, for obvious reasons. The Advisory Committee Note to Rule 615 justifies the subdivision "[a]s the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present." If entities did not have an absolute right to designate an agent, they would have a disadvantage as compared to individuals.[15] But that very reason for having Rule 615(b) indicates that it should be limited to a single agent. Otherwise, *individual parties will be disadvantaged* because entities could have multiple witnesses exempt from exclusion and individual parties would not.

For all these reasons, if an amendment to Rule 615(b) is to be proposed, it should limit the number to one agent. This will be a pretty easy drafting exercise. It can be done as follows:

But this rule does not authorize excluding:

(1) a party who is a natural person;

(2) ~~an~~ one officer or employee of a party that is not a natural person, ~~after being~~ who is designated as the party's representative by its attorney;

* * *

Note that this amendment is completely independent from the proposal regarding the extent of a Rule 615 order. Exceptions to exclusion are not relevant to orders that extend outside of court, because the witness within an exception will not be excluded in the first place, and so will hear the trial testimony first-hand.

[15] Tellingly, the Committee Note states that "[m]ost of the cases have involved allowing *a* police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness."

If the Committee decides that an amendment to Rule 615(b) should be added to the existing proposal, the Committee Note would have to be altered. Here is a possible draft, with the reference to 615(b) at the end (with the same change possible should the Committee prefer the alternative draft to Rule 615(b) that requires a court to extend the order outside the courtroom):

Draft Committee Note, combining language about the extent of an order and language about entity representatives

Rule 615 has been amended for two purposes. Most importantly the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining or getting access to trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the 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 (9th 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 from the courtroom. Under the amendment, the court may by order prevent excluded witnesses from obtaining, learning about, or being provided with trial testimony --- but in the interest of fair notice, the court's order must so specify.

Nothing in the amendment is intended to create an expectation that the court should issue orders controlling conduct outside the courtroom. The rule leaves the question of the extent of the order within the discretion of the court. It simply states that if the court does want the order to extend to conduct outside the courtroom, it must so provide.

The amendment 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, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

Finally, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated agent per entity. This limitation, which has been followed by most courts, provides parity for individual and entity parties. If an entity seeks to have more than one agent protected from exclusion, it is free to argue that the agent is essential to presenting the party's claim or defense under subdivision (a)(2).

TAB 5

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra
Re: COVID, the CARES Act, an Emergency Rule, and the Federal Rules of Evidence
Date: October 1, 2020

It goes without saying that the COVID crisis has challenged the courts, and has raised the question of whether the National Rules can, in their current state, accommodate trials and other proceedings that are affected by a pandemic or a similar emergency. In that regard, the CARES Act contains a provision that directs the Judicial Conference to consider whether rules changes are necessary to deal with a future emergency. In March, the Advisory Committees were each tasked with the question of whether an emergency rule should be proposed (and these proposals, if any, would be coordinated and presented on a somewhat accelerated schedule).

The other Advisory Committees are dealing with issues such as service by mail; proceedings required under current rules to be in "open court"; grand jury proceedings; the right to a public trial; sentencing proceedings; how jury trials can work; and on and on. The Evidence Rules, however, deal only with the admission of proffered evidence, so there is really only one question: are changes needed in order to allow evidence to be admissible, if the trial must be adjusted to emergency conditions? As applied to evidence rules, that really means whether the rules are flexible enough to allow for the presentation of testimony and other evidence *remotely.*

Each of the other Advisory Committees are working on a draft emergency rule. The template comes from the Criminal Rules Committee. At this writing, the Criminal Rules Committee emergency rule reads as follows:

Rule 62. Emergency Rule.

(a) Conditions for a Rules Emergency. A rules emergency may be declared when:
(1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the ability of a court to perform its functions in compliance with these rules; and
(2) no viable alternative measures would eliminate such substantial impairment within a reasonable time.

(b) Declaring a Rules Emergency.

(1) ***Authority to Declare.*** The Judicial Conference of the United States may declare a rules emergency upon finding that the conditions in (a) are met in one or more courts.

(2) ***Contents.*** Each declaration must identify:

(A) the court or courts affected;

(B) any restrictions in addition to those in [the subdivision(s) setting forth those rules that can be suspended or altered] on the authority to modify the rules; and

(C) a date, no later than 90 days from the date of the declaration, on which it will terminate.

(3) ***Additional Declarations; Early Termination***. The Judicial Conference of the United States may

(A) issue additional declarations if emergency conditions change or persist; and

(B) terminate a declaration for one or more courts before its stated termination date when it finds a rules emergency affecting those courts no longer exists.

(c) Authority to Depart from These Rules After a Declaration

[This section lists the rules that are subject to suspension in an emergency, and it will specify what courts are allowed to do in the absence of the rule.]

(d) Authority to Use Video Teleconferincing and Teleconferencing After a Declaration

[This section will list the proceedings that may occur by video or telephone conferencing in an emergency --- trials are not on this list. The rules effected cover public access to a proceeding, election of bench trials, sentencing proceedings, issuing summonses, etc.]

(e) Effect of a termination. Terminating a declaration for a court ends its authority to depart from these rules. But if a particular proceeding is already underway and complying with these rules for the rest of the proceeding would be infeasible or work an injustice, that it may be completed as if the declaration had not terminated.[1]

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[1] At this writing, the Civil Rules Committee has prepared a draft emergency rule, but so few rules were found necessary to suspend for an emergency that the Committee is considering whether or not to propose an emergency rule at all. The alternative would be to amend the affected rule—which as of this writing appears to be Rule 4 only. The Committee came to the conclusion that the vast majority of Civil Rules are broad and flexible enough to cover any emergency. That was essentially the finding of the Chair and Reporter of this Committee regarding the Evidence Rules. See text infra. The Bankruptcy Rules Committee's proposal has the same structure as that of the Criminal Rules--- the only rules that would be effected are those that deal with deadlines. The Appellate Rules version would simply allow for suspension of any of the rules in an emergency. The expressed rationale for that broad doctrine is that Appellate Rule 2 already allows for the suspension of any rule by order in any case.

In March, the Chair of the Standing Committee contacted the Reporter and the former Chair, Judge Livingston, to provide an opinion on whether an emergency rule is necessary in the Evidence Rules. After substantial research, and a canvassing of a number of law professors, lawyers and judges, the Chair and Reporter responded that they did not see a reason for an emergency rule to be added to the Rules of Evidence.[2]

This memo explains the Chair and Reporter's reasoning for concluding that an emergency rule was unnecessary for the Evidence Rules. It also discusses whether existing Evidence Rules might be amended, not to accommodate emergencies, but to recognize the possibility of remote trials in the future, even in the absence of an emergency. This latter question is not Covid-related, but we all know that one of the consequences of Covid is the call from some for the increasing use of remote testimony even after the pandemic is over. If that is a good thing, at least in some cases, this memo considers as a preliminary matter whether any Evidence Rules should be amended to accommodate the regular use of remote testimony.

I. Should an Emergency Rule Be Added to the Federal Rules of Evidence?

As applied to the Evidence Rules, the basic question of the impact of an emergency boils down to the possibility of having to proffer (or wanting to proffer) evidence remotely. Of course there are many trial-related issues that arise with remote proceedings: managing the jury, voir dire, challenges to jurors, managing juror deliberations, the right to a public trial, and possible difficulties in assessing witness credibility are some of the issues that have been discussed. But none of these issues of trial management, or even of jurors able to assess witness credibility, are covered by the Evidence Rules. The only question that appears to tread upon the Evidence Rules is whether the rules permit the use of virtual presentation of evidence.

In terms of written information, such as documents and other writings, the question is easy: Rule 101(b)(6) provides that all written information is equally admissible in electronic form. As to physical evidence, such as a gun or drugs, there is simply nothing in the Evidence Rules that governs the form in which that evidence must be presented.

What about witness testimony? Is there is there anything in the Evidence Rules requiring that testimony must be given in the courtroom?

[2] Consequently, unlike the other Committees, Judge Livingston did not find it necessary to appoint an emergency rule subcommittee.

A. Rules on "Testimony"

It turns out that none of the references to "testimony" in the Evidence Rules require testimony to be made physically in the courtroom.[3] "Testifying" or "testimony" is referred to in the following rules, and just reading these rules one can see that there is nothing that requires that testimony be made physically in the courtroom:

● **Rule 103(d): Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

● **Rule 405(a): By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion.

● **Rules 413-14 notice provision: Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. (Similar language in Rule 415 for civil cases).

● **Rule 602: Need for Personal Knowledge**

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

● **Rule 603: Oath or Affirmation to Testify Truthfully**

> Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

● **Rule 605: Judge's Competency as a Witness**

[3] Unlike the Evidence Rules, Civil Rule 43 requires that testimony be in the courtroom, but it provides an exception that will be triggered by a serious emergency. The Civil Rules Subcommittee has determined that Rule 43 is flexible enough to cover an emergency and so has not included it in the list of rules that would be suspended in an emergency. The situation on the Criminal side is more complicated because of the constitutional right to face-to-face confrontation --- discussed later in this memo.

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

● **Rule 606(a): Juror's Competency as a Witness**

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

● **Rule 606(b): (1) Prohibited Testimony or Other Evidence**.

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether * * * .

● **Rule 608(a): Reputation or Opinion Evidence.**

A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

● **Rule 608(b): Specific Instances of Conduct.**

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

● **Rule 612(a): Writing Used to Refresh a Witness's Memory**

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

● **Rule 612(b): Adverse Party's Options; Deleting Unrelated Matter.**

Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

● **Rule 612(c): Failure to Produce or Deliver the Writing.**

If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

● **Rule 615: Excluding Witnesses**

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony.[4]

● **Rule 701: Opinion Testimony by Lay Witnesses**

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

[4] It is true that Rule 615 contemplates physical exclusion from a courtroom for prospective witnesses. But it doesn't say that the testimony that prospective witnesses are excluded from must be made in court. The Committee's work on an amendment to Rule 615 in fact addresses the possibility of a remote trial because it would specify that the court needs to consider the possibility of specifying that the order should extend outside the courtroom.

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

● 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.

● Rule 703: Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

● Rule 705: Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

● Rule 706(b): Expert's Role.

The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

● **Rule 801(c):** "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

● **Rule 801(d)(1):** A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

● **Rule 803(6)(D):** all these conditions[5] are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification;

● **Rule 803(10):** ***Absence of a Public Record.***

Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

[5] The reference is to the foundation requirements for a business record.

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind;

● **Rule 803(18):** ***Statements in Learned Treatises, Periodicals, or Pamphlets*****.**

A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

● **Rule 804(a): Criteria for Being Unavailable.**

A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.[6]

[6] Note that the rule actually distinguishes between physically attending the trial and testifying. This point will be discussed in the next section.

● **Rule 804(b)(1): *Former Testimony*.** Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one;[7] and

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

● **Rule 806: Attacking and Supporting the Declarant's Credibility**

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

● **Rule 901(b)(1): Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement [of authentication]:

(1) ***Testimony of a Witness with Knowledge*.** Testimony that an item is what it is claimed to be.

● **Rule 903: Subscribing Witness's Testimony**

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

● **Rule 1005: Copies of Public Records to Prove Content**

The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original.

[7] Note again the distinction between the concept of "testimony" and physically testifying at the trial.

- **Rule 1007: Testimony or Statement of a Party to Prove Content**

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

This journey through the use of the word "testimony" and its derivatives indicates that nothing in the Evidence Rules requires testimony to be made physically in the courtroom. Of course there are other references throughout the rules to "witness" (see, e.g., Rules 803(5), 804(b)(6), 901(b)(3)); "cross-examination" (see, e.g., Rules 608 and 611(b); "disclose to the jury" (see, e.g., Rule 703); "questions" (see, e.g., Rule 611(c)), and other terms related to the process of providing testimony. But having gone through all of those references, it seems very safe to say that none of them even refer to, much less mandate, a physical in-court location.[8]

B. Possible Problem Areas:

1. Rule 1006

One rule that could be read as raising an "in court" issue that is unrelated to testimony. Rule 1006 states that summaries of admissible evidence can be admitted if the underlying information "cannot be conveniently examined *in court*." And it further states that the court may order that the proponent of the summary produce the underlying information "in court." But even this rule does not specifically state that "in court" means physically in a courtroom. It would be odd to read the rule as requiring a summary to be excluded in a virtual trial because, by definition, the material cannot be conveniently examined physically in the courtroom. Surely, in a virtual trial, the question of convenience is whether the material can be conveniently examined over an electronic platform. And surely electronic availability of the information during a virtual trial would suffice to make the information presented "in court."

It may be that Rule 1006 could usefully be amended to allow summaries if they cannot be conveniently produced "in court or remotely." Likewise an amendment could provide for

[8] Compare Civil Rule 43(a): "At trial, the witnesses' testimony *must be taken in open court* unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." (There is an argument that Rule 43 does not require testimony to be made physically in court. One could construe testimony given in a virtual trial to be taken "in open court.")

inspection of the underlying records can be provided "in court or remotely." Both of these tweaks might be useful in going forward if virtual trials become a reality. But surely this is a niche question and does not itself justify an amendment that would add a general rule about emergencies to the Evidence Rules.

2. Hearsay?

Another possible concern is that remote testimony might somehow be hearsay because it is not being made physically at the trial. Yet that concern is handled by Rule 801(c), which defines hearsay as a statement that "the declarant does not make while testifying at the current trial or hearing." With remote testimony, the declarant *is* testifying at the current trial or hearing. And there is no case that I know that has found a hearsay problem in remote testimony given in real time at a trial.

3. Authenticity?

A concern that has been expressed recently is that the rules on authenticity must be changed to accommodate remote trials. But while it is true that authenticating documents remotely provides some challenges, none of those challenges are imposed by the Evidence Rules as applied to authentication of items at a virtual trial. That is to say, nothing about the Evidence Rules makes items harder to authenticate in a virtual trial than in an old school trial. For example, authenticating a video usually requires testimony of a person with knowledge of how the video was prepared, etc. Nothing in Rule 901 requires that the foundation testimony be made physically in a courtroom. The same authenticating witness that would testify in person would testify remotely and give the same testimony.

It should be emphasized that many of the authentication rules make it easier to authenticate evidence without any testimony at all. That is what Rule 902 is all about, and as you know, Rule 902 has been amended to allow authentication by a certificate (in lieu of testimony) with respect to business records (Rules 902(11) and (12)) and digital information (Rules 902(13) and (14)).

4. The Right to Face to Face Confrontation in Criminal Cases

Of course, in a criminal trial, remote testimony offered against the accused does raise special concerns, but again this is not because of the Evidence Rules. If a prosecution witness testifies remotely, the defendant has a viable claim that it violates his right to face to face confrontation. *See Coy v. Iowa,* 487 U.S. 1012 (1988) ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."). Even where the defendant and the witness can see each other over Zoom, there is a strong argument that this right to "virtual" face to face confrontation is not automatically

sufficient.[9] It can also be argued that cross-examining a witness virtually is not as effective as cross-examining them in court --- and that jurors might have more difficulty assessing how cross-examination affects a witness's credibility if the questioning is virtual.

But even assuming that all the points about cross-examining virtually are valid, and thus the right to face to face confrontation is potentially violated by remote testimony, there are two responding points. First, the right to face to face confrontation is not absolute. Remote testimony is permitted if the court finds that critical interests of the state require virtual testimony. That is the holding of *Maryland v. Craig,* 497 U.S. 836 (1990), where the court upheld closed circuit testimony of a child witness, after the trial court found that the child would be traumatized if required to testify in the presence of the defendant.

There is certainly an argument to be made that the pandemic or a similarly serious public health emergency raises state interests in the physical protection of witnesses that is every bit as weighty as the interest in child protection at stake in *Craig. Craig* requires a case-by-case determination of state interests, but in a public health emergency, it is probably likely that the government will be able to show the risks of physically producing a witness to testify in the courtroom in most cases. And there is Covid case law which has held that the right to face-to-face confrontation was qualified by the risks that a witness would hazard by traveling and testifying in person --- and therefore that remote testimony did not violate the defendant's right to face-to-face confrontation. *See United States v. Donziger,* 2020 WL 5152162 (S.D.N.Y. Aug. 31, 2020) ("There is no question that limiting the spread of COVID-19 and protecting at-risk individuals from exposure to the virus are critically important public policies" and allowing a 70 year-old witness to testify remotely "rather than in person, which would require boarding a plane and spending at least two weeks in New York City, is needed to promote those important public policies.").[10]

The second responsive point to the right to face to face confrontation issue is that the question before the Committee is whether any *Evidence Rules n*eed to be amended to adjust to remote testimony. On that question, it appears that there would be very little for the Committee to do in addressing the limits of the Confrontation Clause on remote testimony, in an emergency or otherwise. The whole matter would be controlled by the Confrontation Clause, not by the Evidence Rules. And the issue for the Committee is whether certain evidence rules need to be *suspended* in an emergency --- not whether the Constitution prohibits the application of any Evidence Rules.

In sum, it is unlikely that an amendment addressing the constitution's impact on remote testimony in a criminal trial would be useful, and especially not so as part of any effort to address an emergency.

[9] See Justice Scalia's comment about the proposal to amend the Criminal Rules to allow for remote testimony at the government's election: "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." Order of the Supreme Court, 207 F.R.D. 89, 93 (2002).

[10] Covid has also been found a sufficient reason under *Craig* to justify an order that witnesses at a criminal trial wear a facemask. See *United States v. Crittenden*, 2020 WL 4917733 (M.D. Ga. Aug. 21, 2020)

C. Positive Indications in the Evidence Rules Regarding Remote Testimony

So far the argument has been that nothing in the Evidence Rules specifically prohibits remote testimony. But there is more to it than that. In fact there are a number of affirmative indications in certain Evidence Rules that appear to embrace or at least to contemplate remote testimony.

1. Rule 611(a)

The most important Rule supporting the possibility of remote testimony is Rule 611(a), which provides as follows:

> **Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**
>
> **(a) Control by the Court; Purposes.** The court should exercise reasonable control over the ***mode*** and order of examining witnesses and presenting evidence so as to:
>
> **(1)** make those procedures effective for determining the truth;
>
> **(2)** avoid wasting time; and
>
> **(3)** protect witnesses from harassment or undue embarrassment.

The specific reference in Rule 611(a) to the "mode" of examining witnesses and presenting evidence appears to provide the court substantial discretion in deciding whether to permit remote testimony. The rule has been cited in pre-pandemic cases as a source of authority for allowing remote testimony on a showing of substantial need. For example, in the civil case of *Parkhurst v. Belt,* 567 F.3d 995 (8th Cir. 2009), the court held that the trial court was within its discretion under Rule 611(a) to allow for closed circuit television testimony to protect a child witness from trauma. As discussed above, the witness safety interests that are implicated in a public health emergency can be as serious as those associated with witness trauma. And there is other pre-pandemic case law relying on Rule 611(a) to allow remote testimony. *See, e.g., Jennings v. Bradley,* 419 Fed. App'x 594, 598 (6th Cir. 2011) (remote testimony allowed where three witnesses posed security threats while fourth witness would be deprived of necessary mental health support if forced to testify in person)); *Meirs v. Cashman,* 2018 WL 9815834 (W.D. Mich.) (allowing live video testimony from a witness who was incarcerated more than 100 miles from the courthouse; the court finding that live remote testimony was preferable to a *de bene esse* deposition).

So it is not surprising that there is authority under Rule 611(a) for ordering remote testimony during the pandemic. See *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967 (D. Minn. 2020) (ordering remote testimony in light of Covid concerns of witnesses and counsel; relying on the good cause exception to Civil Rule 43 and stating that "the Court's discretion on this question is supplemented by its wide latitude in determining the manner in which

evidence is to be presented under the Federal Rules of Evidence" and citing Rule 611(a)). *See also Argonaut Insurance Company v. Manetta Enterprises, Inc.,* 2020 WL 3104033 (E.D.N.Y.) (relying on Rule 611(a) to order virtual testimony over the defendant's objection, due to the pandemic).

It follows that an emergency rule is not needed in the Evidence Rules, because Rule 611(a) gives the court discretion to adapt to an emergency by allowing remote testimony.

Rule 611(a) Looking Forward

All that said, the Committee might wish to consider a review of Rule 611(a) to see if any more structure and definition should be put into that rule --- as opposed to having a giant heaping mass of discretion allowing a court to do pretty much what it wants. One possibility that might be addressed to Covid-like situations is to *add* authority for judges to "protect the health or safety of the witnesses or other participants in the trial or hearing." By specifying more of what judges can do, there can be thought given to, perhaps, controlling some of the exercises of authority under Rule 611(a) that have been allowed. ***None of this means that an emergency rule is required.*** But perhaps the Committee can give some thought to how Rule 611(a) is working and whether it provides any limitations at all.

Per the Chair's request, the Reporter will prepare a memorandum on Rule 611(a) for the next meeting.

2. Rule 804(a)(4) and (5)

These provisions establish two grounds of unavailability for the Rule 804 exceptions. Rule 804(a)(4) provides a ground of unavailability for a declarant who "***cannot be present or testify*** at the trial or hearing because of . . . a then-existing infirmity [or] physical illness . . ." Thus the rule distinguishes between testimony and physical presence in the courtroom. What it means is that if a declarant is too infirm to travel to testify, that declarant is not unavailable if she can still provide remote testimony.[11]

Rule 804(a)(5) also distinguishes between "testimony" and physical presence in the courtroom. As such it affirmatively supports the argument that the Evidence Rules do not require all testimony to be made in the courtroom. Rule 804(a)(5) provides for a ground of unavailability for absence. It requires a showing that the declarant:

[11] This may be true even in criminal cases. If the witness is too infirm to be physically produced, remote testimony is likely to be permissible under the "state interest" analysis of *Craig*. *See United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999) (admission of witness's testimony via two-way, closed-circuit television from a remote location did not violate the defendant's Sixth Amendment right of Confrontation, where witness was fatally ill and could not travel). Also, if it is the accused who is arguing that a prosecution witness is not unavailable because he could testify remotely, that argument would probably be a waiver of the right to confrontation.

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's ***attendance or testimony***, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

So assume that a party has a hearsay statement that would be admissible as a declaration against interest under Rule 804(b)(3), and the party seeks to establish absence as the ground of unavailability. The party argues that the declarant is absent because he is unable to procure the declarant's physical attendance, as the declarant is outside the subpoena power. That argument is insufficient to establish absence, because the party must show that he is unable to procure physical presence ***or testimony.*** So if the declarant can be compelled to, or agrees to, testify remotely, the declarant is not absent. Thus, Rule 804(b)(5) posits that "testimony" can be presented outside the courtroom --- at least in the situation of Rule 804. More broadly, the distinction between "testimony" and physical presence in the courtroom shows an affirmative indication that the Evidence Rules pose no bar on remote testimony.

3. Rule 804(b)(1)

The hearsay exception for prior testimony also provides an affirmative indication that the Evidence Rules contemplate that "testimony" need not be testimony in the courtroom at the current trial. The rule provides an exception for "[t]estimony that . . . was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one."

In sum, there is nothing in the Evidence Rules that requires witness testimony to be made physically in the courtroom. And there are some affirmative indications in the Evidence Rules that trial courts have discretion to order or allow remote testimony. That is why the Chair and Reporter concluded that the Evidence Rules did not need to be amended to cover emergencies like the pandemic.

II. Looking Ahead to the Possibility of More Frequent Use of Remote Testimony

A question that has been much-discussed is whether virtual trials should continue to be held post-pandemic. Many have argued that virtual trials are a positive good in that they are cheaper, with no significant falloff in terms of fair adjudication. Without taking a position on the

merits of that contention, it is worth considering whether any Evidence Rules might need to be amended in the future to accommodate remote testimony *in a non-emergency situation*. [12]

On a first take, all the arguments in Part One are equally applicable to the question of virtual trials in a non-emergency: nothing in the Rules require testimony to be made physically in a courtroom, and Rule 611(a) provides the court broad discretion to allow remote testimony. So it would appear that no amendment is required to the Evidence Rules for the use of virtual testimony as a ready option even in the absence of an emergency. There would be hurdles on other fronts, though. Thus, Civil Rule 43 would have to be amended before remote testimony can become routine. Civil Rule 43 allows remote testimony only for good cause in "compelling circumstances and with appropriate safeguards." And of course in criminal cases the constitutional guarantee of the right to face to face confrontation would have a lot to say about routine use of remote testimony. Under *Coy*, supra, it is extremely unlikely that remote testimony offered against a criminal defendant will be admissible in a case that does not evolve an emergency or some other important state interest.

But let us assume that the Civil Rules are amended to allow more frequent use of remote testimony, and as to criminal cases, the question of remote testimony arises as to the defendant's witnesses. If virtual testimony is a ready option, is there anything in the Evidence Rules that must be adjusted?

One possibility would be to add language to Rule 611(a) that would specifically include remote testimony as a "mode" that the court could authorize. A counter to that proposal is that Rule 611(a) is intentionally written in very general language, to cover a myriad of issues in the presentation of evidence that the court may encounter (from allowing jurors to ask questions, to allowing illustrative aids, to altering the order of proof, etc.). It could be inconsistent with that general approach to add "ordering testimony by remote means" to the text. Second, it doesn't seem necessary given the fact that Civil Rule 43 would already have to be amended to allow for more frequent use of remote testimony – if the Civil Rule opens the floodgates, it would probably be duplicative for the Evidence Rules to add similar language.

Another possibility is to add to the definitions of Rule 101, in the manner that electronic information was addressed. See Rule 101(b)(6). It might read something like this:

> "A reference to any kind of witness testimony includes testimony given remotely [or, outside the courtroom]."

That amendment would need to be thought about carefully, because it ends up to be a complete equation of in-court and remote testimony. Arguably a trial court should have the

[12] It should be noted that virtual trials as a usual practice is not a near-future thing in the federal courts. Civil Rule 43 allows for remote testimony only upon good cause and in extraordinary circumstances, like a pandemic. There are no moves afoot to amend Rule 43 to allow for remote testimony as a matter of routine. And rules amendments take three years minimum to get enacted. And the timeline for criminal trials is surely longer, given concerns about the right to face-to-face confrontation.

So, what follows is essentially a thought experiment. You don't need to read any further if you are tired.

discretion (under Rule 611(a)) to require in-court testimony where it is convenient and more effective under the circumstances.

There are, however, two rules that might profit from an amendment if the use of remote testimony becomes more prevalent. In each of these rules, the choice would be not between remote and in-person testimony. Rather the choice would be between remote testimony and hearsay.

One such rule is Rule 804(a). One ground of unavailability should be narrowed if virtual testimony is a viable alternative to hearsay offered under Rule 804. Under Rule 804(a)(5), the ground of absence, a deposition is admissible as prior testimony if the proponent is unable to procure the declarant's "attendance." This is unlike the rule for declarations against interest, where absence is found by the absence of "testimony." If remote testimony becomes a thing, then there is a good argument that a deposition should not be admitted as prior testimony if the declarant at the time of trial is able to provide remote testimony. An amendment along these lines might look something like this:

> (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure~~:~~
>
> ~~(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or~~
>
> ~~(B)~~ the declarant's attendance or <u>remote</u> testimony~~, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4)~~.

The second rule that might be affected by a ready possibility of remote testimony is Rule 807, the residual exception to the hearsay rule. Rule 807 admits trustworthy hearsay only if it is "more probative than any other evidence reasonably available." When that other evidence is from a witness, the argument that currently can be made is that the witness cannot be produced physically to testify, so the residual hearsay should be admitted. But if remote testimony is a viable alternative, then the statement offered as residual hearsay should not be admissible --- because the alternative is "reasonably available" when the witness could testify remotely. The question would then be whether Rule 807 should be amended to account for the possibility that remote testimony could be a reasonably available alternative. The answer is probably not --- the rule speaks to "reasonably available" alternatives and there is nothing in the text of that rule that would prevent a court from finding that remote testimony is reasonably available. Compare Rule 804(a)(5), which refers to "attendance" --- a word in text that would need to be amended to accommodate remote testimony.

It must be emphasized that the effect of widespread remote testimony on the Evidence Rules is the subject of a long-term investigation --- it anticipates that remote testimony will become coin of the realm (which is not a foregone conclusion) and it is dependent on changes outside the Evidence Rules. But the bottom line appears to be that the Evidence Rules are in large part flexible enough to accommodate regular use of remote testimony, with at most one minor rule requiring some possible adjustment.

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Circuit Splits on Interpreting Evidence Rules
Date: October 1, 2020

In 2002, the Evidence Rules Committee undertook a project to discover and analyze circuit splits in courts' interpretation of the Federal Rules of Evidence. The rationale for the project was that if there is a circuit split on a particular rule of evidence, that may well be a good reason for proposing an amendment for rectifying a split. After all, they are supposed to be the *Federal* Rules of Evidence, and one of the main reasons for codification was to provide uniform rules for the entire country. [1]

The 2002 project uncovered about 15 rules on which the circuits reached different interpretations. The Advisory Committee found that the benefits of rectifying most of those splits was outweighed by the dislocation costs of proposing an amendment --- mostly this was because the problem that gave rise to the split did not arise very often. The project did lead to the amendment of several rules, however. Rules 404, 406, 606(b), and 608 were amended in the period between 2003 and 2006. Other splits recognized back then took longer to rectify --- Rule 804(b)(3) was amended in 2010, and Rule 801(d)(1)(B) was amended in 2014. And one of the splits raised

[1] Indeed Judge Becker's famous article on circuit splits under the Federal Rules of Evidence was instrumental in Chief Justice Rehnquist's decision to reconstitute the Advisory Committee, after it had been disbanded in 1975. *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years: The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 892 (1992).

in the 2002 project --- the conflict regarding the rule of completeness, Rule 106 --- is being considered by the Committee right now.[2]

Because the rules currently being considered by the Committee --- 106, 615, and 702 --- are nearing a final resolution, I thought it might be useful to revisit the question of circuit splits to see if there are any rules that might be put on the agenda going forward.[3]

This memo provides a short-ish introduction to the circuit splits that I have found in the current rules.[4] The goal is to let the Committee know about the split and to provide some preliminary analysis --- and where appropriate to set out some possible language for an amendment, to assist the Committee in its review. If the Committee decides that any of these splits justifies further inquiry, then a full memo on the subject will be prepared for the next meeting.[5]

I. Expert Testimony on the Unreliability of Identification Evidence

There are conflicting decisions among the circuit courts as to the admissibility of expert testimony on eyewitness identification. The applicable rules are 403 and 702. Under Rule 403, the question is whether the probative value of the expert testimony is substantially outweighed by its prejudicial and confusing effect on juries. The question under Rule 702 is whether the expert is testifying to a subject matter on which the jury needs assistance.

A number of circuits have upheld their trial courts' exclusion of this type of expert testimony under either Rule 403 or 702.[6] In many instances, the Rule 403 analysis is bolstered by a trial judge's comprehensive jury instruction as a less costly alternative to expert testimony about the unreliability of identification evidence.[7] Other courts have found that expert testimony on eyewitness identification can fail under Rule 702 alone without need for a Rule 403 balancing ---

[2] They say one of the virtues of the rulemaking process is that it is deliberate, meaning slow. The history recounted here is a testament to that.

[3] Many thanks to Cameron Molis, Columbia '21, for his outstanding work on this project.

[4] There may well be others. Whether there is a "split" is often a matter of judgment.

[5] This memo does not discuss the circuit splits involving Rules 106, 615 and 702 --- as those splits are currently being considered by the Committee.

[6] *See, e.g.*, *United States v. Fosher,* 590 F.2d 381, 383–84 (1st Cir. 1979) (finding the trial court's 403 balancing was not an abuse of discretion); *United States v. Rincon*, 28 F.3d 921, 923–26 (9th Cir. 1994) (holding it was not error for district court to exclude under Rules 403 and 702); *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996) (same)); *United States v. Curry,* 977 F.2d 1042, 1052 (7th Cir. 1992) (same).

[7] *See Fosher*, 590 F.2d at 382; *Rincon*, 28 F.3d at 925-26; *Kime*, 99 F.3d at 883.

because the topic of identification is purportedly one on which the jury does not need assistance.[8] Courts also express concern that expert testimony about identification might intrude on the jury's prerogative of determining the credibility of identification witnesses.[9]

Other circuits reach the opposite conclusion, either upholding admission or finding error in exclusions of expert testimony on eyewitness identification.[10] While it is possible that these opposing outcomes are indicative of a split in the courts, some cases on this side of the divide make an effort to distinguish their facts from cases which resulted in the exclusion of eyewitness experts. In *United States v. Smith* for example,[11] the Sixth Circuit declared that the trial court's expert did not have the same shortcomings as the excluded expert in *United States v. Fosher*[12] because this expert provided a far more specific analysis of eyewitness identification reliability in situations identical to facts of the instant case and offered evidence to support the scientific acceptance of his research.[13] But some of the dispute is not fact-based. Thus, in *United States v. Downing*, 753 F.2d 1224, 1243 (3d Cir. 1985), the Third Circuit explicitly identified its disagreement with cases like *Thevis* and *Fosher* when it noted that the concern over the creation of a "cottage industry" of psychological experts battling it out in criminal court was not a sufficient reason to exclude experts on the unreliability of identification evidence. Added to the mix is a report from the National Academy of Sciences advocating that expert testimony on the unreliability of identification methods should be admitted more often than it is by federal courts, because it is based on reliable studies, and it could assist the jury in assessing the reliability of the identification.[14]

It is fair to state that there are differing attitudes in the courts about the admissibility of expert testimony on the unreliability of identifications. While this is a problem, it is unclear whether it should be remedied by an amendment to the Evidence Rules. It would surely be problematic to amend either Rule 403 or 702 to treat identification testimony specifically. Just two

[8] *See, e.g.*, *Curry*, 977 F.2d at 1051 (noting that "the jury is generally aware of the problems with identification."); *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (district court did not err in excluding expert testimony on Rule 702 grounds); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. 1982) (same).

[9] *See Rincon*, 28 F.3d at 926; *Lumpkin*, 192 F.3d at 289.

[10] *See United States v. Mathis,* 264 F.3d 321, 339–40 (3d Cir. 2001) (reversing trial court's decision to exclude such testimony as abuse of discretion); *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir. 1984) (finding potential error in excluding expert but also finding any error to be harmless).

[11] 736 F.2d 1103 (6th Cir. 1984).

[12] 590 F.2d 381 (1st Cir. 1979).

[13] *See Smith*, 736 F.2d at 1106–07.

[14] See https://www.innocenceproject.org/national-academy-of-sciences-issues-landmark-report-on-memory-and-eyewitness-identification/

years ago, the Committee decided that it would not propose a rule that would cover forensic evidence specifically, as that is not what the Evidence Rules do. And testimony on identifications is even narrower than testimony on forensics.

Perhaps the Committee should start thinking about adding another Article to the Evidence Rules that would address very specific problem areas. Sometimes it might be necessary to solve specific problems that can't be solved in the broad language of the existing rules.

It should be noted that many of the states have rules on particularized matters that are not treated in the Federal Rules of Evidence. Specifically with regard to identification evidence, **Utah Rule of Evidence 617** provides as follows:

> In cases where eyewitness identification is contested, the court shall exclude the evidence if the party challenging the evidence shows that a factfinder, considering the factors in this subsection (b), could not reasonably rely on the eyewitness identification. In making this determination, the court may consider, among other relevant factors, expert testimony and other evidence on the following:
>
> (1) Whether the witness had an adequate opportunity to observe the suspect committing the crime;
>
> (2) Whether the witness's level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;
>
> (3) Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;
>
> (4) Whether the witness was aware a crime was taking place and whether that awareness affected the witness's ability to perceive, remember, and relate it correctly;
>
> (5) Whether a difference in race or ethnicity between the witness and suspect affected the identification;
>
> (6) The length of time that passed between the witness's original observation and the time the witness identified the suspect;
>
> (7) Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;
>
> (8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and

(9) Whether any other aspect of the identification was shown to affect reliability.

On the merits, there is much to be said for allowing more expert testimony on the unreliability of identification evidence. First, the contention that the jury understands that identification testimony can be unreliable has not been verified by any study and in fact is undermined by the many wrongful convictions based on eyewitness testimony. But even if that general proposition is true, an expert's testimony can still be helpful. The expert can explain *why* the identification procedure used in the case raises reliability questions. This type of expert testimony is used in many state courts, and as stated above, the National Academies of Science advocates more widespread use of expert testimony in identification cases. Moreover, as the Rule 702 memo to the Committee notes, the courts are quite receptive to rather dubious forensic expert testimony offered by the government. It seems inconsistent to have a restrictive attitude to expert testimony offered by the defendant on the unreliability of identification evidence, which is based on dozens of valid empirical studies.

If the Committee is interested in pursuing either an amendment on identification evidence, or more broadly a new Evidence article on specific rules, I will prepare a detailed memo for the next meeting.

II. Rule 407 --- Does It Exclude Subsequent Changes in Contract Cases?

The courts are divided on whether changes in contract or policy language should be protected by Rule 407 as a subsequent remedial measure. To take an example, assume that an employee has signed a form contract, and claims that a certain clause supports his claim for overtime. The employer disagrees with that interpretation. The employee wishes to introduce the fact that after he brought his breach of contract action, the employer changed the language of the form contract to sharpen it, in a way that would have terminated the plaintiff's claimed interpretation. This is offered as proof that the employer recognized the strength of the plaintiff's interpretation. The Third, Fourth, Seventh, and Tenth Circuits have held that Rule 407 does apply to altered contract or policy language in breach of contract or warranty cases.[15] These courts have viewed changes in advertised language on a website, policy language in a contract, and terms in

[15] *See Reynolds v. Univ. of Pa*., 483 F. App'x 726, 733 (3d Cir. 2012) (finding no abuse of discretion in applying FRE 407 to evidence of changed website language in a breach of contract claim); *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 153–54 (4th Cir. 1995) (applying FRE 407 to exclude evidence that a payment limitation was discontinued in a case alleging breach of contract due to an unjustified application of the limitation); *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1045 (7th Cir. 2007) (applying Rule 407 to evidence of a changed insurance policy in a breach of contract claim).

insurance offerings as subsequent remedial measures excludable by FRE 407. By contrast, the Eighth Circuit and district courts from the First, Seventh, and Eleventh Circuits have all refused to exclude this type of changed language in breach of contract or warranty cases, because such financial injuries do not appear to be within the concern of Rule 407, which speaks in the tort-based terms of "fault." [16]

On the merits, there is an argument that the policy of Rule 407 should apply to contractual changes. The policy of Rule 407 is to avoid a disincentive to fix something for fear that the fix will be used against you at trial. In contract cases, the drafter of the contract may be deterred from improving it for fear that the improvement will be used against him at trial. On the other hand, the policy basis of Rule 407 is probably pretty weak in most cases, because defendants would fix things anyway --- even without the protection of the rule --- for fear that not fixing them will lead to future injuries. So there is an argument that it is a bad idea to extend a weak policy basis to a different fact situation --- to throw good money after bad, so to speak.

There is also a distinction in the context of tort and contract claims as applied to Rule 407. In the tort case, the plaintiff is saying, "if you fixed it before, I wouldn't have lost my leg in the lawnmower." In the contract case, the plaintiff is saying, "if you fixed the contract, I wouldn't have had a breach of contract" but what he is also saying is that "if you fixed the contract, I wouldn't have the right I am claiming now." Which is weird.

If the rule were to be amended to specifically cover contract actions, it might look like this:

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; ~~or~~
- a need for a warning or instruction; or
- a breach of contract.

[16] *See R.W. Murray, Co. v. Shatterproof Glass Corp.*, 758 F.2d 266, 274 (8th Cir. 1985) (finding 407 inapplicable where no negligence or culpable conduct finding is required); *Mowbray v. Waste Mgmt. Holdings, Inc.*, 45 F.Supp.2d 132, 141 (D. Mass. 1999) (finding Rule 407 to be inapplicable to breach of warranty cases because no proof of culpability or mental state are required); *All the Chips, Inc. v. OKI Am., Inc.,* 1990 WL 36860, at *4 (N.D. Ill.) (holding that since breach of contract requires no showing of any sort of fault, it negates the operation of Rule 407); *Smith v. Miller Brewing Co. Health Benefits Program*, 860 F. Supp. 855, 857 n.1 (M.D. Ga. 1994) ("[W]hen the dispute concerns the terms of a contract, changes in the language that make the intent of the drafter clearer, the court should consider that change in evaluating the disputed term.").

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Another possibility would be to amend Rule 407 to *preclude* its use in contract actions. You could start the rule with a qualifier like, "In personal injury actions" --- for example.

III. Rule 609(a), Theft-based Convictions

Rule 609(a)(2) provides that felonies involving a "dishonest act or false statement" are automatically admissible to impeach the character for truthfulness of any witness. Crimes covered under this subdivision obviously include perjury and fraud. You have to lie to be convicted of those crimes. The Committee Note to the 1990 amendment to Rule 609 (which corrected an error about how the rule would apply in civil cases) mentions that some decisions had taken "an unduly broad view of 'dishonesty'--- admitting convictions such as for bank robbery or bank larceny." The Note indicates, however, that the Committee had decided not to amend the rule to address those decisions, even though they were wrong. It concluded that the legislative history provided sufficient guidance, because it states that admissibility under Rule 609(a)(2) is for crimes that require a lie for conviction.

Rule 609 was subsequently amended in 2006 (to prevent convictions from being automatically admitted merely because the witness lied at some point in committing the crime). The Committee Note to the 2006 amendment to the Rule emphasizes that the crimes covered by Rule 609(a)(2) are only those "in which the ultimate criminal act was itself an act of deceit."

Despite these two Committee Notes, there is still a small minority of courts that have held that theft-based crimes are automatically admissible, even though a person does not have to lie to commit them. [17] But the vast majority of courts has found that theft-based crimes are not automatically admissible under Rule 609(a)(2), and so are admissible only if they satisfy the balancing tests of Rule 609(a)(1) (and are felonies, as required by that subdivision).[18]

[17] *See United States v. Carden,* 529 F.2d 443, 446 (5th Cir. 1976) (conviction for petty larceny is automatically admissible under Rule 609(a)(2)); *United States Xpress Enters. v. J.B. Hunt Transp.*, 320 F.3d 809, 816-817 (8th Cir. 2003) (conviction for receipt of stolen property is automatically admissible under Rule 609(a)(2)); *United States v. Brown,* 603 F.2d 1022 (1st Cir. 1979) (burglary and petty larceny are automatically admitted under Rule 609(a)(2)).

[18] *See United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982) ("We agree with defendant that robbery per se is not a crime of dishonesty within the meaning of 609(a)(2)."); *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977) (crimes of stealth --- burglary and petty larceny --- are not within Rule 609(a)(2)); *United States v. Foster*, 227

On the merits, it is clear that theft convictions should not be automatically admissible. There is plenty in the legislative history, and the common law, to indicate that automatic admissibility is for crimes involving active lying only. A strict construction of Rule 609(a)(2) is sound policy: Because almost every criminal act is in some sense a dishonest act in either preparation or execution, a broad construction of Rule 609(a)(2) would swallow up Rule 609(a)(1) and would lead to mandatory admission of almost all prior convictions --- even though many of these convictions would have slight probative value as to the witness's character for truthfulness, and would carry significant prejudicial effect. Given the predominance of the Rule 403 balancing approach throughout the Federal Rules and the general grant of discretion that the rules provide to trial judges, it makes sense to limit where possible a rule that mandates admission and thus prohibits the use of judicial discretion and balancing. As the D.C. Circuit Court of Appeals has stated:

> Rule 609(a)(2) is to be construed narrowly; it is not carte blanche for admission on an undifferentiated basis of all previous convictions for purposes of impeachment; rather, precisely because it involves no discretion on the part of the trial court, Rule 609(a)(2) must be confined to a narrow subset of crimes—those that bear directly upon the accused's propensity to testify truthfully.

United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978).

The question is whether Rule 609(a)(2) should be amended to clarify that theft-based crimes are not included. Cutting against an amendment is the fact that the Advisory Committee twice passed on dealing with the problem even though it was amending the rule in other respects. The case law is not different now than it was back then --- there are only a few reported cases in which theft-based crimes have been found automatically admissible. However, if the Committee thinks that it is finally time to treat theft-based convictions specifically in the rule, in might be amended like this:

> (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement. <u>For purposes of this rule, an act of theft may not be treated as a dishonest act or false statement.</u>

F.3d 1096, 1100 (9th Cir. 2000) (holding that like shoplifting, burglary, grand theft, and bank robbery, receipt of stolen property is not per se a crime of dishonesty for purposes of Rule 609(a)(2)); *United States v. Smith*, 179 U.S. App. D.C. 162, 551 F.2d 348, 362 (1976) (attempted robbery does not involve dishonesty or a false statement); *United States v. Washington*, 702 F.3d 886 (6th Cir. 2012) (theft of services was not automatically admissible to impeach, because it was a crime of stealth, not a crime involving an active element of misrepresentation); *United States v. Johnson,* 388 F.3d 96 (3d Cir. 2004) (conviction for purse snatching was improperly admitted under Rule 609(a)(2)).

IV. Rule 609(b), Timing of the Conviction

Rule 609(b) provides a more exclusionary test for old convictions that are offered to impeach a witness's character for truthfulness. Admitting an old conviction requires the court to find that "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." (This is the reverse of the Rule 403 test.)

Timing is important because if the conviction is covered by Rule 609(b), the balancing test is tilted toward exclusion. But if the conviction is instead covered by Rule 609(a), then: 1) falsity-based convictions are automatically admissible; 2) non-falsity based convictions against a criminal defendant are admissible if the probative value outweighs prejudice; and 3) non-falsity based convictions of all other witnesses are covered by the inclusive Rule 403 test.

"Old" in Rule 609(b) means that "more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later." So we know what the starting point is. But the rule does not speak to the endpoint. In response to this ambiguity, courts have adopted at least three different approaches for marking the endpoint. The Third, Fifth, Seventh, Eighth, and Ninth Circuits have each stated that the endpoint is the date the trial in question begins.[19] In contrast, the Fifth Circuit (in conflict with another panel) and various district courts have ended the measuring period on the date the relevant witness testifies.[20] Finally, the Seventh and Eighth Circuit have also, on occasion, marked the endpoint as the date on which the offense being litigated was committed.[21]

This is a pretty narrow question. It clearly does not come up often --- it involves only a witness whose conviction's timing is so close to ten years as to fall off the 609(a) cliff somewhere between the offense and the testimony.

[19] *See United States v. Hans,* 738 F.2d 88, 93 (3d Cir. 1984) (measuring whether conviction/release "occurred within 10 years of the trial"); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1075 (5th Cir. 1982) (measuring "ten years prior to trial"); *United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986); United States v. Cobb, 588 F.2d 607, 612 n.5. (8th Cir. 1978) (measuring until "the date of [defendant's] trial"); *United States v. Portillo*, 633 F.2d 1313, 1323 n.6. (9th Cir. 1980) (measuring until "the time of trial").

[20] *See United States v. Cathey*, 591 F.2d 268, 274 (5th Cir. 1979); *United States v. Pettiford*, 238 F.R.D. 33, 37 (D.D.C. 2006); *Kiniun v. Minn. Life Ins. Co.*, 2013 U.S. Dist. LEXIS 196081, at *12 n.10 (N.D. Fla.); *United States v. Bro*wn, 409 F. Supp. 890, 894 (W.D.N.Y. 1976).

[21] *See United States v. Foley*, 683 F.2d 273, 277 (8th Cir. 1982); *Rodriguez v. United States,* 286 F.3d 972, 983 (7th Cir. 2002).

If, however, the Committee is interested in clarifying the timing question, it would seem that the date of the witness's testimony is the best fit with the policy of Rule 609. Rule 609 allows convictions for impeachment of the witness's character for truthfulness – the relevant time for that assessment by the factfinder is *when the witness testifies*. It is true that a person's character for truthfulness is unlikely to change much between the time the trial starts and the time she testifies. But Congress made two relevant determinations: 1. The older the conviction, the less probative it is of the witness's character for truthfulness at the time she testifies; and 2. Instead of having the date of the conviction factor into its probative value in every case, it was better to have a bright-line ten-year rule, whereupon probative value falls off a cliff. So given those determinations, it seems appropriate to assess the age of the conviction at the time the witness testifies. (Certainly setting the timing as of the crime charged in the case makes no sense).

There is a risk, though, if the relevant date is the date of testimony. A party who has a witness with a 9 year 360 day-old conviction and wants to protect their witness may delay their testimony until after the 10-year clock runs out. But that same strategic thinking might occur with the trial date. And in any case, this is a scenario that would seem quite rare.

If the Committee does wish to deal with the Rule 609(b) timing question, the change might look like this:

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if, on the day the witness first testifies, more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

V. Rule 613(b) --- Laying a Foundation with the Witness

Under common law, a party seeking to impeach a witness with a prior inconsistent statement was required to lay a foundation for the statement before introducing it. This was referred to as "the rule in Queen Caroline's case." That rule required the cross-examining party to

confront the witness directly on cross-examination with the inconsistent statement. At that point, the witness would have an opportunity to admit, explain, repudiate, or deny the statement. If the witness denied making the statement, then the trial court could in its discretion permit the cross-examining party to prove through extrinsic evidence that the statement was made.

Rule 613(b), on its face, changes the common-law foundation requirements. The rule provides that when a witness is examined concerning a prior statement, this statement need not be shown to the witness at the time of the examination. However, extrinsic evidence of the statement may not be introduced unless the witness is given some opportunity, *at some point in the trial*, to explain, repudiate, or deny the statement.[22] Assuming such an opportunity has been provided, extrinsic evidence of the statement is admissible subject to Rule 403.[23]

Despite the language of the rule and the apparent intent of the drafters, many federal courts have held that Rule 613(b) *does not* abolish the traditional common-law requirement of laying a foundation with the witness prior to the introduction of a prior inconsistent statement. [24] Other federal courts apply the rule as written and hold that a prior foundation is not required.[25] Yet even

[22] *See, e.g., United States v. McCall*, 85 F.3d 1193 (6th Cir. 1996) (no error when the government in rebuttal introduced extrinsic evidence of a defense witness's prior inconsistent statement; while the prosecution did not confront the witness with the prior statement, the defense could have recalled the witness and did not, choosing instead to argue that the government's impeachment attempt was a failure); *United States v. Hudso*n, 970 F.2d 948 (1st Cir. 1992) (foundation for admitting extrinsic evidence of a prior inconsistent statement does not require that the witness have an opportunity to explain or deny the statement before it is introduced; all that is required is that the witness at least be available for recall during the course of the trial; a trial court can exercise its discretion to require a prior confrontation, but here the court labored under a misapprehension of law that a prior confrontation was always required; therefore it was reversible error to exclude a prior inconsistent statement of a government witness on the ground that the witness was not confronted with the statement before it was proffered).

[23] *See, e.g., United States v. Watkins*, 591 F.3d 780 (5th Cir. 2009) (after a witness denies making a statement during cross-examination, evidence may be introduced to prove the statement was made, subject to Rule 403); *United States v. Mez*a, 701 F.3d 411, 426 (5th Cir. 2012) (no error in allowing the prosecution to introduce extrinsic evidence of a prior inconsistent statement where the witness conceded making the statement but attempted to explain it away: Rule 613(b) "makes no exception for prior inconsistent statements that are explained instead of denied").

[24] The following cases are among those that retain the common-law rule: *United States v. DiNapoli*, 557 F.2d 962 (2d Cir. 1977); *United States v. Su*tton, 41 F.3d 1257 (8th Cir. 1994) (the trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while on the witness stand); *United States v. Cutler*, 676 F.2d 1245 (9th Cir. 1982); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989) ("before a prior inconsistent statement may be introduced, the party making the statement must be given the opportunity to explain or deny the same").

[25] The following cases are among those holding that Rule 613(b) dispenses with a general prior foundation requirement: *United States v. McGuire*, 744 F.2d 1197 (6th Cir. 1984); *United States v. Young*, 86 F.3d 944 (9th Cir. 1996) (rejecting the argument that an inconsistent statement was inadmissible because no foundation was laid on cross-examination; all that is required is that the witness have an opportunity to explain or deny the statement at

those courts that read the rule to dispense with a prior foundation requirement nonetheless recognize that a trial court has the power to control the order of proof under Rule 611(a), and that this power can be exercised on a case-by-case basis to require a prior foundation before admitting extrinsic evidence of an inconsistent statement. As the First Circuit stated in *United States v. Hudson,* 970 F.2d 948, 956 n.2 (1st Cir. 1992): "Rule 611(a) allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law prior foundation requirement when such an approach seems fit." The *Hudson* Court concluded that Rule 613 "was not intended to eliminate trial judge discretion to manage the trial in a way designed to promote accuracy and fairness." *See also United States v. Marks,* 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled despite Rule 613 "to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and jurors").

In the end, given the discretion allowed under Rule 611(a), there is not much daylight between the courts that retain the common law approach and the courts that follow the more liberal approach of the text of Rule 613(b). And as a practical matter, in most cases of prior inconsistent statement impeachment, the foundation will be developed in the same manner as it is in the traditional common-law jurisdiction. That is because laying the foundation while the witness is on the stand testifying will usually prove to be the most efficient way of proceeding. For one thing, presenting the statement to the witness may be needed to satisfy authentication or best evidence concerns. And at any rate it may be risky to dispense with a prior foundation, because the witness could become unavailable before the statement is proffered. If that occurs, the admissibility of the extrinsic evidence is subject to the discretion of the court; and that discretion is rarely exercised in favor of a party who had a chance to confront the witness with the statement and did not do so.[26]

The Eleventh Circuit noted the prudence of adhering to the common-law procedure as a practical matter in *Wammock v. Celotex Corp.,* 793 F.2d 1518, 1522 (11th Cir. 1986):

> Rule 613(b) does not supplant the traditional method of confronting a witness with his inconsistent statement prior to its introduction as the preferred method of proceeding. In fact, where the proponent of the testimony fails to do so, and the witness subsequently

some point, and such an opportunity can be provided by recalling the witness); *Wammock v. Celotex Corp.,* 793 F.2d 1518 (11th Cir. 1986) (noting, however, that prior foundation is the preferred method).

[26] See, e.g., *United States v. Schnapp,* 322 F.3d 564 (8th Cir. 2003) (no error in prohibiting the defendant from introducing an inconsistent statement from a prosecution witness; counsel had not asked the witness about the statement either on cross-examination or when recalled by the defense, and it was well within the judge's discretion not to permit deviation from the traditional procedure of providing a witness an opportunity to explain or deny the statement); *In re Nautilus Motor Tanker Co.*, 862 F. Supp. 1251 (D.N.J. 1994) (inconsistent statements are not admissible where the plaintiff did not try to offer them until the end of the trial, and at that point there was no opportunity to recall the witnesses; the court chose not to exercise its discretion to dispense with the witness's explanation or denial).

> becomes unavailable, the proponent runs the risk that the court will properly exercise its discretion to not allow the admission of the prior statement. For this reason, most courts consider the touchstone of admissibility under rule 613(b) to be the continued availability of the witness for recall to explain the inconsistent statements.

On the merits, the more flexible foundation requirements established by the text of Rule 613(b) were a good faith attempt to deal with some legitimate problems. The common-law rule is in some cases a trap for the unwary: (1) statements might be excluded due to an inadvertent failure to lay a foundation at the time the witness testifies; (2) problems are presented when inconsistent statements are discovered after the witness testifies; and (3) there is the danger under the common-law rule of prematurely alerting collusive witnesses to the evidence available for impeachment.

However, these problems could probably be better handled by adding to the standard common-law rule a sentence allowing the trial court the discretion to dispense with the traditional foundation requirement when that is necessary in the interests of justice. This would be a solution similar to that provided in Rule 611(b), which recognizes the merits of the common-law rule of scope limitations on cross-examination, but which nonetheless permits the trial court in its discretion to dispense with the rule in appropriate circumstances.

Moreover, for whatever problems arise in the common-law regime, the prior foundation requirement has its virtues. For example, it avoids the cost and delay of providing extrinsic evidence of the prior inconsistent statement if the witness, when confronted with it, admits having made it. Also, it avoids a certain type of trial-by-ambush. Judge Selya, concurring in *United States v. Hudson*, 970 F.2d 948, 959 (1st Cir. 1992), has summarized the virtues of the common-law approach as follows:

> [The common-law rule] works to avoid unfair surprise, gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency, facilitates judges' efforts to conduct trials in an orderly manner, and conserves scarce judicial resources. At the same time, insistence upon a prior foundational requirement, subject, of course, to relaxation in the presider's discretion if the interests of justice otherwise require, does not impose an undue burden on the proponent of the evidence.

If the Committee decides to consider come kind of amendment to deal with whatever dispute in the courts exists regarding Rule 613(b), the question is what such an amendment might look like. If the problem is that some courts are not adhering to the explicit language of the rule, and the Committee thinks that they should be doing so, then there is not really much to be done

about that.[27] But if the problem is that the Rule itself has made the wrong choice, and that there should be a return to the common-law rule (while allowing for some flexibility) then the rule might be amended as follows:

> **(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ should not be admitted unless the witness is given an opportunity to explain or deny the statement before it is introduced. But the court may in its discretion delay the witness's opportunity to explain or deny the statement. ~~and an adverse party is given an opportunity to examine the witness about it, or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

VI. Rule 701 – The Line Between Lay and Expert Testimony

In 2000, Rule 701 was amended to address the problem of parties calling expert witnesses but styling them as lay witnesses. The Advisory Committee determined that it was an abuse to evade the requirements of Rule 702 (and its accompanying disclosure requirements) by offering expert testimony in lay clothing. Rule 701 was amended to provide that testimony of a fact witness was regulated by Rule 702 to the extent that it was based on "scientific, technical, or other specialized knowledge" --- drawing that phrase from Rule 702. The Committee was quite aware that the line between expert and lay testimony is often fuzzy --- and that the term "specialized knowledge" was subject to differing interpretations. The Committee Note to the 2000 amendment attempted to provide some guidance:

> Rule 701 has been amended to eliminate[28] the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g,* 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson. See Joseph, Emerging Expert Issues Under the 1993

[27] The situation is unlike the problem with Rule 702, where some courts have ignored the fact that the admissibility requirements must be proved by a preponderance of the evidence. The preponderance of the evidence standard is not explicitly placed in the text of Rule 702.

[28] That turned out to be overly optimistic.

Disclosure Amendments to the Federal Rules of Civil Procedure , 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). See also *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16 (a)(1)(E)").

The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g., United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness's testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g,* 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp*. 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook,* 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification

where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra*.

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

It is definitely fair to state that there is a conflict in the courts in navigating the line between lay and expert testimony. Obviously the cases are highly fact-dependent, but in the hundreds of reported cases on this point since 2000, you can definitely find similar fact situations decided differently --- that is to say, one case holds that the opinion should have been evaluated as expert testimony and another says the same opinion was properly admitted as lay witness testimony. Most of the cases in the criminal context are about law enforcement witnesses testifying to matters such as drug code, gang structure, drug conspiracy operations, etc. So as an example of conflict, several circuits have permitted non-expert testimony on the meaning of codewords or ambiguous statements, with the witness having only reviewed transcripts and intercepted calls (i.e., without personal knowledge of the code), and relying for their opinion on their general experience.[29] But others have barred lay testimony derived from a review of information gathered during an investigation because the witness did not participate in or observe the relevant conversation as it was occurring, and did not have personal knowledge of the facts they relayed.[30] These latter courts

[29] *See United States v. El-Mezain*, 664 F.3d 467, 515 (5th Cir. 2011); *United States v. Rollins*, 544 F.3d 820, 831–33 (7th Cir. 2008); *United States v. Freeman*, 498 F.3d 893, 904–05 (9th Cir. 2007).

[30] *See United States v. Johnson*, 617 F.3d 286, 293–294 (4th Cir. 2010)(law enforcement agent's purported lay opinion testimony regarding his interpretation of wiretapped telephone calls was erroneously admitted, as the agent did not participate in surveillance that produced wiretapped calls, did not personally observe events and activities

properly distinguish between "knowledge derived from previous professional experience" (which is expert testimony) and "knowledge derived from the investigation at hand" (which is lay testimony).[31] And then there are courts that distinguish problematically between specialized lay testimony and specialized expert testimony --- despite the fact that testimony based on "specialized knowledge" is covered by Rule 702. *See, e.g., United States v. Savage,* 970 F.3d 217 (3rd Cir. 2020) ("We require lay testimony to be grounded either in experience or specialized knowledge.").

If the Committee is interested in revisiting the line between lay and expert testimony, one solution that might be considered is to provide, in rule text, some guidance in the rule rather than simply to replicate the language of Rule 702 ("scientific, technical or specialized knowledge") as the 2000 amendment did. In 2000, there was a lot of helpful guidance in the Committee Note, but maybe the situation can be improved if some of the relevant considerations are lifted to rule text.

In terms of guidance, the Committee might consider a test that would try to distinguish how expert and lay witnesses differ in how they come to their conclusions. One possible solution has been offered by Professor Ed Imwinkelried, who is The Man on all things Evidence. In his view, what differentiates lay witness testimony from expert testimony is the *reasoning process* that underlies each. Professor Imwinkelried elaborates as follows:

> When any witness, lay or expert, forms an opinion about the significance of a fact or facts in the case, he or she is making a comparative judgment. One term of the comparison is a generalization such as the normal appearance of a particular author's handwriting style or the symptomatology of a certain disease. The other term of the comparison is a case-specific fact such as a questioned document or a set of case-specific facts such as a patient's case history. Both lay and expert witnesses reason to their opinions by comparing the case-specific fact or facts to the generalization. However, . . . the two types of witnesses differ fundamentally with respect to: (1) how they derive the generalization they rely on, and (2) how they acquire their information about the case-specific fact or facts. Although a lay witness must rely on a generalization resting exclusively or primarily on his or her personal knowledge, an expert witness is likely to [and permitted to] draw on a wide range of sources, including much hearsay, lectures by

discussed in recordings, and the opinions were based on post-hoc assessments of calls rather than his own perceptions); *United States v. Peoples*, 250 F.3d 630, 639–42 (8th Cir. 2001) ("Agent Neal lacked first-hand knowledge of the matters about which she testified. Her opinions were based on her investigation after the fact, not on her perception of the facts. Accordingly, the district court erred in admitting Agent Neal's opinions about the recorded conversations."). *See also United States v. Malagon,* 964 F.3d 657 (7th Cir. 2020) ("As a party to the conversation, [the witness's] testimony as to the meaning of the words used by the parties in the conversation falls within Rule 701" and "[n]othing in his testimony indicates that his testimony is based on specialized knowledge, as opposed to his understanding of the conversation as a participant in it.").

[31] The quoted language, and the distinction, is found in *United States v. Cristerna-Gonzalez,* 962 F.3d 1253 (10th Cir. 2020) (finding testimony about movement of drugs and meaning of coded terms to be expert testimony because it was "based on prior training and experience rather than what was learned in the investigation of the drugs in the [car]."

his or her teachers, statements in textbooks, reports of experiments and experiences of others in the same field. And, of course, lay witnesses must also derive knowledge of the case-specific fact from personal observation.

[T]o draw the line and intelligently analyze the admissibility of lay and expert opinions, the judge should focus on the reasoning processes underlying the two types of opinions. . . . [T]here are fundamental epistemological differences between the two types of opinions. While lay witnesses form their generalizations primarily through firsthand knowledge, out of necessity experts rely on other, hearsay sources of information. Like Newton, to some extent, every expert stands on the shoulder of the giants who preceded him or her. Furthermore, although lay witnesses must acquire their information about the case-specific facts to be evaluated exclusively through personal knowledge, Federal Rule of Evidence 703 permits experts to draw on a much wider range of sources of information. Once the judge appreciates the basic differences between the reasoning process underlying a lay opinion and that supporting an expert opinion, the analysis is fairly straightforward. By carefully dissecting the reasoning process underpinning the witness's opinion, the courts will not only improve the courts' ability to distinguish between lay and expert opinions * * * [T]he judge ought to ask: What is the warrant for that conclusion? How did you reason to that opinion?

Edward J. Imwinkelried, *Distinguishing Lay from Expert Opinion: The Need to Focus on the Epistemological Differences Between the Reasoning Process Used by Lay and Expert Witnesses,* 68 SMU L. REV. 73, 85–86 (2015).

If an amendment were to be proposed along the lines of Professor Imwinkelried's reasoning, it might look like this:

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; ~~and~~

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702; and

(d) drawn from the witness's involvement with the specific facts at issue.

But on the other hand, because the line between lay and expert witnesses is so fuzzy, and because the term "specialized knowledge" is not exactly precise, this might be one of those areas in evidence that are better left alone. It is possible that no text change will be able to fix it any better

than it was fixed in 2000. Maybe the best plan is to do a more in-depth workup of the cases and problems so that the Committee can decide whether to dive in further.

VII. Rule 801(d)(2) --- Prior Statements of Experts

Assume that an expert report contains a statement that the opposing party wants to offer as proof of a fact. This is hearsay. But might it be admissible as the statement of an agent of the party-opponent? Some courts have held that a retained expert is an agent of the party-opponent.[32] But other courts have disagreed. The leading case to the contrary is Judge Becker's opinion in *Kirk v. Raymark Indus.,* 61 F.3d 147, 164 (3d Cir. 1995). Judge Becker reasoned as follows:

> [D]espite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise. Thus, one can call an expert witness even if one disagrees with the testimony of the expert. Rule 801(d)(2)(C) requires that the declarant be an agent of the party-opponent against whom the admission is offered, and this precludes the admission of the prior testimony of an expert witness where, as normally will be the case, the expert has not agreed to be subject to the client's control in giving his or her testimony. See *Sabel v. Mead Johnson & Co.*, 737 F.Supp. 135, 138 (D.Mass.1990). Since an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent. See Restatement (Second) of Agency § 1 cmt. a (1958) ("The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act.").

This description of the "conflict" in the case law with regard to experts as agents is not as stark as it seems. Many of the cases holding that experts are agents involve experts who actually were hired by the principal to investigate or provide recommendations regarding a matter --- eventually they were called to testify to what they found. Judge Becker describes one opinion as follows:

[32] *See Collins v. Wayne Corp*., 621 F.2d 777, 780 (5th Cir. 1980) (admitting the statement under 801(d)(2)(C)); *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.)*, 534 F.3d 986, 1016 (9th Cir. 2008) (same); *Aliotta v. AMTRAK,* 315 F.3d 756, 762–63 (7th Cir. 2003) (admitting the statement under 801(d)(2)(D)).

> In that case the court made a finding that the expert witness was an agent of the defendant and the defendant employed the expert to investigate and analyze the bus accident. The court determined that in giving his deposition, the expert was performing the function that the manufacturer had employed him to perform. As such, the court concluded that the expert's report of his investigation and his deposition testimony in which he explained his analysis and investigation was an admission of the defendant.[33]

A similar result would occur if the expert was an employee. The expert's opinion would be admissible over a hearsay objection under Rule 801(d)(2)(C)/(D).

Given the fact-dependent nature of the question, it is not clear that any amendment would be useful in delineating when an expert is an agent of the principal and when she is not for purposes of Rule 801(d)(2). It would seem inappropriate to institute a bright-line rule that an expert is either always or never an agent of the principal. And drafting language for some middle, case-by-case determination seems to be getting into the kind of weeds that are usually avoided in drafting the Evidence Rules. But if the Committee disagrees and wishes to investigate the matter further, a memorandum and draft amendment will be prepared for discussion at the next meeting.

VIII. Admissibility of Hearsay Statements by Government Agents under Rule 801(d)(2)(D)

There is some dispute in the courts about whether a government official's hearsay statement is admissible against the government under Rule 801(d)(2)(D). In one of the earliest cases on this subject, Judge Bazelon reasoned that the federal government is a defendant's party-opponent in a criminal trial, and therefore statements made by government agents can be admitted against that opponent.[34] Similarly, the Ninth Circuit found statements from a Department of Transportation memorandum to be admissible against the government under FRE 801(d)(2)(D).[35]

[33] The case described is *Collins v. Wayne Corp*., 621 F.2d 777, 780 (5th Cir. 1980).

[34] *See United States v. Morgan,* 189 U.S. App. D.C. 155 n.10., 581 F.2d 933, 937 (1978).

[35] *See United States v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989).

The Second Circuit has used similar reasoning to hold that a prosecutor's hearsay statements can be offered against the government as party-opponent statements --- at least in cases in which the prosecutor is directly involved.[36]

Other courts disagree, holding that in criminal cases, government employees and agents cannot "bind the sovereign."[37] So there is some broad language running around, but parsing through the cases there appears to be a case-by-case approach on attributing statements to the government on the basis of agency. The line in most cases appears to be that statements made in and to a court are admissible over a hearsay objection, while statements that are not formally directed to a court are usually excluded. [38] Decisions consistent with this line include exclusion of a report issued by an Inspector General not attendant to a litigation,[39] and exclusion of statements made by a government informant.[40]

There may be some value in providing guidance on when statements of a government agent can be attributed to the government. There also may be value in expanding the notion of attribution. There is an argument that it is unfair for private parties litigating against the government to have all manner of their agents' statements admissible against them, while the statements of the government agents are barred. But the argument against any amendments are three, at least: 1) attribution is largely a case-by-case approach that will be hard to describe; 2) in the end there is not that much of a difference among the cases; and 3) writing a rule specifically for government agents --- even one that says simply "including government agents" --- gets into the weeds that the Evidence Rules usually avoid.

[36] *See, e.g.*, *United States v. Salerno*, 937 F.2d 797, 811–12 (2d Cir. 1991).

[37] *See United States v. Pandilidis*, 524 F.2d 644, 650 (6th Cir. 1975); *United States v. Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997) (suggesting without deciding that a prosecutor cannot bind the sovereign and acknowledging the divergence from other courts); *United States v. Kampiles,* 609 F.2d 1233, 1246 (7th Cir. 1979) ("Because the agents of the Government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign, their statements seem less the product of the adversary process and hence less appropriately described as admissions of a party. Nothing in the Federal Rules of Evidence suggests an intention to alter the traditional rule and defendant has cited no truly contrary case indicating such a trend.").

[38] *See United States v. Yildiz,* 355 F.3d 80, 82 (2d Cir. 2004).

[39] *See United States v. Garza*, 448 F.3d 294, 298-99 (5th Cir. 2006).

[40] *See Lippay v. Christos,* 996 F.2d 1490, 1497-98 (3d Cir. 1993).

IX. Rule 803(3) --- State of Mind Statements Offered to Prove the Conduct of a Non-Declarant

In *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), the state of mind exception to the hearsay rule was applied to admit a party's statement of intent to travel to a location, as evidence that he subsequently traveled toward that destination. The opinion went on to say in dicta that a statement mentioning a traveling companion would likewise be admissible to show that the *companion* had traveled with the declarant.

The use of a state of mind statement to prove the conduct of a non-declarant is problematic, so it is not surprising that there is a split in the courts on the subject. The rationale for extending the state of mind exception to prove the conduct of a non-declarant is dubious. The Committee Note to Rule 803(3) states that the basis for admitting state of mind statements is that the declarant has a unique perspective into his own state of mind. This rationale obviously does not apply to the declarant's conclusion about the state of mind of *someone else.* A declarant might have unique perception of his own state of mind, but he has no special perspective into the thoughts and feelings of another person.

The report of the House Judiciary Committee regarding Rule 803(3) stated that the Committee intended that Rule 803(3) be construed to limit the *Hillmon* doctrine "so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." The Senate Report made no mention of this limitation. And no such limitation was specifically set in the rule.

The federal courts have interpreted this ambiguous legislative history in differing ways. Some courts have adopted the House limitation and refused to admit a statement that the declarant intended to meet with a third party as proof that the declarant and the third party did indeed meet.[41] One court has permitted the declarant's statement to be used to show another's conduct, at least where the trial court gives a limiting instruction that the statement cannot be used to prove the intent or conduct of another but can only be used for the inference that the declarant carried out his intended action (though that instruction seems to work at cross-purposes with the holding that the state of mind statement can be used to prove the conduct of a non-declarant).[42] The Second Circuit has taken a compromise approach, allowing a declarant's statement of intent to be admitted to prove the conduct of a non-declarant only "when there is independent evidence which connects

[41] *See, e.g., Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978) (a witness's statement that "I intend to see [the defendant]" was not admissible when offered to prove that the witness met with the defendant); *United States v. Jenkins*, 579 F.2d 840 (4th Cir. 1978) (accepting the House limitation on *Hillmon*).

[42] *See, e.g., United States v. Astorga-Torres*, 682 F.2d 1331 (9th Cir. 1982).

the declarant's statement with the non-declarant's activities."[43] Thus as to state of mind statements, the Second Circuit has incorporated a corroborating circumstances requirement, akin to that in Rule 804(b)(3), without any textual support for doing so.

On the merits, the best result without doubt is that a state of mind statement should not be admissible to prove the conduct of a non-declarant. Just because somebody knows their own state of mind (a dubious prospect to start with) doesn't mean that they have any special insight into the state of mind (much less conduct) of another person. Potentially, the hearsay rule is rendered a nullity if state of mind statements are admitted to prove the conduct of another --- because every person's statement is in some way reflective of a state of mind.

The compromise measure of the Second Circuit --- allowing such statements to prove the conduct of another if there are corroborating circumstances indicating trustworthiness --- is questionable for at least three reasons. First, it is subject to being applied in a flimsy way. Second, it is lifted from Rule 804(b)(3), but it obviously only applies there if the declarant is unavailable. As applied to Rule 803(3), a state of mind statement could be offered to prove the conduct of a non-declarant without the proponent having to try to produce the declarant. And third, the declaration against interest exception is based on a more solid ground of reliability to start with --- that people don't say disserving things unless they are true. The basis for the state of mind exception --- that people know their own state of mind --- is dubious.[44]

If an amendment were proposed to preclude a state of mind statement from being offered to prove the conduct of a non-declarant, it might look like this:

> **(3)** ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including:

[43] *United States v. Delvecchio,* 816 F.2d 859, 863 (2d Cir. 1987) (an informant's statement that he was going to meet Delvecchio to complete a drug transaction was inadmissible where there was no independent evidence of Delvecchio's presence at the meeting). *Compare United States v. Sperling*, 726 F.2d 69 (2d Cir. 1984) (an informant's statement that he planned to meet Sperling to complete a drug transaction was admissible where the declarant's statement of intent to meet with the defendant was confirmed by later eyewitness testimony that the meeting actually took place).

[44] For more on the use of state of mind statements to prove the subsequent conduct of another, see Lynn McLain, *"I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker—and the Role of the Due Process Clause as to Nontestimonial Hearsay,* 32 Cardozo L. Rev. 373 (2010) (advocating that the state of mind exception should not be used to prove the conduct of a non-declarant).

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will; and

(B) a statement offered to prove the state of mind or conduct of someone other than the declarant.

X. Rule 803(3) --- A Spontaneity Requirement for State of Mind Statements

Rule 803(3) does not guarantee that the declarant's state of mind will be spontaneous in any meaningful sense. All it requires in text is that the statement be one that is "then-existing" --- meaning a statement like "I love my spouse" is admissible to prove that the declarant was in love with the spouse at the time of the statement, whereas "I loved my spouse yesterday" is not admissible to prove that fact under Rule 803(3).[45] But this "then-existing" requirement is different from a "spontaneity" requirement --- there is a substantial risk under the rule that a declarant will make a statement about a fabricated state of mind. For example, in *United States v. Lawal*, 736 F.2d 5 (2d Cir. 1984), the defendant arrived at Customs after a flight from Nigeria, and drugs were found in his luggage. At that point, the defendant made a "spontaneous" statement of anger at being "set up" and duped by a person in Nigeria. At trial, the defendant offered this statement to prove that he had no intent to smuggle drugs. The trial court excluded the statement on the ground that it was unreliable. But the Court of Appeals held that this was error. The court reasoned that the statement expressed the declarant's then-existing state of mind (of innocence), and this is all that the Rule requires. The court concluded that statements that fit the definition of Rule 803(3) cannot be excluded as hearsay, even if they are self-serving and made under untrustworthy circumstances; the court does not have the discretion to exclude untrustworthy statements unless there is language in the rule supporting that exclusion. Thus, the actual untrustworthiness of a statement of the declarant's existing state of mind goes to the weight and not the admissibility of the statement. *See also United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984) (Friendly, J.) (exculpatory statement of state of mind made under untrustworthy circumstances is admissible under Rule 803(3): "False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that rule are read to mean what they say, its truth or falsity is for the jury to determine."); *United States v. Peak*, 856 F.2d 825 (7th Cir. 1988) (an exculpatory statement by the defendant was held admissible under Rule 803(3) despite the contention that the defendant had an opportunity to fabricate a then-existing state of mind).

[45] *See, e.g., United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013) (statement by the defendant that he had never intended to go to a terrorist training camp was not admissible under Rule 803(3) because it was referring to a past, not a present, state of mind).

Despite the rule text, some courts have held that statements of a state of mind made without spontaneity and with the likelihood of fabrication are not admissible.[46] They reason that spontaneity is an inherent part of the rationale for the exception, albeit not stated in the text of the rule. Exclusion in these courts is particularly likely with respect to exculpatory statements of criminal defendants made under circumstances in which the defendant has a reason to lie. The problem with courts requiring spontaneity is that, while trustworthiness may be a part of the rationale for Rule 803(3), the rule as written does not contain a provision for excluding untrustworthy statements that would otherwise fall within the hearsay exception—in contrast to some other hearsay exceptions such as Rule 803(6), which contain specific language excluding untrustworthy statements. All that is required under Rule 803(3) is that the statement must be of a "then-existing" state of mind; and the defendant's statement in a case like *Lawal* clearly meets this requirement ("I feel so innocent right now"). Courts are not allowed, outside the rulemaking process, to impose textual limitations on hearsay exceptions.

If the Committee is interested in exploring an amendment, there are two possibilities: One is to codify *Lawal* more explicitly, and the other is to add a spontaneity or trustworthiness requirement to the exception. The latter approach seems preferable, because the language of Rule 803(3) is simply inadequate to guarantee the trustworthiness that the hearsay exceptions are supposed to provide. A trustworthiness add-on might look like this:

> **(3)** ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), made under trustworthy circumstances --- but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

XII. Rule 803(4) --- Statements by Children Regarding Sexual Abuse

[46] *See, e.g., United States v. Reyes*, 239 F.3d 722 (5th Cir. 2001) (no error in excluding an exculpatory statement by a criminal defendant; the defendant suspected that the person he was speaking to was a government informant and that the conversation was being monitored; the defendant's statements were more self-serving than candid, and lacked the spontaneity required for admission under Rule 803(3)); *United States v. Faust*, 850 F.2d 575 (9th Cir. 1988) (an exculpatory letter written by the defendant was not admissible under Rule 803(3) because the defendant had time to reflect in drafting the letter, and thus any evidence of state of mind provided by the letter was unreliable).

Rule 803(4) provides a hearsay exception for statements made for, and reasonably pertinent to, "medical diagnosis or treatment." The intent of the Advisory Committee was to preclude statements attributing fault --- the example given in the original Advisory Committee Note is that a statement "a car hit me after running a red light" would not be admissible to show that the driver was negligent. That said, courts have admitted under this exception the accusatory statements of children who relate acts of sexual abuse. So, a statement like "my dad sexually abused me," made to medical personnel, has been admitted under Rule 803(4) to prove that the father did the act. The reasoning is that the accusation is pertinent to treatment, because the doctor's treatment includes protecting the child from further harm.

The conflict in the case law is not about the admissibility of a child's accusation per se. All courts who have addressed the question have held that such an accusation can be covered by the "pertinent to medical treatment" language of Rule 803(4). The conflict is that some circuits have added an additional requirement intended to preserve the reliability of the hearsay exception in the case of child victims. In these circuits, the prosecution must show that the child understood that she was speaking to medical personnel and appreciated that telling the truth was necessary in order to get properly treated. The leading case for this point of view is *United States v. Renville*, 779 F.2d 430, 438 (8th Cir. 1985) (child's statement attributing fault is admissible under Rule 803(4) only "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding."). A good application of the *Renville* standards is found in *United States v. Sumner*, 204 F.3d 1182, 1185 (8th Cir. 2000), where the court found that a child's statement to a doctor accusing the defendant of sexual abuse was erroneously admitted under Rule 803(4):

> Although Dr. Zitzow explained that he was a doctor, he did not discuss with [the victim] the need for truthful revelations or emphasize that the identification of the abuser was important to Dr. Zitzow's attempts to help her overcome any emotional trauma resulting from the abuse to which she had been subjected.

The Tenth Circuit follows *Renville* but with a twist: it places the burden on the defendant to provide evidence that the child-declarant did not understand she was being treated by doctors and needed to be truthful. *United States v. Pacheco,* 154 F.3d 1236 (10th Cir. 1998).

Other courts admit statements of child-declarants without the *Renville* guarantee. These courts are more flexible and look to the circumstances to determine whether the child was seeking treatment or diagnosis. *See, e.g.,United States v. Kootswatewa*, 893 F.3d 1127 (9th Cir. 2018) (child's statements to a nurse practitioner regarding sexual abuse were admissible; an adequate foundation for the treatment motive was laid by a showing of the context in which the statement was made --- the statements were made in response to questions from a medical official in a medical facility); *Danaipour v. McLarey*, 386 F.3d 289, 296, n.1 (1st Cir. 2004) (rejecting as "unnecessary inflexible" the rule that statements by children are admissible only where the physician makes clear to the child that truthfully identifying the abuser is necessary to diagnosis

and treatment: "There are many ways in which a party wishing to enter into evidence a statement under Rule 803(4) can demonstrate that the statement was made for the purpose of diagnosis and treatment.").

So there is a dispute in the courts about the treatment of child-victim statements of sexual abuse under Rule 803(4). But an amendment may not be an ideal solution. The cases seem inherently fact-based. And more importantly, amending Rule 803(4) to cover a specific kind of case like a prosecution for child sexual abuse would go to a level of detail that conflicts with the general approach of the Federal Rules of Evidence. The Committee passed on a proposal to adopt a rule regulating forensic evidence on the ground that it was specifically directed to one type of evidence --- thus *too* specific. An amendment to cover child sexual abuse cases is even more refined --- it applies to one type of case. Of course it is true that Rules 412-415 are tied to specific cases. But Rule 412 is well-steeped in the policy of protecting victims of sexual assault. An amendment to Rule 803(4) would be much narrower, as it would cover the treatment of one type of statement in one type of factual situation. And as to Rules 413-415, they were directly enacted by Congress --- over the objection of the Advisory Committee, which argued that the rules were contrary to the generalized approach of the Federal Rules of Evidence.

As discussed above, there may come a time when it makes sense to have a whole new article of the Federal Rules of Evidence to deal with specific kinds of cases or specific kinds of evidence. That time may be now. If so, the treatment of statements made to doctors by child-victims may be a good candidate for an amendment, given the conflict in the case law. But it does not appear to fit in Rule 803(4).

XIII. Rule 804(b)(1) Predecessor-in-Interest Requirement in Civil Cases

Rule 804(b)(1) provides that prior testimony is admissible if it is "offered against a party who had --- or, in a civil case, whose predecessor in interest had --- an opportunity and similar motive to develop it by direct, cross-, or redirect examination." There is a conflict in the case law about the meaning of the term "predecessor in interest" when prior testimony is offered in a civil case against a litigant who was not a party in the prior proceeding.[47] Most courts have held that a prior cross-examination can bind a new party if the prior cross-examiner had a similar motive and opportunity to cross-examine the declarant as the new party would have if the declarant were available. The basic question for these courts is whether the prior cross-examiner did as good a job

[47] The possibility of using prior testimony against a party that did not actually cross-examine the declarant previously is limited to civil cases; extending admissibility to a criminal case would violate a defendant's right to confrontation, especially after *Crawford v. Washington,* 541 U.S. 36 (2004) (finding that testimonial hearsay cannot be admitted against a defendant unless the *defendant* is provided the opportunity to cross-examine the declarant).

as the new party could have expected to do if the witness were available. The leading case is *Lloyd v. American Export Lines, Inc*., 580 F.2d 1179 (3d Cir. 1978), in which the Third Circuit construed the predecessor-in-interest language as mandating only a "sufficient community of interest" between the prior litigant and the party against whom the hearsay is offered. The justification for this position is that if the prior development was as effective and thorough as the subsequent party could expect to have done, it is not unfair to admit the testimony against that later party. At the very least, the opponent should have to present a credible argument that it would develop the testimony differently, and more effectively, if the declarant were available to testify in the present proceeding.[48]

There are a few opinions of district courts that interpret "predecessor-in-interest" to mean something closer to the common law concept of privity.[49] Finally, there is one opinion in which the court favored a strict construction of the "predecessor-in-interest" requirement of Rule 804(b)(1), but nonetheless admitted prior testimony under the residual exception as a "near miss"—so long as the party's development of the testimony was effective enough to bind the party against whom the testimony is now offered.[50]

If the Committee decides that it wants to address the "predecessor in interest" language of Rule 804(b)(1), it should definitely do so in accord with the vast majority of cases that have taken a flexible approach. There is no good reason to exclude testimony if the prior party was in the same situation regarding the witness as the new one is, and the new party can point to nothing that it

[48] *See, e.g., Horne v. Owens-Corning Fiberglas Corp*., 4 F.3d 276, 283 (4th Cir. 1993) (in a product liability case resulting from asbestos exposure, the court held that a deposition from another asbestos case was properly admitted against the plaintiff as prior testimony, even though she had no relationship to the plaintiff in that prior litigation; the party against whom the deposition is offered "must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination"; the plaintiff in this case was in the same situation with respect to asbestos exposure as the plaintiff in the case in which the deposition was taken); Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983) (deposition from a prior litigation is admissible against a nonparty to that litigation, where the party who cross-examined the deponent had the same goal in cross-examination as the party against whom the deposition is now offered); *Volland-Golden v. City of Chi.,* 89 F. Supp. 3d 983, 987–88 (N.D. Ill. 2015) ("every federal Court of Appeals to address the issue head-on has determined that the term "predecessor in interest" does not invoke the common law concept of privity but rather sets out a more forgiving standard") .

[49] *See In re Screws Antitrust Litig*., 526 F. Supp. 1316, 1318–19 (D. Mass. 1981); *Lightsey v. John Crane, Inc.,* 2005 U.S. Dist. LEXIS 51646, at *8–9 (N.D. Ga. Sep. 2, 2005) ("Further, in the absence of a definitive ruling from the Eleventh Circuit, this Court is inclined to give the term "precedessor in interest" [sic] its common definition.").

[50] *Dartez v. Fibreboard Corp*., 765 F.2d 456 (5th Cir. 1985) (a deposition was offered against a defendant who was not a party to the litigation in which the deposition was taken; the party who cross-examined the deponent was probably not a predecessor in interest because there was no legal relationship between them; however, because the defendant could have added nothing to the cross-examination that did take place, the deposition was admissible against the defendant under the residual exception, as a "near miss" of the prior testimony exception).

could have pursued that was not pursued. It must be remembered that the alternative to admitting the prior testimony *is no evidence at all*, because the declarant is by definition unavailable.

An amendment to accord with the majority rule might look like this:

(1) *Former Testimony*. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or~~,~~ in a civil case~~, whose predecessor in interest~~ another party had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Maybe there needs to be something added to assure that the development of the testimony by the different party was adequate (or, as effective as the new party's development would be if it had the chance). Putting this qualifier in the rule presents a drafting challenge. But it can be argued that the qualifier is necessary. It is one thing if the party itself blew the cross-examination the first time around. It's another thing to say that the new party is bound by a terrible cross-examination that was made by a different party, albeit one with a similar motive and opportunity.

If some qualifier such as "the prior party's development was as effective as the party could have done" then it might be better drafting to separate civil and criminal cases. The point being that adding an "equal effectiveness" qualifier is a challenge. And given the fact that there is really not much conflict in the results in the cases, there is some doubt on whether the challenge of an amendment is worth the reward.

XIV. Rule 804(b)(1) – Grand Jury Testimony Offered by the Defendant Against the Government

Another circuit split has developed in the application of Rule 804(b)(1) — the hearsay exception for prior testimony — in a relatively narrow fact situation: the prosecutor calls a witness before the grand jury, and the witness gives testimony favorable to the defendant; at trial, the witness is unavailable (usually because he declares the Fifth Amendment privilege and the government refuses to immunize him) and the defendant offers the grand jury testimony under Rule 804(b)(1).

The 2nd and 1st Circuits have held that exculpatory grand jury testimony is usually inadmissible under Rule 804(b)(1). The D.C. and the 6th and 9th Circuits have held that such testimony is admissible.

The leading Second Circuit case is *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993), in which two witnesses gave grand jury testimony that favored the defendant, then each declared their privilege and refused to testify at trial. The question for the court was whether the prosecutor had a motive to attack the witness at the grand jury that was similar to the motive she would have at trial. The *DiNapoli* court held that generally the prosecutor's motives would be dissimilar. It explained as follows:

> The proper approach … in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding has at a prior proceeding an interest of *substantially similar intensity* to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings — both what is at stake and the applicable burden of proof * * * will be relevant though not conclusive on the ultimate issue of similarity of motive. (Emphasis added).

The *DiNapoli* court held that because the standard of proof at the grand jury is so much lower than that at trial, the level of intensity to attack a witness favorable to the defendant is usually not similar to the level of intensity that would apply at a trial. On the facts of the case, when the witnesses gave exculpatory testimony at the grand jury, there was no doubt about probable cause as to any of the defendants in the case, because they had already been indicted, and the grand jury was simply investigating whether other targets should be indicted. As the court put it, "the grand jury had already been persuaded, at least by the low standard of probable cause, to believe that the [conspiracy] existed and that the defendants had participated in it to commit crimes." In contrast, at trial, where the government had the burden to prove the defendants guilty beyond a reasonable doubt, the prosecutor would have had a substantial incentive to attack the testimony of any exculpatory witness.

While the *DiNapoli* Court did not establish a bright-line rule, it is clear that, under the Court's decision, exculpatory grand jury testimony will only rarely be admissible against the government under Rule 804(b)(1). A similarity of motive is likely to be found only where the indictment is in doubt because the case as to probable cause is close — in that rare situation, the intensity of interest in attacking an exculpatory witness could be similar to what it would be at a trial.[51]

[51] *See also United States v. Peterson*, 100 F.3d 7 (2d Cir. 1996) (exculpatory grand jury testimony was not admissible as prior testimony where the evidence before the state grand jury "provided ample probable cause to indict Peterson" and therefore the government's incentive to attack testimony favorable to Peterson was not similar to the incentive it would have at trial).

The First Circuit is in accord with the Second Circuit's view that the government's motive to develop testimony at the grand jury is usually not similar to the motive to develop testimony at trial. See *United States v. Omar*, 104 F.3d 519, 522-24 (1st Cir.1997)

In contrast, the D.C. and 6th and 9th Circuits have a bright-line rule that exculpatory grand jury testimony is *always* admissible against the government at trial — i.e., that there is always a similar motive to attack the exculpatory testimony at these two proceedings. *See, e.g., United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990); *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997). This view is explained by the 9th Circuit, which adopted the D.C. Circuit view, in *United States v. McFall,* 558 F.3d 951 (9th Cir. 2009). The *McFall* court analyzed the "similar motive" question in the following passage:

> The question is whether the government's motive in examining Sawyer [the exculpatory witness] before the grand jury was sufficiently similar to what its motive would be in challenging his testimony at McFall's trial. Prosecutors need not have pursued every opportunity to question Sawyer before the grand jury; the exception requires only that they possessed the motive to do so.
>
> * * *
>
> As a threshold matter, we must determine at what level of generality the government's respective motives should be compared, an issue that has divided the circuits. . . . In *United States v. Miller,* 904 F.2d 65, 68 (D.C.Cir.1990), the D.C. Circuit compared the government's respective motives at a high level of generality. The *Miller* Court concluded that "[b]efore the grand jury and at trial" the testimony of an unavailable co-conspirator "was to be directed to the same issue — the guilt or innocence" of the defendants — and thus, the government's motives were sufficiently similar. Id.; accord *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997) (citing *Miller* with approval). McFall's trial counsel made a similar argument before the district court, contending that the government's primary goal in questioning Sawyer before the grand jury was to incriminate McFall. At trial, the government's motivation would, of course, have been the same.
>
> In *United States v. DiNapoli*, 8 F.3d 909 (2d Cir.1993) (en banc), in contrast, the Second Circuit required comparison of motives at a fine-grained level of particularity. See id. at 912 ("[W]e do not accept the proposition ... that the test of similar motive is simply whether at the two proceedings the questioner takes the same side of the same issue."); see id. (stating that the proper test for similarity of motive is whether the questioner had "a substantially similar degree of interest in prevailing" on the related issues at both proceedings) (emphasis added); accord *United States v. Omar,* 104 F.3d 519, 522-24 (1st

Cir.1997) (concluding that the government will rarely have a similar motive in questioning a witness before a grand jury as it would have at trial).

* * *

The government's motivation in questioning Sawyer before the grand jury was likely not as intense as it would have been at trial, both because it had already indicted McFall, and because the standard of proof for obtaining a conviction is much higher than the standard for securing an indictment. We cannot agree, however, with the Second Circuit's gloss on Rule 804(b)(1). As one of the dissenters in *DiNapoli* (an en banc decision) noted, the requirement of similar "intensity" of motivation conflicts with the rule's plain language, which requires "similar" but not identical motivation. Id. at 916 (Pratt, J., dissenting) * * * .

On balance, we agree with the D.C. Circuit's elaboration of the "similar motive" test and conclude that the government's fundamental objective in questioning Sawyer before the grand jury was to draw out testimony that would support its theory that McFall conspired with Sawyer to commit extortion — the same motive it possessed at trial. That motive may not have been as intense before the grand jury, but Rule 804(b)(1) does not require an identical quantum of motivation.

In sum, the dispute in the courts is over how to interpret the standard of "similar motive" with respect to exculpatory grand jury testimony. The Second Circuit view is that "motive" includes a requirement of similar "intensity" of interest in developing the testimony at the grand jury, while the Ninth Circuit rejects that position.

But would an amendment be a useful way to address the circuit conflict? In 2010, the Committee considered whether to propose an amendment to solve this problem, and decided against it. The Committee concluded that an amendment would be dealing with a very narrow fact situation — exculpatory grand jury testimony.[52] Moreover, the only amendment that could be cleanly written is one that would automatically admit exculpatory grand jury testimony against the government. The contrary view — that of the Second Circuit — is not an automatic rule excluding such testimony. Rather it is a case by case approach. So it would be more difficult to codify the Second Circuit view. One possible iteration is: "but grand jury testimony is admissible under this exception if at the time of the testimony the obtaining of the indictment is in doubt." Query whether that will be helpful. Another possible iteration is "but grand jury testimony is admissible under

[52] Exculpatory grand jury testimony is a relative rarity because the government does not have an obligation to present exculpatory evidence to the grand jury. *United States v. Williams,* 504 U.S. 36 (1992).

this exception only if the prosecutor has an interest in developing the grand jury testimony that is of similar intensity as the interest in developing it at trial." Again, query if that is sufficient to capture all the possible permutations.[53]

An automatic rule of admissibility could be written more cleanly. For example, something like the following sentence could be added to the end of the rule :

> "Testimony of a witness at a grand jury is admissible against the government under this exception."

But it is likely that a rule amendment *mandating* admissibility of exculpatory grand jury testimony would be strenuously opposed by the DOJ. And on the merits, that amendment could result in a change in grand jury practice in a number of circuits that would require some serious consideration (and perhaps empirical research). Certainly it could be predicted that a rule change from a case by case approach to automatic admissibility would require prosecutors in districts subject to the change to treat every instance of exculpatory grand jury testimony as a trial-like event. A mandated change in practice before a grand jury should not be done lightly by way of an evidence rule.

The other alternative would be to try to add something about "intensity" of motive to the Rule — that is, a general amendment as opposed to one dealing only with exculpatory grand jury testimony. An amendment incorporating the Second Circuit approach might look like this:

> **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive and intensity of interest to develop it by direct, cross-, or redirect examination.

An amendment incorporating the Ninth Circuit approach might look like this:

> **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar ~~motive~~ objective to develop it by direct, cross-, or redirect examination.

The word "objective" seems less likely to be read as having an intensity factor. The option of "motive, but not including intensity of interest" is another possibility, though it seems balky.

But to apply new language outside the grand jury context may create unintended consequences in a wide variety of cases and situations, including depositions and preliminary

[53] Moreover, if the correct concept is "intensity" then that concept should be applied to all prior testimony, not just exculpatory grand jury testimony. That broader question may or may not be something the Committee might want to explore. See the text infra.

hearings. And yet to limit the reference to "intensity" to grand jury testimony would get very down into the weeds, for a relatively small return.

One difference between 2010 and now is that the Committee was influenced not to act in part because *McFall* was a recent case, and there was some hope that the Supreme Court might rectify the conflict. Ten years later, this has not happened, and so there is at least an argument that if there needs to be a solution, it is rulemaking that will have to do it.

XV. Rule 804(b)(3) --- The Meaning of the Corroborating Circumstances Requirement

Rule 804(b)(3) is the hearsay exception for declarations against interest. It provides that in a criminal case a declaration against penal interest is not admissible unless the proponent establishes that it is "supported by corroborating circumstances that clearly indicate its trustworthiness." The Rule was amended in 2010 to clarify that in a criminal case both the government and the defendant must provide corroborating circumstances --- the rule had previously provided that it was only the defendant that had the obligation.

When that amendment was being prepared, the Committee also considered whether the rule should be amended to rectify a conflict in the courts about the meaning of "corroborating circumstances." A question that divided the courts was whether in determining corroborating circumstances, the court could or must consider the existence of *corroborating evidence*. For example, assume that a defendant is charged with murdering Joe. The declarant says "I killed Joe, the defendant wasn't even there." That statement is not admissible on the defendant's behalf without corroborating circumstances. Now assume that the defendant can show that the declarant's fingerprints are on the murder weapon, or that a witness saw the declarant in the vicinity of the murder just before it occurred. These facts corroborate the declarant's account, and help to establish that the declarant is telling the truth. However, they are not circumstantial guarantees of trustworthiness in the making of the statement. Examples of circumstantial guarantees of trustworthiness include: 1) the declarant made the statement spontaneously, 2) to a person he trusted, 3) not long after the murder.

In defining "corroborating circumstances," most courts consider whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (declarant identified himself and the defendant as perpetrators of an arson; the corroborating circumstances requirement was met in part by the testimony of an eyewitness whose description of the scene of the arson the day of the crime matched the declarant's description of the defendant's actions)*; United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account); *United States v. Butler,* 71 F.3d 243, 253 (7th Cir. 1995) (concluding that the declarant's comments

exculpating the defendant were not admissible in part because there was no direct evidence to corroborate them); *United States v. Hamilton,* 19 F.3d 350, 357 (7th Cir. 1994) (finding corroborating circumstances largely because the declarant's account was corroborated by other witnesses); *United States v. Paguio,* 114 F.3d 928 (9th Cir. 1997) (finding corroborating circumstances almost solely by the fact that documents in the transaction supported the declarant's account); *United States v. Westry,* 524 F.3d 1198 (11th Cir. 2008) (corroborating circumstances requirement met by testimony of other witnesses supporting the declarant's account, i.e., by corroborating evidence) ; *United States v. Kelley,* 2007 U.S. Dist. Lexis 14854 (S.D. Tex.) (statement by defendant's brother claiming ownership of guns and drugs was admissible as an exculpatory declaration against interest; corroborating circumstances found in part by the fact that the declarant actually had drugs on his person when arrested, and he correctly described where drugs and guns could be found); *United States v. Honken*, 378 F.Supp.2d 928 (D. Iowa 2004) (corroborating circumstances found in part because the declarant's statement was supported by independent evidence).

A minority of courts hold that independent evidence (or the lack of it) must be treated as irrelevant to the requirement of corroborating circumstances, and that the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made."). *See also United States v. Bobo,* 994 F.2d 524, 528 (8th Cir. 1993) (noting that the Eighth Circuit refers to five factors which aid in determining the trustworthiness of a hearsay statement that is against the penal interests of the declarant — none of which concern corroborating evidence: "1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, 2) the general character of the speaker, 3) whether other people heard the out-of-court statement[54], 4) whether the statement was made spontaneously, and 5) the timing of the declaration and the relationship between the speaker and the witness."); *United States v. Franklin,* 415 F.3d 537, 547 (6th Cir. 2005) ("[t]o determine whether a statement is sufficiently trustworthy for admission under Rule 804(b)(3), the court is not to focus on whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself."). [55]

[54] This factor is misguided. It assures that the statement was actually made, but that is not a hearsay problem. That is a problem of a witness lying in court about whether the statement was made.

[55] There is conflicting authority in the Sixth Circuit. See *United States v. Price,* 134 F.3d 340 (6th Cir. 1998): In an appeal from narcotics convictions, the court held it error to exclude post-custodial statements from a person involved in the drug transaction, which indicated that the money for the drugs belonged only to the declarant, and that the defendant was not a substantial participant in the transaction. The court found corroborating circumstances because: the declarant and the defendant did not have a close relationship; the statement was made after the

The holdings that reject the use of corroborative evidence are curiously based on a theory of the right to confrontation that is long-abandoned. At one time, the Confrontation Clause protection was grounded in a requirement of "particularized guarantees of trustworthiness" --- and the Court in *Idaho v. Wright,* 497 U.S. 805 (1990), held that the standard of particularized guarantees of trustworthiness required the court to look only at circumstantial guarantees of reliability --- corroboration was irrelevant. But there is no reason to import the *Wright* analysis into the different, rule-based standard of "corroborating circumstances" in Rule 804(b)(3).

One could argue, at the time of some of these decisions, that *Wright,* though not on point for the hearsay exception, could be used as persuasive authority on the meaning of trustworthiness. But that time has long past. The *Wright* analysis on trustworthiness has been completely displaced by the focus on testimoniality in *Crawford v. Washington.* Yet the courts rejecting the use of corroborative evidence under Rule 804(b)(3) *still* rely on *Wright*. *See, e.g., United States v. Lubell,* 301 F.Supp.2d 88, 91 (D.Mass. 2007) ("In this context, corroboration does not refer to * * * whether the witness' testimony conforms with other evidence in the case. Rather, corroborating circumstances refers to 'only those that surround the making of the statement and that render the declarant particularly worthy of belief.' *Idaho v. Wright*, 497 U.S. 805, 819 (1990)"); *United States v. Johnson,* 2007 U.S. Dist. Lexis 62035 (E.D. Mich.) (relying on the overruled Supreme Court case of *Ohio v. Roberts* to conclude that corroborating evidence is irrelevant to corroborating circumstances under Rule 804(b)(3)).

In 2010 the Committee considered proposing an amendment that would require a court applying the Rule 804(b)(3) corroborating circumstances requirement to consider the presence or absence of corroborating evidence. (This would have been an add-on to the amendment that extended the requirement to the government in criminal cases). The Committee decided not to address the conflict in the courts on the corroboration question, even though it was proposing an amendment to the rule on other grounds. Here is the account of the Committee's decision from the 2009 minutes:

> Members noted that the disagreement in the courts about the meaning of "corroborating circumstances" did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the irrelevance of the abrogated Confrontation cases is directly addressed by those courts. The vast majority of courts consider corroborating evidence as relevant to the corroborating circumstances inquiry. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

declarant was advised of his *Miranda* rights; there was no evidence that the declarant made the statement in an effort to curry favor with the authorities; and *independent evidence was consistent with the declarant's assertion*.

The Committee was essentially predicting that the courts on the wrong side of the issue would see the error of their ways. But that has not really been the case. The circuits rejecting corroborating evidence are the First, Sixth and Eighth. The First Circuit has held fast to its position. See *United States v. Taylor*, 848 F.3d 476 (1st Cir. 2017) (rejecting the argument that independent evidence can be used in support of a finding of corroborating circumstances). The Eighth Circuit has a case in the intervening years that seems to work at cross-purposes. In *United States v. Henley*, 766 F.3d 893 (8th Cir. 2014), the court held that a confession made by another was admissible as a declaration against penal interest. But the court found it was properly excluded. It stated that even if it were against penal interest, it was "still inadmissible if it lacked indicia of trustworthiness." That sounds like a reference to circumstantial guarantees. But in finding the statement lacking, the court noted that there were many witnesses who disputed the declarant's account. That is a reference to corroborating evidence. There is nothing explicit in the Sixth Circuit to indicate that it has altered its view.

Moreover, the Committee's assessment that the conflict "did not run very deep" is subject to question. There is case law in three circuits that rejects corroborating evidence in the corroborating circumstances inquiry. Three circuits can be thought to be a pretty deep conflict.

Finally, there is now an additional reason to require the courts to consider corroborating evidence in the corroborating circumstances inquiry--- that same requirement has been added to Rule 807 (the residual exception) in the 2019 amendment to that Rule. That rule now provides that the court must find that "the statement is supported by sufficient guarantees of trustworthiness --- after considering the totality of circumstances under which it was made *and evidence, if any, corroborating the statement.*" The Committee Note to the amendment explains as follows:

> The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

In specifically adding the consideration of corroborating evidence as part of the trustworthiness requirement, the Committee was reacting to case law in the Eighth Circuit holding that corroboration was irrelevant under Rule 807, *and relying on Idaho v. Wright for that proposition. See United States v. Stoney End of Horn,* 829 F.3d 681 (8th Cir. 2016) (holding that corroboration has no place in the Rule 807 trustworthiness enquiry). So the Committee was correcting what it saw as an error in rejecting corroborating evidence as part of the trustworthiness

enquiry. Why would it not employ the same fix for the same error in what is essentially the same question --- the search for guarantees of trustworthiness?[56]

After the amendment to Rule 807, there is a good argument that there is an inconsistency between Rule 804(b)(3) and 807 --- at least in those courts that reject the relevance of corroborating evidence in assessing "corroborating circumstances" under Rule 804(b)(3). The bottom line is there was probably a pretty good reason in 2010 for addressing the corroboration requirement in the text of Rule 804(b)(3). And there is a better reason now.[57]

If the Committee wishes to proceed with an amendment to Rule 804(b)(3) to require consideration of the presence or absence of corroboration, the change might look like this:

A statement that:

(A) [is disserving]; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds ~~is~~ supported by corroborating circumstances that clearly indicating trustworthiness --- after considering the totality of circumstances under which it was made and evidence, if any corroborating the statement. ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability~~

The draft language borrows from the language of the 2019 amendment to Rule 807.

[56] When the Committee was working on Rule 807, I digested all of the case law, and found that courts had recognized that the Rule 804(b)(3) corroborating circumstances requirement was essentially equivalent to the trustworthiness requirement of Rule 807. If you met one, you met the other. And if you failed one, you failed the other. *See, e.g., United States v. Benko,* 2013 WL 2467675 (D.Va.): The defendant argued that a declarant's statement was admissible as a declaration against penal interest, and alternatively as residual hearsay. The court found that Rule 804(b)(3) was inapplicable, because of lack of corroborating circumstances indicating trustworthiness, noting that the statement was "fatally uncorroborated." Turning to the residual exception, the court held that the statement failed to meet the trustworthiness requirement for the same reasons it failed to meet the Rule 804(b)(3) corroborating circumstances requirement.

[57] It can be pointed out that the case law rejecting corroboration under Rule 804(b)(3) is not only inconsistent with Rule 807 as amended ---it is also inconsistent with the co-conspirator exception, see *Bourjaily v. United States,* 483 U.S. 171 (1987) (considering corroborating evidence on the question of whether the declarant is a coconspirator).

XVI. The Applicability of the Corroborating Circumstances Requirement to Civil Cases

As seen above, the corroborating circumstances requirement applies to admission of a declaration against penal interest "if it is offered in a criminal case." But in *American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534 (7th Cir. 1999), the court held that the corroborating circumstances requirement applied to declarations against penal interest offered in *civil cases*. Favia, an employee of American, was discovered by the company to have written checks to fictional accounts. When confronted, he admitted that he cashed the checks for his own benefit, receiving payment for the checks from Fishman, who took a fee for the service. American sued Fishman to recover the funds, arguing that Fishman was in on the fraud. Favia's statements to his employer were offered as declarations against Favia's penal interest. The lower court found that American had not met its burden of showing that the statements were supported by corroborating circumstances clearly indicating their trustworthiness; summary judgment was granted for Fishman.

The Seventh Circuit read the corroborating circumstances requirement into civil cases. It basically concluded that it was important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered. And the court reasoned that if there are sufficient doubts concerning the reliability of statements that tend to subject the declarant to criminal liability --- doubts that need to be shored up by the extra requirement of corroborating circumstances --- those doubts are equally applicable when the statement is offered in a civil case.

There are a few district court decisions that are consistent with *Fishman* in that they either hold or assume that the corroborating circumstances requirement applies in civil cases. *See SEC v. 800America.com,* 2006 U.S. Dist. LEXIS (S.D.N.Y.) (SEC enforcement proceeding; statement exculpating the defendant is not admissible as a declaration against penal interest because the defendant did not provide corroborating circumstances indicating that the statement was reliable); *Farr Man Coffee v. Chester,* 1993 U.S. Dist. LEXIS 8992 (S.D.N.Y.); (corroborating circumstances required, and found, in a civil case); *JVC Am., Inc. v. Guardsmark, LLC*, 2007 U.S. Dist. LEXIS 71529 (N.D. Ga.) (stating in dictum that corroborating circumstances are required for declarations against penal interest offered in civil cases).

But other cases disagree with *Fishman,* taking the straightforward position that the corroborating circumstances requirement, by its terms, applies only in criminal cases --- and courts don't have authority to read a requirement into an evidence rule that plainly is not there. For example, in *United States v. Riley*, 920 F.3d 200 (4th Cir. 2019), the court affirmed revocation of supervised release based on a convicted drug offender's admission of methamphetamine use and distribution to his probation officer. Even without a showing of corroborating circumstances, the

statement was found properly admitted as a declaration of the offender's penal interest, because the corroborating circumstances requirement applies only in criminal proceedings, which supervised release revocation proceedings are not. And in *Linde v. Arab Bank,* 97 F.Supp.3d 287 (E.D.N.Y. 2015), the court held that statements by Hamas taking responsibility for terrorist bombings were admissible in a civil case against a bank, alleging that the bank funded Hamas. The court stated as follows:

> It bears mentioning that this is not a criminal case. Thus, Rule 804(b)(3)(B)'s requirement that a statement against interest be supported by corroborating circumstances does not apply, because the statement is not "offered in a criminal case."

The Committee considered extending the corroborating circumstances requirement to civil cases in the work that led up to the 2010 amendment. That work actually started in 2001, with a proposed amendment that was issued for public comment in 2003. That proposed amendment made the corroborating circumstances requirement applicable in all cases (as said previously, the original rule did not apply to government-offered statements in criminal cases, and the major point of the proposed amendment was to require the government to prove corroborating circumstances, just like the defendant had always been required to do). The extension to civil cases was based on *Fishman,* which was the only circuit court case on point at the time. The Committee Note to the proposal provided as follows:

> The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). This unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

When the 2003 proposal was sent out for public comment, the extension of the corroborating circumstances requirement to civil cases was opposed by the American College of Trial Lawyers. The College argued that it would "move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so." The College thought that any change to civil cases should at least await more case law on the subject. It was especially concerned that the change would create proof problems for plaintiffs in antitrust cases, and saw no justification for imposing an extra evidentiary requirement in such cases. Other public comments were favorable, however, arguing the benefit of having a unitary standard for admissibility of declarations against penal interest in all cases.

The 2003 proposed amendment came to an end when, after being approved by the Standing Committee and the Judicial Conference, it was sent back by the Supreme Court. By that time, *Crawford v. Washington* was on the docket, and the Court was concerned that applying the

"corroborating circumstances" requirement to government-proffered hearsay in criminal cases might not mesh with whatever new test for the Confrontation Clause might be developed.

When it was eventually concluded that *Crawford* posed no bar to a corroborating circumstances requirement (because that would have nothing to do with whether the hearsay statement was testimonial), the Committee started its process anew --- and the amendment to Rule 804(b)(3) finally became effective in 2010. During this second process, the Committee revisited the question of the applicability of the corroborating circumstances requirement to civil cases. The Committee noted the dearth of case law in the intervening years, and took to heart the concerns previously expressed by the American College of Trial Lawyers. The idea of a "unitary standard" was downplayed because the standard *would* be unitary in criminal cases, and the use of declarations against penal interest in civil cases is quite infrequent. The Committee unanimously decided not to address the applicability of the corroborating circumstances requirement to civil cases. A short statement was added to the 2010 Committee Note indicating that the Committee was taking no position on the applicability of the corroborating circumstances requirement in civil cases.

The difference between then and now is that now there is conflicting law between two circuits on the subject, as shown above. But there are still only two circuit court cases. It is clearly a question that does not often arise. So the case for an amendment to clarify the applicability of the corroborating circumstances requirement to civil cases is not especially strong.

On the merits of extending the requirement to civil cases, there are arguments on both sides. The College has a point: that it might not be a great idea to criminalize civil practice, and the corroborating circumstances requirement might impose a real impediment on civil plaintiffs (especially because the declarant by definition cannot be produced to testify). The other side of the argument is that expressed above: if the basis of the corroborating circumstances requirement is that the against-penal-interest requirement is too flimsy to support reliability on its own, then that concern applies to all cases, not just criminal cases.

If the Committee wishes to extend the corroborating circumstances requirement to civil cases, it need only delete the language "offered in a criminal case" from Rule 804(b)(3)(B). If the Committee is of the view that the requirement should not extend to civil cases, then there is nothing to do. That is what the rule already says, and the fact that the Seventh Circuit has misread it does not mean it has to be amended again to say "when we say a criminal case, we mean a criminal case."

XVII. Rule 806 --- Impeaching Hearsay Declarants With Bad Acts

Rule 806 provides that when hearsay is admitted, "the declarant's credibility may be attacked . . . by any evidence that would be admissible for the purposes if the declarant had testified as a witness." The rule recognizes that when hearsay is admitted, it is the declarant who is effectively testifying at trial --- so for impeachment purposes, the declarant should be treated the same as a trial witness. Any other rule might allow a party to avoid impeachment of a witness by trying to admit the witness's hearsay statement in lieu of the witness's testimony.

There is a conflict in the courts about the viability of one form of impeachment under Rule 806: impeachment of the witness's character for truthfulness by evidence of prior bad acts. Rule 608(b), as applied at trial, limits the examiner to the witness's answers; it precludes extrinsic evidence of bad acts offered to impeach the witness's character for truthfulness. It can therefore be argued that bad act impeachment of a hearsay declarant who is not present to testify is impermissible, because it would require admission of extrinsic evidence of the bad act when the witness is not at trial to be asked about it and deny it. But the counter-argument is that the need to determine the credibility of a hearsay declarant is the same as with respect to an in-court witness, and so bad act evidence cannot be barred if it is the only way to raise the bad act. Rule 806 is clear in its intent that the adverse party is to have at least the same impeachment weapons as she would have if the witness were to testify.

In some courts, bad act impeachment is a permissible means of impeaching a hearsay declarant, if the witness who relates the hearsay has no knowledge of the bad act.[58] (Extrinsic evidence would not be required if the witness knows about the bad act and so can be asked about it.) The reasoning is that resort to extrinsic proof is the only meaningful way, in the absence of the declarant or any knowledge of the part of the witness, to disclose the bad act to the jury.[59]

In other courts, extrinsic evidence is never admissible to prove a bad act offered to impeach the hearsay declarant's character for truthfulness. For example, the court in *United States v. Saada,* 212 F.3d 210, 222 (3d Cir. 2000), relied on the "plain language" of Rule 806, which it read as creating exactly the same impeachment rules for in-court witnesses and hearsay declarants, with one exception—impeachment with inconsistent statements (where provision is made for admissibility even if the declarant never had an opportunity to explain or deny the statement). Because extrinsic evidence could not be used if the witness were to testify at trial, the court

[58] *See, e.g., United States v. Burton, 937* F.2d 324 (7th Cir. 1991) (error to preclude cross-examination of an FBI agent regarding the criminal record of a non-testifying government informant whose voice was heard in several tape-recorded conversations).

[59] *See, e.g., United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988) (the court observed that when an unavailable declarant cannot be cross-examined, resort to extrinsic evidence may be the only means of presenting such evidence to the jury; in this case, however, the declarant's videotaped admission that he had lied on a single occasion was properly excluded under Rule 403).

reasoned that it cannot be used if the statement is introduced as hearsay. The court found that the rule's express exception for different treatment of inconsistent statements cut against any judicially-created differential treatment for bad-acts impeachment; that is, if Congress had wanted to create differential treatment for bad acts, it knew how to do so because it had done so for prior inconsistent statements. The court recognized that the ban on extrinsic proof, as applied to impeachment of hearsay declarants, "prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant's misconduct." Nevertheless, this drawback "may not override the language of Rules 806 and 608(b)." This means that the witness at trial who relates the hearsay could be asked about the hearsay declarant's bad act --- but only if that witness happens to know the hearsay declarant and has knowledge of the bad act. That will be a random event.[60]

The problem with the reasoning in *Saada* is that it is inconsistent with the intent of Rule 806, which is to give the opponent of the hearsay the same leeway for impeachment as it would have if the declarant testified at trial. Under *Saada*, the opponent of the hearsay is put in a worse position with respect to bad acts of the hearsay declarant. At trial, the bad acts could at least be referred to on cross-examination if the declarant were to testify, whereas if the statement is introduced as hearsay it is only randomly possible that the jury will hear about the declarant's bad acts, i.e., only if the witness relating the hearsay happens to know about the bad act.[61]

Assuming, though, that the *Saada* result is wrong on the merits, it is surely right about its construction of the existing Rule 806. The rule specifically provides an adjustment for impeaching hearsay declarants with prior inconsistent statements --- the Rule 613(b) requirement of providing

[60] *See United States v. White,* 116 F.3d 903 (D.C. Cir. 1997) (per curiam): The court affirmed convictions for a drug trafficking conspiracy, holding there was no abuse of discretion in precluding cross-examination of an undercover officer as to whether a deceased declarant whose hearsay statements he had testified to had ever made false statements on an employment application or had ever violated any court orders. The court noted Rule 608(b)'s bar on extrinsic evidence of misconduct to impeach; "[a]ccordingly, [defendant]'s counsel could have asked [the officer] only if [the declarant] had ever lied on an employment form or violated any court orders, and could not have made reference to any extrinsic proof of those acts." Because the officer had known the declarant for only two months, the court found no abuse of discretion in the conclusion "that the questions were of little utility."

[61] For commentary in support of allowing extrinsic evidence of bad act impeachment under Rule 806, see Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant,* 56 Ohio St.L.J. 495, 526 (1995):

> If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. … In addition, if Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a non-testifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. … These considerations militate strongly in favor of modifying Rule 608(b)'s ban on extrinsic evidence when the attacking party seeks to impeach a non-testifying declarant with specific instances of conduct showing untruthfulness.

an opportunity to explain or deny the statement is specifically made inapplicable to impeachment of hearsay declarants. (And for good reason, because they are not in court to explain or deny). But a similar adjustment was not made to impeachment with bad acts. There is nothing in the legislative history that I could find to explain why the Advisory Committee applied a carve-out to prior inconsistent statements but not to bad acts. But that is what happened.

If the Committee wishes to rectify the conflict in the cases – or if the Committee simply believes that there is a hole in Rule 806 that needs to be fixed, then an amendment might look like this:

Rule 806. Attacking and Supporting the Declarant's Credibility

(a) General Rule. When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.

(b) Inconsistent Statement or Conduct. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

(c) Specific Instances of Conduct. The court may admit extrinsic evidence to prove specific instances of the declarant's conduct in order to attack or support the declarant's character for truthfulness, if the witness relating the declarant's statement at trial has no knowledge of the conduct.

(d) Declarant Called as a Witness. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

TAB 7

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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, 2020

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. Supreme Court Confrontation Cases

A. Ohio v. Clark

The Court's most recent opinion on the Confrontation Clause and hearsay, *Ohio v. Clark,* 576 U.S. 237 (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" for making the statement is to have it 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 C*lark*, in an opinion by Justice Alito for six members of the Court, found that the boy's hearsay statement was not testimonial.[1] It made no categorical rulings as to the issues presented, but did make the following points about the primary motive test of testimoniality:

> 1. Statements of young children are *extremely unlikely* to be testimonial because a young child is not cognizant of the criminal justice system, and so will not be making a statement with the primary motive that it be used in a criminal prosecution.
>
> 2. A statement made without law enforcement involvement is *extremely unlikely* to be found testimonial because if law enforcement is not involved, there is probably some other motive for making the statement other than use in a criminal prosecution. Moreover, the formality of a statement is a critical component in determining primary motive, and if the statement is not made with law enforcement involved, it is much less likely to be formal in nature.
>
> 3. The fact that the teachers were subject to a reporting requirement was essentially irrelevant, because the teachers would have sought information from the child whether or not there was a reporting requirement --- their primary motivation was to protect the child, and the reporting requirement did nothing to change that motivation. (So there may be room left for a finding of testimoniality if the government sets up mandatory reporting in a situation in which the individual would not otherwise think of, or be interested in, obtaining information).

[1]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.[2]

[2] Justice Breyer wrote a concurring opinion. He argued that rejecting the premise that an expert can rely on testimonial hearsay --- as permitted by Fed.R.Evid. 703 --- would end up requiring the government to call every person who had anything to do with a forensic test. That was a result he found untenable. He also set forth several possible approaches to permitting/limiting experts' reliance on lab reports, some of which he found "more compatible with *Crawford* than others" and some of which "seem more easily considered by a rules

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 Justices Scalia and Ginsburg and the retirement of Justice Kennedy, and the uncertainty over the views of the new Justices. (Though, in a dissent from denial of certiorari, Justice Gorsuch appeared to side with Justice Kagan's views in *Williams*).

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 admission of 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. And Justice Thomas's "formality" test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would find no constitutional problem with its admission. See *Michigan v. Bryant,* 562 U.S. 344 (2011) (Thomas, J., concurring) (excited utterance of shooting victim "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.").

Similarly, there is extensive case law both before and after *Williams* allowing admission of testimonial statements on the ground that they are not offered for their truth. For example, if a statement is legitimately offered to show the background of a police investigation, or offered to show that the statement is in fact false, then it is not hearsay and it also does not violate the right to confrontation. This is because if the statement is not offered for its truth, there is no reason to cross-examine the declarant, and cross-examination is the procedure right that the Confrontation Clause guarantees. As will be discussed further below, while both Justice Thomas and Justice Kagan in *Williams* reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted." And they both approve of the result in *Tennessee v. Street,* 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant's own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true --- and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

II. Post-*Crawford* Cases Discussing the Relationship Between the Confrontation Clause and the Hearsay Rule and its Exceptions, Arranged By Subject Matter

"Admissions" --- Hearsay Statements by the Defendant

Defendant's own hearsay statement was not testimonial: *United States v. Lopez,* 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

> **Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. *See United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): "The Sixth Amendment simply has no application [to the defendant's own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself."**

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Text messages were properly admitted as coming from the defendant: *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014). In a prosecution for sex trafficking, text messages sent to a prostitute were admitted against the defendant. The defendant argued that admitting the texts violated his right to confrontation, but the court disagreed. The court stated that the texts were properly admitted as statements of a party-opponent, because the government had established by a preponderance of the evidence that the texts were sent by the defendant. They were therefore "not hearsay" under Rule 801(d)(2)(A), and "[b]ecause the messages did not constitute hearsay their introduction did not violate the Confrontation Clause."

Note: The court in *Brinson* was right but for the wrong reasons. It is true that if a statement is "not hearsay" its admission does not violate the Confrontation Clause. (See the many cases collected under the "not hearsay" headnote, infra). But party-opponent statements are only technically "not hearsay." They are in fact hearsay because they are offered for their truth --- they are hearsay subject to an exemption. The Evidence Rules' technical categorization in Rule 801(d)(2) cannot determine the scope of the Confrontation Clause. If that were so, then coconspirator statements would automatically satisfy the Confrontation Clause because they, too, are classified as "not hearsay" under the Federal Rules. That would have made the Supreme Court's decision in *Bourjaily v. United States* unnecessary; and the Court in *Crawford* would not have had to discuss the fact that coconspirator statements are ordinarily not testimonial. The real reason that party-opponent statements are not hearsay is that when the defendant makes a hearsay statement, he has no right to confront himself.

Bruton --- Statements of Co-Defendants

Bruton* line of cases not applicable unless accomplice's hearsay statement is testimonial:** ***United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

Bruton* does not apply unless the testimonial hearsay directly implicates the nonconfessing codefendant:** ***United States v. Lung Fong Chen, 393 F.3d 139, 150 (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 (2nd Cir. 2015) (noting that if an accomplice confession is properly redacted to satisfy *Bruton,* then *Crawford* is not violated because the accomplice is not a witness "against" the defendant within the meaning of the Confrontation Clause).

Bruton* protection limited to testimonial statements:** ***United States v. Berrios, 676 F.3d 118 (3rd Cir. 2012): "[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings." ***See also United States v. Shavers,*** 693 F.3d 363 (3rd Cir. 2012) (admission of non-testifying co-defendant's inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore "no resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent").

Bruton* protection does not apply unless the codefendant's statements are testimonial: *United States v. Dargan, 738 F.3d 643 (4th Cir. 2013): The court held that a statement made to a cellmate in an informal setting was not testimonial --- therefore admitting the statement against the nonconfessing codefendant did not violate *Bruton,* because the premise of *Bruton* is that the nonconfessing defendant's confrontation rights are violated when the confessing defendant's statement is admitted at trial. But after *Crawford* there can be no confrontation violation unless the hearsay statement is testimonial.

Bruton* does not apply unless the testimonial hearsay clearly and directly implicates the non-confessing co-defendant: *United States v. Benson, 957 F.3d 218 (4th Cir. 2020). In a case involving a robbery and murder, one of the joined defendants made a confession to a police officer. This statement was clearly testimonial, but the court found no *Bruton* violation because the confession was "not facially incriminating" at to the non-confessing codefendant. The statement was that the confessing defendant took the non-confessing defendant's truck to the robbery. "Left unsaid was whether Brown was physically present in the truck or at the house, or that Brown approved or even knew of Wallace's use of his truck." The court also rejected a *Bruton* claim as to confessions made by one defendant to a friend, because that statement was not testimonial.

Limiting instruction satisfies *Bruton* as to testimonial hearsay, because it was not a direct accusation against the defendant: *United States v. Ramos-Cardenas,* 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant (because he has no right to confront himself); nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court found that the reference to the other defendants in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Codefendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper,* 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh,* and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The

court concluded that because "the Supreme Court has so far taken a pragmatic approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

Bruton* inapplicable to statement made by co-defendant to another prisoner, because that statement was not testimonial: *United States v. Vasquez, 766 F.3d 373 (5th Cir. 2014): The defendant's co-defendant made a statement to a jailhouse snitch that implicated the defendant in the crime. The defendant argued that admitting the codefendant's statement at his trial violated *Bruton*, but the court disagreed. It stated that *Bruton "*is no longer applicable to a non-testimonial prison yard conversation because *Bruton* is no more than a by-product of the Confrontation Clause." The court further stated that "statements from one prisoner to another are clearly non-testimonial."

Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Johnson, 581 F.3d 320 (6th Cir. 2009): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Dale, 614 F.3d 942 (8th Cir. 2010): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

Bruton* protection does not apply unless codefendant's statements are testimonial: *Lucero v. Holland, 902 F.3d 979 (9th 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 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned --- *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the

defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson,* 713 F.3d 1237 (10th Cir. 2013): The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. ***See also United States v. Clark,*** 717 F.3d 790 (10th Cir. 2013) (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was not testimonial); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statement admissible as a coconspirator statement cannot violate *Bruton* because "*Bruton* applies only to testimonial statements" and the statements were made between coconspirators dividing up the proceeds of the crime and so "were not made to be used for investigation or prosecution of crime.").

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 (11th 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,* 576 U.S. 237 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement from a young child is extremely unlikely to be testimonial because the child is not aware of the possibility of use of statements in criminal prosecutions, and so cannot be speaking with the primary motive that the statement will be so used. The Court refused to adopt a bright-line rule, but it is hard to think of a case in which the statement of a young child will be found testimonial under the primary motivation test.

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Coconspirator Statements

Coconspirator statement not testimonial: ***United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord** ***United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial); ***United States v. Ciresi*****,** 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are "by their nature" not testimonial because they are "made for a purpose other than use in a prosecution.") ***United States v. Mayfield****,* 909 F.3d 956 (8th 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.

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Statements made pursuant to a conspiracy to commit kidnapping are not testimonial: ***United States v. Stimler,*** 864 F.3d 253 (3rd Cir. 2017): The defendants were prosecuted for conspiracy to kidnap and related crimes arising out of Orthodox Jewish divorce proceedings. Statements were made at a *beth din* which was convened when the alleged victim of one of the kidnappings had challenged the validity of the *get* he signed. The court found that those statements were made pursuant to the kidnapping conspiracy, and reasoned that "none of the individuals at the *beth din* --- all of whom were charged in the conspiracy --- would have reasonably believed that they were making statements for the purpose of assisting a criminal prosecution."

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. ***See also United States v. Bobb,*** 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: ***United States v. Robinson***, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not testimonial under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord***

United States v. Delgado, 401 F.3d 290 (5th Cir. 2005); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011); ***United States v. Alaniz,*** 726 F.3d 586 (5th Cir. 2013); ***United States v. Ayelotan,*** 917 F.3d 394 (5th Cir. 2019). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that definition would mean that all hearsay is testimonial simply by being offered at trial. The court observed that *"Crawford's* emphasis clearly is on whether the statement was testimonial at the time it was made."

Statement by an anonymous coconspirator is not testimonial: *United States v. Martinez,* 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford* because it was not written with the intent that it would be used in a criminal investigation or prosecution. ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford,* "co-conspirators' statements made in pendency and furtherance of a conspiracy are not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); ***United States v. Damra,*** 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator "by their nature are not testimonial") ***United States v. Tragas,*** 727 F.3d 610 (6th Cir. 2013) ("As coconspirator statements were made in furtherance of the conspiracy, they were categorically non-testimonial.").

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove,* 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that *"Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in *Crawford*, "the Supreme Court specifically cited *Bourjaily* --- which as here involved a coconspirator's statement made to a government informant --- to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Lee,*** 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements to be admissible must be made during the course and in furtherance of the conspiracy, they cannot be the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes*****,** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators); ***United States v. Furman,*** 867 F.3d 981 (8th Cir. 2017) (statements by a coconspirator over a prison telephone were not testimonial even though the declarant knew the statements were recorded by law enforcement: "[A]lthough Gerald was aware that law enforcement might listen to his telephone conversations and use them as evidence, the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution.").

Statements in furtherance of a conspiracy are not testimonial: ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial); ***United States v. Grasso,*** 724 F.3d 1077 (9th Cir. 2013) ("co-conspirator statements in furtherance of a conspiracy are not testimonial"); ***United States v. Cazares,*** 788 F.3d 956 (9th Cir. 2015) ("a conversation between two gang members about the journey of their burned gun is not testimonial").

Statements admissible under the co-conspirator exemption are not testimonial: ***United States v. Townley,*** 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); ***United States v. Patterson,*** 713 F.3d 1237 (10th Cir. 2013) (same); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they "were not made to be used for investigation or prosecution of crime."); ***United States v. Yurek*****,** 925 F.3d 423 (10th 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 (11th Cir. 2006): In a narcotics prosecution, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements "clearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place." The court concluded as follows:

> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

See also United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011): co-conspirator's statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely "bragging to a friend" and not a formal statement intended for trial.

Cross-Examination

Cross-examination of a witness during prior testimony was adequate even though defense counsel was found ineffective on other grounds: *Rolan v. Coleman,* 680 F.3d 311 (3rd Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford.* The question was whether the witness --- who was unavailable for the second trial --- was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be constitutionally ineffective at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate --- that court found "baseless" the defendant's argument that counsel had failed to explore the witness's immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that "[t]here is no Supreme Court precedent to suggest that Goldstein's cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court's finding was not contrary to, or an unreasonable application of, *Crawford.*"

Attorney's cross-examination at a prior trial was adequate and therefore admitting the testimony at a later trial did not violate the right to confrontation: *United States v. Richardson,* 781 F. 3d 287 (5th Cir. 2015): The defendant was convicted on drug and gun charges, but the conviction was reversed on appeal. By the time of retrial on mostly the same charges, a prosecution witness had become unavailable, and the trial court admitted the transcript of the witness's testimony from the prior trial. The court found no violation of the right to confrontation. The court found that *Crawford* did not change the long-standing rule as to the opportunity that must be afforded for cross-examination to satisfy the Confrontation Clause. What is required is an "adequate opportunity to cross-examine" the witness: enough to provide the jury with "sufficient information to appraise the bias and the motives of the witness." The court noted that while the lawyer's cross-examination of the witness at the first trial could have been better, it was adequate, as the lawyer explored the witness's motive to cooperate, his arrests and convictions, his relationship with the defendant, and "the contours of his trial testimony."

Cross-examination at a deposition was adequate to satisfy the right to confrontation: *United States v. Mallory,* 902 F.3d. 584 (6th 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 liked 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 (9th Cir. 2014): The defendant argued that his right to confrontation was violated when the transcript of the preliminary hearing testimony of an eyewitness was admitted against him at his state trial. The witness was unavailable for trial and the defense counsel cross-examined him at the preliminary hearing. The court found that the state court was not unreasonable in concluding that the cross-examination was adequate, thus satisfying the right to confrontation. The court noted that "there is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause purposes" but concluded that there was "reasonable room for debate" on the question, and therefore the state court's decision to align itself on one side of the argument was beyond the federal court's power to remedy on habeas review.

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

Accomplice's jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial: ***United States v. Pelletier,*** 666 F.3d 1 (1st Cir. 2011): The defendant's accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements "to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility." For similar reasons, the hearsay was not testimonial under *Crawford.* The court stated that the statements were made "not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier." ***See also United States v. Veloz,*** 948 F.3d 418 (1st Cir. 2020) (statement to a fellow inmate, admissible as a declaration against penal interest, was not testimonial).

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: ***United States v. Saget,*** 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer---the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford* --- it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends found admissible under Rule 804(b)(3) and not testimonial).

Intercepted conversations were admissible as declarations against penal interest and were not testimonial: ***United States v. Berrios,*** 676 F.3d 118 (3rd Cir. 2012): Authorities intercepted a conversation between two criminal associates in a prison yard. The court held that

the statements were non-testimonial, because neither of the declarants "held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance." A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant "only to complain that he crashed the getaway car." ***See also Mitchell v. Superintendent,*** 902 F.3d 156 (3rd Cir. 2016) (jailhouse conversations among inmates, admissible as declarations against interest, were not testimonial).

Accomplice's statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan,* 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, by extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor,* 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. She argued that a statement is testimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution --- and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not

know he was talking to anyone affiliated with law enforcement, and the *husband's* primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is testimonial only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

> **Note: This case was decided before *Michigan v. Bryant, infra,* but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication --- and that all of them must be primarily motivated to have the statement used in a criminal prosecution for the statement to be testimonial.**

Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper,* 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception --- but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, were not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that testimonial evidence includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) sometime after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame"); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes." ***Accord United States v. Volpendesto*** *,* 746 F.3d 273 (7th Cir. 2014): Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v. Bryant,* had in the interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry "is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had." Applying this objective approach, the court concluded that the conversation "looks like a casual, confidential discussion between co-conspirators."

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Accomplice statements to cellmate were not testimonial: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Accomplice's confession to law enforcement was testimonial, even if redacted: *United States v. Shaw,* 758 F.3d 1187 (10th Cir. 2014): At the defendant's trial, the court permitted a police officer to testify about a confession made by the defendant's alleged accomplice. The accomplice was not a co-defendant, but the court, relying on the *Bruton* line of cases, ruled that

the confession could be admitted so long as all references to the defendant were replaced with a neutral pronoun. The court of appeals found that this was error, because the confession to law enforcement was, under *Crawford,* clearly testimonial. It stated that "[r]edaction does not override the Confrontation Clause. It is just a tool to remove, in appropriate cases, the prejudice to the defendant from allowing the jury to hear evidence admissible against the codefendant but not admissible against the defendant." The trial court's reliance on the *Bruton* cases was flawed because in those cases the accomplice is joined as a codefendant and the confession is admissible against the accomplice. In this case, where the defendant was tried alone and the confession was offered against him only, it was inadmissible for any purpose, whether or not redacted.

Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: *United States v. Smalls,* 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. And the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.,* 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved. ***See also, United States v. Hano,*** 922 F.3d 1272 (11th Cir. 2019) (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).

Dying Declarations

Testimonial dying declarations do not clearly offend the Confrontation Clause: *Woods v. Cook,* 960 F.3d 295 (6th Cir. 2020): Reviewing a denial of a habeas petition, the court found that the state court had not acted unreasonably in determining that the admission of a testimonial dying declaration did not violate the petitioner's right to confrontation. The court stated that under *Crawford,* "the state may admit an unconfronted out-of-court statement if it fits a historically recognized common law exception." It noted, however, that the *Crawford* Court refused to decide whether the Sixth Amendment incorporates the dying declaration exception, and so the exception is in "High Court limbo." Nonetheless, the fact that the *Crawford* Court found it unnecessary to decide the issue meant that the state court by definition had not unreasonably applied clearly established Supreme Court precedent in determining that the dying declarations exception was consistent with the Sixth Amendment. The court explained as follows:

> Since *Crawford*, the U.S. Supreme Court has acknowledged the potential permissibility of this common law exception to the Confrontation Clause. See *Giles*, 554 U.S. at 358, 128 S.Ct. 2678. Under these circumstances, we cannot fault state courts for continuing to do what the U.S. Supreme Court has acknowledged they may be able to do after *Crawford* and what the Court itself did before *Crawford*. *See, e.g., Mattox v. United States,* 156 U.S. 237, 243–44, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (noting that courts have treated dying declarations as "competent testimony" since "time immemorial"). * * * Our sister circuits have taken a similar view in unpublished opinions. See, e.g., *Martin v. Fanies,* 365 F. App'x 736, 738–39 (8th Cir. 2010); *Brown v. Att'y Gen. of Cal.,* 650 F. App'x 434, 436 (9th Cir. 2016). We are not aware of a contrary decision, and Woods has not identified one.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to one of the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,* 562 U.S. 344 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter --- and admitted as an excited utterance under a state rule of evidence --- was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis* --- whether the primary motive for making the statement was to have it used in a criminal prosecution --- and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

> 1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.
>
> 2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's

primary purpose. An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency --- unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with

questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a primary purpose "to establish or prove past events potentially relevant to later criminal prosecution." For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them "to meet an ongoing emergency" --- essentially, who shot the victim and where did the act occur. Nothing in the victim's responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency --- apprehending a suspect with a gun --- and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law --- he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of illegal firearm possession. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a

desire to obtain a prompt response." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore her report was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher --- a question that only momentarily interrupted an otherwise continuous stream of consciousness."

911 call --- including statements about the defendant's felony status --- was not testimonial: *United States v. Proctor,* 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the "primary purpose" test and evaluated the call in the following passage:

> Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency --- not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

See also United States v. Mouzone, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as "each caller simply reported his observation of events as they unfolded"; the 911 operators were not attempting to "establish or prove past events"; and "the transcripts simply reflect an effort to meet the needs of the ongoing emergency").

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: *United States v. Arnold,* 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances --- Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is not testimonial*: United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements as follows:

> [T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

Statement made by a child immediately after an assault on his mother was admissible as excited utterance and was not testimonial: *United States v. Clifford,* 791 F.3d 884 (8th Cir. 2015): In an assault trial, the court admitted a hearsay statement from the victim's three-year-old son, made to a trusted adult, that the defendant "hurt mama." The statement was made immediately after the event and the child was shaking and crying; the statement was in response to the adult asking "what happened?" The court of appeals held that the statement was admissible as an excited utterance and was not testimonial. There was no law enforcement involvement and the court noted that the defendant "identifies no case in which questions from a private individual acting without any direction from state officials were determined to be equivalent to police interrogation." The court also noted that the interchange between the child and the adult was informal, and was in response to an emergency. Finally, the court relied on the Supreme Court's most recent decision in *Ohio v. Clark:*

> As in *Clark,* the record here shows an informal, spontaneous conversation between a very young child and a private individual to determine how the victim had just been injured. [The child's] age is significant since "statements by very young children will rarely, if ever, implicate the Confrontation Clause."

911 call was not testimonial even though the caller referenced a prior crime: *United States v. Robertson,* 948 F.3d 912 (8th Cir. 2020): In a prosecution for a gun-related assault, the court admitted a 911 call after a shooting, identifying Robertson as the shooter and "the same one that shot his gun over here last month." The court found that the 911 call was not testimonial. The declarant was clearly under the influence of the shooting that prompted the call; the statement about the prior shooting was not intended for trial but rather to "help police identify and apprehend an armed, threatening individual."

911 calls and statements made to officers responding to the calls were not testimonial: *United States v. Brun,* 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the

defendant's right to confrontation after *Crawford.* The court first found that the nephew's 911 call was not testimonial because it was not the kind of statement that was equivalent to courtroom testimony. The court had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

Statements made by mother to police, after her son was taken hostage, were not testimonial: *United States v. Lira-Morales,* 759 F.3d 1105 (9th Cir. 2014): The defendant was charged with hostage-taking and related crimes. At trial, the court admitted statements from the hostage's mother, describing a telephone call with her son's captors. The call was arranged as part of a sting operation to rescue the son. The court found that the mother's statements to the officers about what the captors had said were not testimonial, because the primary motive for making the call --- and thus the report about it to the police officers --- was to rescue the son. The court noted that throughout the event the mother was "very nervous, shaking, and crying in response to continuous ransom demands and threats to her son's life." Thus the agents faced an "emergency situation" and "the primary purpose of the telephone call was to respond to these threats and to ensure [the son's] safety." The defendant argued that the statements were testimonial because an agent attempted, unsuccessfully, to record the call that they had set up. But the court rejected this argument, noting that the agent "primarily sought to record the call to obtain information about Aguilar's location and to facilitate the plan to rescue Aguilar. Far from an attempt to build a case for prosecution, Agent Goyco's actions were good police work directed at resolving a life-threatening hostage situation. * * * That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation."

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which

the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant.*

911 call that a man had put a gun to another person's head was not testimonial: *United States v. Hughes,* 840 F.3d 1368 (11th Cir. 2016): In a felon-firearm prosecution, the trial court admitted a 911 call in which a bystander reported that the defendant had cocked a gun and put it to the head of a couple of people. The defendant argued that the 911 call was testimonial, but the court of appeals found no error. It concluded that "Hughes fails to distinguish the 911 caller's statements from those in *Davis* in any way whatsoever."

Expert Witnesses and Other Witnesses Relying on Testimonial Hearsay for Their Conclusion

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. 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 lower court cases after *Williams* --- 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. Lower federal courts are in substance treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

Confrontation Clause violated where expert does no more that restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez,* 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant's vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz*, and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant's right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

> Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth

Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) ("[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay," there is likely a *Crawford* violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007) (" [T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion."). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to "say what are the results of the test," and he did exactly that, responding "[b]oth bricks were positive for cocaine." This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

Note: Whatever *Williams* may mean, the court's analysis in *Ramos-Gonzalez* surely remains valid. Even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Confrontation Clause not violated where testifying expert conducts his own testing that confirms the results of a testimonial report: *United States v. Soto,* 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant's laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico,* in which the Court held that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through Agent Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to

> mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

> Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

See also Barbosa v. Mitchell, 812 F.3d 62 (1st Cir. 2016): On habeas review, the court found it not clearly established that expert reliance on a testimonial lab report violates the Confrontation Clause. The defendant was convicted in the time between *Melendez-Diaz* and *Williams*. The Court held that, "[t]o the contrary, four Justices [in *Williams*] later read *Melendez-Diaz* as not establishing at all, much less beyond doubt" the principle that such testimony violates the Confrontation Clause.

Testimony by *lay* witnesses that they had seen lab reports does not violate the Confrontation Clause: *United States v. Ocean,* 904 F.3d 25 (1st 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 (1st Cir. 2015): In a trial on a charge of unlawful possession of a firearm, the government's expert testified that the firearm was made in Austria. He relied on a manufacturing inscription on the firearm that stated "made in Austria." The court found no confrontation violation in the expert's testimony. The statement on the firearm was clearly not made by the manufacturer with the primary purpose of use in a criminal prosecution. The Confrontation Clause does not regulate expert testimony unless the expert is relying on *testimonial* hearsay.

No relief under AEDPA where expert relied on informal notations regarding testing of buccal swab: *Washington v. Griffin,* 876 F.3d 395 (2nd Cir. 2017) (Livingston, J.): In this habeas petition, the constitutional challenge in state court presented facts close to those of *Williams:* a buccal swab of the defendant was subjected to DNA testing, and an expert relied on notations by lab personnel indicating the process of extraction, amplification, and chain of custody. The expert who testified was not involved in conducting or supervising that process, but the expert did conduct her own review and made an independent conclusion that the DNA from the buccal swab matched the DNA from the crime scene. The court held that the petitioner had not established a clear violation of the Confrontation Clause --- as required under AEDPA --- when the state court allowed the expert to testify and did not require production of the lab analysts. The court found that *Melendez-Diaz* and *Bullcoming* were distinguishable because "Washington does not rely on a lab analyst's affidavit, as in *Melendez-Diaz*, or on the formal certificate of an analyst attesting to his results, as in *Bullcoming,* to make out his constitutional claim. He instead points to a medley of unsworn, uncertified notations by often unspecified lab personnel * * * . Such notations, standing alone, are potentially as suggestive of a purpose to record tasks, in order to accomplish the lab's work, as of any purpose to make an out-of-court statement for admission at trial." The court also noted that the lab reports on the buccal swab were never entered into evidence. The court found that the disarray in *Williams* only highlighted the fact that the state court had not violated clearly established law in allowing the expert to testify and not requiring the lab analysts to do so.

Judge Katzmann, concurring, suggested that the prosecution could avoid any litigation risk by simply having an 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 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that "it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the

matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Statements made to psychiatric expert were testimonial and were used by the jury for their truth at trial: *Lambert v. Warden,* 861 F.3d 459 (3rd Cir. 2017): Tillman shot two people and Lambert drove him to and from the crime. Tillman's mental capacity was in dispute and the government called a psychiatric expert to whom Tillman made statements. Tillman did not testify at trial. The court found that the jury may have used these statements, related inferentially in the expert's testimony, against Lambert for their truth --- in which case there would have been a confrontation violation. The government argued that the statements were not offered to prove anything, only for judging the expert's opinion, but the court found that in the context of the case this was not a "legitimate" not for truth purpose --- the prosecutor raised the statements as inferential proof of Lambert's involvement and the trial court gave no limiting instruction. The court remanded for an assessment of whether the defense counsel's failure to object constituted ineffective assistance of counsel.

Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers,* 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government's failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a "pure instrument read-out." The court stated that "[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine" should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. ***See also United States v. Shanton,*** 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*).

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court recognized that it is "appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay." But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. "Instead, each expert presented his independent judgment and specialized understanding to the jury." Because the experts "did not become mere conduits" for the testimonial hearsay, their consideration of that hearsay "poses no *Crawford* problem." ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."). ***Accord United States v Palacios*,** 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert "did not specifically reference" any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

> **Note: These cases are in doubt if you count the votes in *Williams,* but most courts have come to the same result after *Williams:* Finding no confrontation problem where an expert relies on testimonial hearsay, so long as the hearsay is not admitted into evidence and the expert draws his own conclusion from the data (rather than just parroting it).**

Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants: *United States v. Garcia,* 752 F.3d 382 (4th Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied, in coming to her conclusion, on input from coconspirators whom she had debriefed. The court distinguished *Johnson, supra*, on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that "the question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay." In this case, "we cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just has 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 (4th 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").

Officer testifying as a lay witness as to drug activity, in part based on statements from arrestees, did not violate the Confrontation Clause: *United States v. Smith,* 962 F.3d 755 (4th Cir. 2020): In a drug trial, a law enforcement officer was allowed to testify as a lay witness on drug practices like the use of baggies, on the basis of his extensive experience. (For the record, it was probably expert testimony, but the court disagreed). The defendant argued that the officer's conclusions were based in part on statements he heard during police investigations --- which were testimonial hearsay. But the court found no confrontation violation in the testimony, because none of the testimonial hearsay was disclosed at trial, and the officer "was not merely 'parroting' outside statements or repeating what he had overheard in come interrogation room, as opposed to offering insight gleaned from decades of police work."

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 (5th Cir. 2016): In a prosecution of Latin Kings gang members for racketeering and drug offenses, the court found it was not error to allow a law enforcement officer to testify as an expert about the organization of the gang. The testimony was based in large part on listening to jail conversations and interviewing former members. The court found no violation of the Confrontation Clause to the extent the underlying statements were not transmitted to the jury. The one instance in which a statement was related to the jury was found to be harmless error.

Expert opinion based in part on information learned during custodial interrogation did not violate *Crawford* where expert was more than a conduit: *United States v. Lockhart,* 844 F.3d 501 (5th Cir. 2016): In a sex trafficking prosecution, an officer testified as an expert that the defendants were gang members. The defendant argued that the testimony violated his right to confrontation because the officer, in reaching his conclusion, relied on statements made during custodial interrogations, as well as statements of other officers describing their experiences during interrogations. But the court found no error. The court explained that *Crawford* "in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence." It further stated that "when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." The court concluded that in this case the expert "did not serve as a conduit for inadmissible testimonial hearsay."

Law enforcement expert's testimony about a motorcycle group, based in part on statements from members in interviews, did not violate the Confrontation Clause: *United States v. Portillo,* 969 F.3d 144 (5th Cir. 2020): In a prosecution of members of a motorcycle gang, a law enforcement agent testified as an expert about the organization and activity of the gang, based on his extensive investigation as well as on interviews with gang members. The court found that the expert's reliance on testimonial hearsay did not violate the defendants' right to confrontation, because the expert "used his expertise to synthesize various source materials rather than simply regurgitating information he learned from those sources." The court concluded that "[a]s long as an expert forms his opinion by *amalgamating* potential testimonial statements, his testimony does not violate the Confrontation Clause." (emphasis in original).

Expert testimony by technical reviewer, rather than the case analyst, does not clearly violate the Confrontation Clause: *Jenkins v. Hall,* 910 F.3d 828 (5th 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 (5th 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 (6th Cir. 2015): In a trial involving manufacture of methamphetamine, a law enforcement officer testified as an expert on the conversion ratio between pseudoephedrine and methamphetamine. He relied in part on statements from people he had interviewed after he had arrested them for manufacturing methamphetamine. The court found no plain error because there was "no evidence that the suspected methamphetamine manufacturers Agent O'Neil questioned throughout his career 'intended to bear testimony' against Collins or his co-defendants." Thus the expert was not relying on testimonial hearsay.

> **Note: The court appears to be applying --- maybe without realizing it --- Justice Alito's definition of testimoniality in *Williams.* The court is saying that the arrestees did not *target* their testimony toward the defendant. But under the view of five Justices in *Williams,* the statements of the arrestees would probably be testimonial, as they were under arrest --- just like Mrs. Crawford --- and the statements could be thought to be motivated toward *some* criminal prosecution.**

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Expert reliance on drug test conducted by another does not violate the Confrontation Clause --- though on remand from *Williams* the court states that part of the expert's testimony might have violated the Confrontation Clause, but finds harmless error*: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7th Cir. 2013) : At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant --- the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, emphasizing that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own.

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams.* On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum "casts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge." But the court noted that even after *Williams*, much of what the expert testified to was permissible because it was based on personal knowledge:

> We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury how suspect substances are tested using gas chromatography, mass spectrometry, and infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the

> undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. * * *
>
> As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion. Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

The *Turner* court on remand saw two Confrontation problems in the expert's testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, "Block necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony strengthened the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine." And while the case was much like *Williams,* the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito's not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the report was "certified" and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results --- the certification was made by the Attorney General to the effect that the report was a correct copy of the *report.* Yet the court implied that it was sufficiently formal in any case, because it was "both official and signed, it constituted a formal record of the result of

the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report."

Ultimately the court found it unnecessary to decide whether the defendant's Confrontation rights were violated because the error, if any, in the use of the analyst's report was harmless.

No confrontation violation where expert did not testify that he relied on a testimonial report: *United States v. Maxwell,* 724 F.3d 724 (7th Cir. 2013): In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

> What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying * * * , she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

The court concluded that concluded that "Maxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that Gee relied on Nied's data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance."

Expert's reliance on report of another law enforcement agency did not violate the right to confrontation: *United States v. Huether,* 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. The court found no confrontation violation

because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

No confrontation violation where expert who testified did so on the basis of his own retesting: *United States v. Ortega,* 750 F.3d 1020 (8th Cir. 2014): In a drug conspiracy prosecution, the defendant argued that his right to confrontation was violated because the expert who testified at trial that the substances seized from a coconspirator's car were narcotics had tested composite samples that another chemist had produced from the substances found in the car. But the court found no error, because the testifying expert had personally conducted his own test of the composite substances, and the original report of the other chemist who prepared the composite (and who concluded the substances were narcotics) was not offered by the government; nor was the testifying expert asked about the original test. The court noted that any objection about the composite really went to the chain of custody --- whether the composite tested by the expert witness was in fact derived from what was found in the car --- and the court observed that "it is up to the prosecution to decide what steps are so crucial as to require evidence." The defendant made no showing of bad faith or evidence tampering, and so any question about the chain of custody was one of weight and not admissibility. Moreover, the government's introduction of the original chemist's statement about creating the composite sample did not violate the Confrontation Clause because "chain of custody alone does not implicated the Confrontation Clause" as it is "not a testimonial statement offered to prove the truth of the matter asserted."

No Confrontation Clause violation where expert's opinion was based on his own assessment and not on the testimonial hearsay: *United States v. Vera,* 770 F.3d 1232 (9th Cir. 2014): Appealing from convictions for drug offenses, the defendants argued that the testimony of a prosecution expert on gangs violated the Confrontation Clause because it was nothing but a conduit for testimonial hearsay from former gang members. The court agreed with the premise that expert testimony violates the Confrontation Clause when the expert "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." But the court disagreed that the expert operated as a conduit in this case. The court found that the witness relied on his extensive experience with gangs and that his opinion "was not merely repackaged testimonial hearsay but was an original product that could have been tested through cross-examination."

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo*, 625 F.3d 1285 (10th Cir. 2010), ***on remand for reconsideration under Williams,* 696 F.3d 1280 (10th Cir. 2012)**: The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the

extent they were discussed before the jury, it was only to describe the basis of the expert's opinion --- which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that "we need not decide the precise mandates and limits of *Williams,* to the extent they exist." The court noted that five members of the *Williams* Court "might find" that the expert's reliance on the lab test in this case was for its truth. But "we cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission."

The *Pablo* court on remand concluded that "the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4-1-4 divide of opinions in *Williams*."

Expert's testimony on gang structure and practice did not violate the Confrontation Clause even though it was based in part on testimonial hearsay, where expert applied his own expertise. *United States v. Kamahele,* 748 F.3d 984 (10th Cir. 2014): Appealing from convictions for gang-related activity, the defendants argued that a government expert's testimony about the structure and operation of the gang violated the Confrontation Clause because it was based in part on interviews with cooperating witnesses and other gang members. The court found no error and affirmed, concluding that the admission of expert testimony violates the Confrontation Clause "only when the expert is simply parroting a testimonial fact." The court noted that in this case the expert "applied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion." Therefore, no testimonial hearsay was offered for its truth against the defendant. ***Compare United States v. Garcia,*** 793 F.3d 1194 (10th Cir. 2015) (gang-expert's testimony violated the Confrontation Clause, where he parroted statements from former gang members that were testimonial hearsay: "The government cannot plausibly argue that Webb applied his expertise to this statement. It involves no interpretation of gang culture or iconography, no calibrated judgment based on years of experience and the synthesis of multiple sources of information. He simply relayed what DV gang members told him. Admission of the testimony violated the Confrontation Clause.").

Forfeiture

Constitutional standard for forfeiture --- like Rule 804(b)(6) --- requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,* 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to invoke the Confrontation Clause, because he murdered the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial --- presumably because the primary motivation for making such statements is for something other than use at trial.

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding --- rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate more than one bad motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Fleeing prosecution constitutes forfeiture: *United States v. Ponzo,* 853 F.3d 558 (1st Cir. 2017): At the defendant's racketeering trial the government offered prior testimony of a witness from the trial of the defendant's coconspirators. The defendant was not tried with his coconspirators because he had fled prosecution. By the time he was caught and tried, the witness had died. The defendant argued that admitting the dead witness's testimony at his trial violated his right to confrontation, but the court found that the defendant had forfeited that right by absenting himself from the prior trial. It reasoned as follows: "Had Ponzo been at the 1988 trial, he could have cross-examined Hildonen. But like a defendant who obtains a witness's absence by killing him, by fleeing and remaining on the lam for years, Ponzo effectively schemed to silence Hildonen's testimony against him. And Hildonen's subsequent unavailability signifies the success of that scheming. So Ponzo forfeited his confrontation rights. To hold otherwise would allow Ponzo to profit from his own wrong and would undermine the integrity of the criminal-trial system --- which we cannot allow."

Forfeiture through veiled threats and prior history of violence: *United States v. Pratt,* 915 F.3d 266 (4th 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 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant's drug operation and as retaliation for robbing one of the defendant's friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

Forfeiture can be found on the basis of *Pinkerton* liability: *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, "the Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts." ***Compare United States v. Brown,*** 2020 WL 5088074 (7th Cir. Aug. 28, 2020) (questioning whether forfeiture can be found under *Pinkerton* under the Constitution, because the constitutional doctrine of forfeiture is based on common law, and *Pinkerton* liability did not exist under common law; but finding it unnecessary to decide the question because any error in admitting the hearsay testimony was harmless).

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Forfeiture of confrontation rights, like forfeiture under Federal Rule 804(b)(6), is found upon a showing by a preponderance of the evidence: *United States v. Johnson*, 767 F.3d 815 (9th Cir. 2014): The court affirmed convictions for murder and armed robbery. At trial hearsay testimony of an unavailable witness was admitted against the defendant, after the government made a showing that the defendant had threatened the witness; the trial court found that the defendant had forfeited his right under both the hearsay rule and the Confrontation Clause to object to the hearsay. The court found no error. It held that a forfeiture of the right to object under the hearsay rule and under the Confrontation Clause is governed by the same standard: the government must establish by a preponderance of the evidence that the defendant acted wrongfully to cause the unavailability of a government witness, with the intent that the witness would not testify at trial. The defendant argued that the Constitution requires a showing of clear and convincing evidence before forfeiture of a right to confrontation can be found. But the court disagreed. It noted that a clear and convincing evidence standard had been applied by some lower courts when the Confrontation Clause regulated the admission of unreliable hearsay. But now, after *Crawford v. Washington*, the Confrontation Clause does not bar unreliable hearsay from

being admitted; rather it regulates testimonial hearsay. The court stated that after *Crawford,* "the forfeiture exception is consistent with the Confrontation Clause, not because it is a means for determining whether hearsay is reliable, but because it is an equitable doctrine designed to prevent defendants from profiting from their own wrongdoing." The court also noted that the Supreme Court's post-*Crawford* decisions of Davis v. Washington and Giles v. California "strongly suggest, if not squarely hold, that the preponderance standard applies." On the facts, the court concluded that "the evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did. This was sufficient to satisfy the preponderance standard."

Evaluating the kind of action the defendant must take to justify a finding of forfeiture: *Carlson v. Attorney General of California,* 791 F.3d 1003 (9th Cir. 2015): Reviewing the denial of a habeas petition, the court found that statements of victims to police were testimonial, but that the state trial court was not unreasonable in finding that the petitioner had forfeited his right to confront the declarants. In a careful analysis of Supreme Court cases, the court provided "a standard for the kind of action a defendant must take" to be found to have forfeited the right to confrontation. The court concluded that

> [T]he forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case. Simple tolerance of, or failure to foil, a third party's previously unexpressed decision either to skip town himself rather than testifying or to prevent another witness from appearing [is] not a sufficient reason to foreclose a defendant's Sixth Amendment confrontation rights at trial.

On the merits --- and applying the standard of deference required by AEDPA, the court concluded that the trial court could reasonably have found, on the basis of circumstantial evidence, that the petitioner more likely than not was actively involved in procuring unavailability, with the intent to keep the witness from testifying.

> **Note: The court says that a defendant's mere "acquiescence" is not enough to justify forfeiture. That language might raise a doubt as to whether a forfeiture may be found by the defendant's mere membership in a conspiracy; courts have found such membership to be sufficient where disposing of a witness is within the course and furtherance of the underlying conspiracy. See, e.g., *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012). The *Carlson* court, however, cited the conspiracy cases favorably, and noted that in such cases, the defendant *has* acted affirmatively and committed wrongdoing by joining a conspiracy in which a foreseeable result is killing witnesses.**
>
> **A different panel of the Ninth Circuit, in a case decided around the same time as *Carlson*, upheld a finding of forfeiture based on *Pinkerton* liability. *See United***

***States Cazares,* 788 F.3d 956 (9th Cir. 2015). *But see United States v. Brown,* 2020 WL 5088074 (7th Cir. Aug. 28, 2020) (questioning whether forfeiture can be found under *Pinkerton* under the Constitution, because the constitutional doctrine of forfeiture is based on common law, and *Pinkerton* liability did not exist under common law; but finding it unnecessary to decide the question because any error in admitting the hearsay testimony was harmless).**

The *Carlson* court noted that the restyled Rule 804(b)(6) provides a helpful clarification of what the original rule meant by "acquiescence."

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2nd Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2nd Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2nd Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer's guilty plea: *United States v. Head,* 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend's guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford's* statement that "prior testimony that the defendant was unable to cross-examine" is one of the "core class of 'testimonial' statements."

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Implied Testimonial Statements

Testimony that a police officer's focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant's right to confrontation: ***United States v. Meises,*** 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." ***Compare United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015)**:** In a narcotics prosecution, an officer testified that he arranged for a cooperating informant to buy drugs from the defendant; that he monitored the transactions; and that the drugs that were in evidence were the same ones that the defendant had sold to the informant. The defendant argued that the officer's conclusion about the drugs must have rested on assertions from the informant, and therefore his right to confrontation was violated. The defendant relied upon *Meises,* but the court distinguished that case, because here the officer's testimony was based on his own personal observations and did not necessarily rely on anything said by the informant. The fact that the officer's surveillance was not airtight did not raise a confrontation issue, rather it raised a question of weight as to the officer's conclusion.

Testimonial statements to law enforcement were admitted by implication, in violation of the Confrontation Clause: ***United States v. Kizzee,*** 877 F.3d 650 (5th Cir. 2017): The defendant was suspected of drug-dealing; an officer arrested Brown after leaving the defendant's house and Brown implicated the defendant. At trial, the officer was asked only whether he asked Brown about the defendant's drug activity. The officer responded that he asked but did not state Brown's answers. The officer was asked what he did after receiving Brown's answers and he responded that he got a warrant to search the defendant's house. The court found that the officer's testimony "introduced Brown's out-of-court testimonial statements by implication" and that an officer's testimony "that allows a fact-finder to infer the statements made to him --- even without revealing the content of those statements --- is hearsay." ***Accord United States v. Jones,*** 930 F.3d 366 ((5th 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.). ***Accord Atkins v. Hooper,*** 969 F.3d 200 (5th Cir. 2020) ("explain-the investigation exceptions to hearsay cannot displace the Confrontation Clause"; statement by a cohort specifically identifying the defendant was in effect offered for its truth).

Compare United States v. Sosa, 897 F.3d 615 (5th 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 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court's denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant's testimonial hearsay statement. It reasoned as follows:

> Where the government officers have not only "produced" the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language --- contradictions, hesitations, and other clues often used to test credibility --- are lost, and instead a veneer of objectivity conveyed.
>
> * * *

> Whatever locution is used, out-of-court statements admitted at trial are "statements" for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

See also United States v. Brooks, 772 F.3d 1161 (9th Cir. 2014): An agent testified that he telephoned a postal supervisor and provided him a description of the suspect, and then later searched a particular parcel with a tracking number and mailing information he had been provided over the phone as identifying the package mailed by the suspect. The postal supervisor was not produced for trial. The government argued that the agent's testimony did not violate the Confrontation Clause because the postal supervisor's actual statements were never offered at trial. But the court declared that "out-of-court statements need not be repeated verbatim to trigger the protections of the Confrontation Clause." Fairly read, the agent's testimony revealed the substance of the postal supervisor's statements. And those statements were made with the motivation that they be used in a criminal prosecution. Therefore the agent's testimony violated the Confrontation Clause.

Accord United States v. Benamor, 937 F.3d 1182 (9th 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, quoting from prior cases: "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,* 576 U.S. 237 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement is extremely unlikely to be found testimonial in the absence of some participation by or with law enforcement. The presence of law enforcement is what signifies that a statement is made formally with the motivation that it will be used in a criminal prosecution. The Court did not establish a bright-line rule, however, leaving at least the remote possibility that an accusation might be testimonial even if law enforcement had no role in the making of the statement.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,* 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

Threats to cooperating witness were not testimonial: *United States v. Kirk Tang Yuk,* 855 F.3d 57 (2nd Cir. 2018): A cooperating witness testified that he felt intimidated by two inmates who were friends of the defendant. The defendant argued that the threats were testimonial, but the court held that the threats were obviously not intended to be used as part of an investigation or prosecution, and so were not testimonial.

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan,* 385 F.3d 196 (2nd Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 5) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 6) it was not written to curry favor with the authorities or with anyone

else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between the defendant and an undercover informant was not testimonial*: United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, "anything he said was meant not as an accusation in its own right but as bait."

> **Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the defendant's statement does not violate the Confrontation Clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context --- therefore it does not violate the right to confrontation because it is not offered as an accusation.**

Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones,* 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that "a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent" and that "just because recorded statements are used at trial does not mean they were created for trial." The court also noted that a prison "has significant institutional reasons for recording phone calls outside or procuring forensic evidence --- i.e., policing its own facility by monitoring prisoners' contact with individuals outside the prison." ***See also United States v. Benson,*** 937 F.3d 218 (4th Cir. 2020) ("testimonial evidence does not include statements made to friends in an informal setting").

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012)**:** The court found no error in the state court's admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements "unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial." The court elaborated further:

> The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become available at trial. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal-Mart parking lot. An objective analysis would conclude that the primary purpose of the unidentified individuals' statements was to arrange the drug deal. Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause.

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter,* 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." ***See also United States v. Boyd,*** 640 F.3d 657 (6th Cir.

2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: ***Miller v. Stovall,*** 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement --- especially because the declarant was a former police officer.

> **Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant.* The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.**

Informal statements made about planned criminal activity are not testimonial: ***United States v. Klemis,*** 899 F.3d 436 (7th Cir. 2017): In a narcotics prosecution in which a user died, the court held that statements by the victim to a friend, that he had stolen from her in order to pay a drug debt to the defendant, were not testimonial. The court reasoned that the Supreme Court in *Ohio v. Clark* declared that a statement was very unlikely to be testimonial if it was made outside the law enforcement context. Here, spontaneous statements to a friend about attempts to borrow or steal from her to pay a drug debt, were not "efforts to create an out-of-court substitute for trial testimony."

Statements made by an accomplice to a jailhouse informant are not testimonial: ***United States v. Honken,*** 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime --- but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a

police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that he was speaking to a government agent. It explained as follows:

> Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Incriminatory statements made by an accomplice from a telephone in jail are not testimonial: *United States v. LeBeau,* 867 F.3d 960 (8th Cir. 2017): The defendant's codefendant made coded calls while in jail to further drug activity. The defendant argued that these statements were testimonial because the codefendant was aware --- based on a message played at the beginning of the call --- that his call was being monitored by law enforcement. But the court rejected this argument, stating that even though the codefendant might have anticipated that his statements were used in a criminal prosecution, his primary motivation was not related to law enforcement: "the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution." The fact that the codefendant spoke in code was strong evidence that his primary motivation was *not* to have his statement used in a criminal prosecution.

Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright,* 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

Accusatory statements in a victim's diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Jailhouse conversations among coconspirators were not testimonial: *United States v. Alcorta,* 853 F.3d 1123 (10th Cir. 2017): Affirming drug convictions, the court rejected the defendant's argument that admitting jailhouse conversations of his coconspirators violated his right to confrontation. The court stated that to be testimonial, the statements must be made "with the primary purpose of creating evidence for the prosecution." The court concluded that "[t]he statements here --- jailhouse conversations between criminal codefendants (none of whom were cooperating with the government) --- do not satisfy that definition because that was not their purpose; quite the opposite."

Private conversation between mother and son is not testimonial: *United States v. Brown,* 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Defendant's lawyer's informal texts with I.R.S. agent found not testimonial: *United States v. Wilson,* 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting checks that he knew to be issued as a result of fraudulently filed income tax returns. He claimed that he was a legitimate cashier and did not know that the checks were obtained by fraud. The trial court admitted texts sent by the defendant's lawyer to the I.R.S. The texts involved the return of certain records that the I.R.S. agent had allowed the defendant to take to copy; the texts contradicted the defendant's account at trial that he didn't know he had to return the boxes (in essence a showing of consciousness of guilt). The defendant argued that the lawyer's texts to the I.R.S. agent were testimonial, but the court disagreed: "Here, the attorney communicated through informal text messages to coordinate the delivery of the boxes. The cooperative and informal nature of those text messages was such that an objective witness would not reasonably expect the texts to be used prosecutorially." ***See also United States v. Mathis,*** 767 F.3d 1264 (11th Cir. 2014) (text messages between defendant and a minor concerning sex were informal, haphazard communications and therefore not made with the primary motive to be used in a criminal prosecution).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony recounting the interpreter's translation does not violate *Crawford*: *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): At the defendant's drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter's statements about what the defendant said violated his right to confrontation. The court found that the interpreter had acted as a "mere language conduit" and so he was not a witness against the defendant within the meaning of the Confrontation Clause. The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as "which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." The court found that these factors cut in favor of the lower court's finding that the interpreter in this case had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, "the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself." ***See also United States v. Romo-Chavez*,** 681 F.3d 955 (9th Cir. 2012)(where an interpreter served only as a language conduit, the defendant's own statements were properly admitted under Rule 801(d)(2)(A), and the Confrontation Clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself); ***United States v. Aifang Ye,*** 808 F.3d 395 (9th Cir. 2015) (adhering to pre-*Crawford* case law that a translator acting as a language conduit does not implicate the Confrontation Clause, because that case law "is not clearly irreconcilable with *Crawford*"; finding on the facts that the translator was a language conduit, by applying the four-factor test from *Orm Hieng*). .

Interpreter's statements were testimonial: *United States v. Charles,* 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant's statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter's translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, supra. ***See also United States v. Curbelo,*** 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator's implicit out-of-court representation that the translation was correct, and the translator's implicit assertions were testimonial; but there was no violation of the Confrontation Clause

because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

Interrogations, Tips to Law Enforcement, Etc.

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial," it clearly covers sworn statements by accomplices to police officers.

Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez,* 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth --- to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh,* 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes a formal statement to government officers bears testimony." ***See also United States v. McGee****,* 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Circuit Court's opinion that an anonymous tip to law enforcement is testimonial was reversed by the Supreme Court on AEPDA grounds: *Etherton v. Rivard,* 800 F.3d 737 (6th Cir. 2015), ***rev'd sub nom., Woods v. Etherton,*** 136 S.Ct. 1149 (2016): On habeas review, the court held that an anonymous tip to law enforcement, accusing the defendant of criminal misconduct, was testimonial. It further held that the defendant's right to confrontation was violated at his trial where the tip was admitted into evidence for its truth. It noted that "[t]he prosecutor's repeated references both to the existence and the details of the tip went far beyond what was necessary for background --- thereby indicating the content of the tip was admitted for its truth." **But the Supreme Court, in a per curiam opinion, reversed the Sixth Circuit,** holding that it gave insufficient deference to the state court's determination that the anonymous tips were properly admitted for the non-hearsay purpose of explaining the context of the police investigation. The Court stated that a "fairminded jurist" could conclude "that repetition of the tip did not establish

that the uncontested facts it conveyed were submitted for their truth. Such a jurist might reach that conclusion by placing weight on the fact that the truth of the facts was not disputed. No precedent of this Court clearly forecloses that view."

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during an interrogation. The court noted that even the first part of Volz's statement --- that she did not have access to the floor safe --- violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement * * * implicated himself and thus was loosely akin to a confession.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Statements by victims to an officer about why they were refusing to testify were *not* testimonial: *United States v. Cooper,* 926 F.3d 718 (11th 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 (11th 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 (3rd Cir. 2016): After a cooperating witness testified on direct, defense counsel attacked his credibility on the ground that he had made a deal. On redirect, the trial court allowed the witness to read into evidence the reports of a law enforcement officer who had interviewed the witness. The reports indicated that the witness had made statements consistent with his in-court testimony. The court of appeals found a violation of the Confrontation Clause, because the officer's hearsay statements (about what the witness had told him) were testimonial and the officer was not produced for cross-examination. The court found that the reports were "investigative reports prepared by a government agent in actual anticipation of trial."

Joined Defendants

(See also *Bruton* cases, supra)

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,* 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Accusations made to child psychologist appointed by law enforcement were testimonial: *McCarley v. Kelly,* 759 F.3d 535 (6th Cir. 2014): A three year old boy witnessed a murder but would not talk to the police about it. The police sought out a child psychologist, who interviewed the boy with the understanding that she would try to "extract information" from him about the crime and refer that information to the police. Helping the child was, at best, a secondary motive. Under these circumstances, the court found that the child's statements to the psychologist were testimonial and erroneously admitted in the defendant's state trial. The court noted that the sessions "were more akin to police interrogations than private counseling sessions."

> **Note: *McCarley* was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *McCarley* differs in one respect from *Clark,* though. In *McCarley,* the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result in *McCarley* is questionable after *Clark* -- - and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

Airline official's denial to board a plane after the defendant resists law enforcement officials was not testimonial: *United States v. Buluc,* 930 F.3d 383 (5th 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 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation." The court found it important that the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

Note: *Bobadilla* was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *Bobadilla* differs in one respect from *Clark,* though. In *Bobadilla,* the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result in *Bobadilla* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.

Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux,* 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford*. The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a "forensic" interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.
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> **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.**
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> **Moreover, the court concedes that there may have been a dual motive here --- treatment being the other motive. At a minimum, a court would have to make the finding that the prosecutorial motive was primary, and the court did not do this.**

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). ***Compare United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."); ***United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012) (discussed below under "medical statements" and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machine-Generated Information

Printout from machine is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine --- that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alcohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

> **Note: The result in *Washington* appears unaffected by *Williams,* as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.**

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert's reliance on a "pure instrument read-out" did not violate the Confrontation Clause because such a read-out is not "testimony").

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Google satellite images, and machine-generated location markers, are not hearsay and therefore, even if prepared for trial, their admission does not violate the Confrontation Clause: *United States v. Lizarraga-Tirado,* 789 F.3d 1107 (9th Cir. 2015): The defendant was convicted of illegal re-entry into the United States. The defendant contended that when he was arrested, he was still on the Mexican side of the border. At trial the arresting officer testified that she contemporaneously recorded the coordinates of the defendant's arrest using a handheld GPS device. To illustrate the location of these coordinates, the government introduced a Google Earth satellite image. The image contained a "tack" showing the location of the coordinates to be on the United States side of the border. There was no testimony on whether the tack was automatically generated or manually placed and labeled. The defendant argued that both the satellite image and the tack were inadmissible hearsay and that their admission violated his right to confrontation. As to the satellite image itself, the court found that "[b]ecause a satellite image, like a photograph, makes no assertion, it isn't hearsay." The court found the tack to be a more difficult question. It noted that "[u]nlike a satellite image itself, labeled markers added to a satellite image do make clear assertions. Indeed, that is what makes them useful." The court concluded that if a tack is placed manually and then labeled, "it's classic hearsay" --- for example, a dot manually labeled with the name of a town "asserts that there's a town where you see the dot." On the other hand, "[a] tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay" because it is completely machine-generated and so no assertion is being made.

In this case, the court took judicial notice that the tack was automatically generated because the court itself accessed Google Earth and typed in the same coordinates to which the arresting officer testified --- which resulted in a tack identical to the one shown on the satellite image admitted at trial. Thus the program "analyze[d] the GPS coordinates and, without any human intervention, place[d] a labeled tack on the satellite image." The court concluded that "[b]ecause the program makes the relevant assertion --- that the tack is accurately placed at the labeled GPS coordinates --- there's no statement as defined by the hearsay rule." The court noted that any issues of malfunction or tampering present questions of authenticity, not hearsay, and the defendant made no authenticity objection. Finally, "[b]ecause the satellite images and tack-coordinates pair weren't hearsay, their admission also didn't violate the Confrontation Clause."

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a CD of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the CD was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process

* * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue, and therefore the Confrontation Clause was inapplicable.

Still photos from surveillance videos are not testimonial hearsay: *United States v. Clotaire,* 963 F.3d 1288 (11th Cir. 2020): The defendant argued that admission of still photos taken from video surveillance tapes at an ATM violated his right to confrontation. But the court disagreed. It stated: "Surveillance cameras are not witnesses and surveillance photos are not statements."

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 (3rd 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 (3rd 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 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial, because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant.* The court also recognized that the Air Force program "incorporates reporting requirements and a security component" but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the "primary motive" test was not met in the following passage:

> We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan's answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.

> Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties' actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan --- not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon's Sixth Amendment rights.
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> **Note: The court's analysis is strongly supported by the subsequent Supreme Court decision in *Ohio v. Clark.* The *Clark* Court held that: 1) Statements by children are extremely unlikely to be primarily motivated for use in a criminal prosecution; and 2) public officials do not become an agent of law enforcement by asking about suspected child abuse.**

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux,* 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Labels on electronic devices, indicating that they were made in Taiwan, are not testimonial: *United States v. Napier*, 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government proved the interstate commerce element by offering two cellphones used to commit the crimes. The cellphones were each labeled "Made in Taiwan." The defendant argued that the statements on the labels were hearsay and testimonial. But the court found that the labels clearly were not made with the primary motive of use in a criminal prosecution.

> **Note: The court in *Napier* reviewed the confrontation argument for plain error, because the defendant objected at trial only on hearsay grounds; a hearsay objection does not preserve a claim of error on confrontation grounds.**

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler,* 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Non-Testimonial Hearsay and the Right to Confrontation

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* is not retroactive (the holding in *Bochting*) 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

See also the cases under the heading "Machine-Generated Evidence" supra.

Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation: ***United States v. Wallace,*** 753 F.3d 671 (7th Cir. 2014): In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was

> a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was "confronted." [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define "statement" to include "nonverbal conduct," but only if the person whose conduct it was "intended it as an assertion." We can't fit the videotape in this definition.

Photographs of seized evidence was not testimony so its admission did not violate the Confrontation Clause: ***United States v. Brooks,*** 772 F.3d 1161 (9th Cir. 2014): In a narcotics trial, the defendant objected to the admission of photographs of a seized package on the ground it would violate his right to confrontation. But the court disagreed. It noted that the *Crawford* Court defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." The photographs did not meet that definition because they "were not 'witnesses' against Brooks. They did not 'bear testimony' by declaring or affirming anything with a 'purpose.'"

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Bostick,* 791 F.3d 127 (D.C.Cir. 2015): In a surreptitiously taped conversation, the defendant made incriminating statements to a confidential informant in the course of a drug transaction. The defendant argued that admitting the informant's part of the conversation violated his right to confrontation because the informant was motivated to develop the conversation for purposes of prosecution. But the court found that the Confrontation Clause was inapplicable because the informant's statements were not offered for their truth, but rather to provide "context" for the defendant's own statements regarding the drug transaction. (And the defendant had no right to confront his own statements). Statements that are not hearsay cannot violate the Confrontation Clause even if they fit the definition of testimoniality.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* --- as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."); ***United States v. Santiago,*** 566 F.3d 65 (1st Cir. 2009) (statements were not offered for their truth "but as exchanges with Santiago essential to understand the context of Santiago's own recorded statements arranging to 'cook' and supply the crack"); ***United States v. Liriano,*** 761 F.3d 131 (1st Cir. 2014) (even though statements were testimonial, admission did not violation the Confrontation Clause where they were properly offered to place the defendant's responses in context). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth;

rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito's analysis that the Confrontation Clause was not violated because the testimonial lab report was not admitted for its truth. The question left from *Williams* is whether there are any potential not-for-truth uses of testimonial statements that will escape constitutional proscription. The answer is apparently that *Williams* does not extend to situations in which the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert's use of the lab report from the prosecution's admission of an accomplice's confession in *Tennessee v. Street,* where the confession "was not introduced for its truth, but only to impeach the defendant's version of events." In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele's confession. Peele's confession was introduced not for its truth but only to show that it differed from Street's. For that purpose, it didn't matter whether it was true. Justice Thomas stated that "[u]nlike the confession in *Street,* statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose" because "to use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true." Justice Kagan in her opinion essentially repeats Justice Thomas's analysis and agrees with his distinction between legitimate and illegitimate use of the "not-for-truth" argument. Both Justices Kagan and Thomas agree with the Court's statement in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible.*

It follows that the cases under this "not-for-truth" headnote are probably unaffected by *Williams,* as they largely permit admission of testimonial statements as offered "not-for-truth" only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.*

Statements by informant to police officers, offered implausibly to prove the "background" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the informant's statements were not admitted for their truth, but to explain the background of the police investigation:

> The government's articulated justification --- that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* --- is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

Accomplice statements purportedly offered for "background" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted for the purpose of explaining the police investigation. The government at trial emphasized the details of the

accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

> **Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams.* The prosecution's was not offering the accusations for any *legitimate* not-for-truth purpose.**

Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,* 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford.* But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements." ***See also United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015) (statements by undercover informant made to defendant during a drug deal were properly admitted; they were offered not for their truth but to provide context for the defendant's own statements, and so they did not violate the Confrontation Clause).

Accomplice's confession, when offered in rebuttal to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay --- as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough investigation it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" --- for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case." ***See also United States v. Diaz,*** 670 F.3d 332 (1st Cir. 2012) (testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: "The government offered Perez's out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.").

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: ***United States v. Logan,*** 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

> **Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,* 445 F.3d 211 (2nd Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

> **Note: This typical use of "context" is not in question after *Williams*, because the focus is on the defendant's statements and not on the truth of the declarant's statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant's statements. See, e.g., *United States v. Powers* from the Sixth Circuit, infra.**

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart*, 433 F.3d 273 (2nd Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make

the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams.* That is, to the extent some members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.

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 (2nd 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 a police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala,* 386 F.3d 536 (3rd Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3rd Cir. 2005) (relying on *Trala,* the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,* 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users identified by the administrator confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Accomplice's testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel,* 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they

differed from the defendant's confession on a number of details. The court found no error in the admission of the accomplices' confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.
>
> **Note: The use of the cohort's confessions to show differences from the defendant's confession is precisely the situation reviewed by the Court in *Tennessee v. Street.* As noted above, while some Justices in *Williams* rejected the "not-for-truth" analysis as applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street.***

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source --- recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." ***See also United States v. Gurrola,*** 898 F.3d 524 (5th Cir. 2018) ("The Confrontation Clause does not bear on non-testimonial statements. And it is well-settled in this circuit that co-conspirator statements are not

testimonial."); ***United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness --- by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime --- did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect); ***United States v. Smith,*** 822 F.3d 755 (5th Cir. 2016)(testimonial statement from an accomplice did not violate the Confrontation Clause because it was "introduced in the context of how Agent Michalik developed suspects . . . for the charged bank robberies. This court has consistently held that out-of-court statements providing background information to explain the actions of investigators are not hearsay" and so do not violate the Confrontation Clause); ***United States v. Sosa,*** 897 F.3d 615 (5th Cir. 2018) (admitting a tip to police about a cohort of the defendant, offered to explain why the officer investigated the cohort, did not violate the right to confrontation; courts must be "vigilant" in assuring that attempts to explain an officer's actions "do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for their truth"; but the greatest risks of backdoor use occur when the statement implicates the defendant directly; this one did not, and the jury already knew about the cohort, so "at a minimum it was not obvious that this statement was offered for its truth").

Informant's accusation, purportedly offered to explain the police investigation, was hearsay and violated the Confrontation Clause: ***United States v. Kizzee,*** 877 F.3d 650 (5th Cir. 2017): In a drug and firearm prosecution, an officer testified (implicitly) that he received information from an arrestee that the arrestee had purchased drugs from the defendant, and he used that information (as well as other observations of the residence) to obtain a warrant. The government argued that the testimony did not violate the hearsay rule (and so could not violate the Confrontation Clause) because it was offered at trial only to explain the background of the police investigation. But the court disagreed and reversed the conviction. The court stated that the information from the arrestee "was not necessary to explain Detective Schulz's actions" because "there was minimal need for Detective Schulz to explain the details forming the basis of the search warrant" and his own observations "would have been sufficient to explain his investigatory actions and provide background information." ***See also United States v. Jones,*** 924 F.3d 219 (5th 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 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz's drug activity. The court found that the informant's statement was testimonial --- because it was an accusation made to a police officer --- but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that admitting the testimony "explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor's case." The court also observed that "had defense counsel objected to the testimony at trial, the court could have easily restricted its scope." ***See also United States v. Al-Maliki,*** 787 F.3d 784 (6th Cir. 2015) (in a prosecution for child sex abuse, the trial court admitted the defendant's wife's statement to police accusing the defendant of sexual abuse; the court found no error because it was offered for the limited purpose of explaining why an official investigation began: "Two conclusions follow: It is not hearsay, * * * and the government did not violate the Confrontation Clause"); ***United States v. Doxey,*** 833 F.3d 692 (6th Cir. 2016) (informant's tip leading to search of the defendant's vehicle was not hearsay as it was offered "merely by way of background"); ***United States v. Davis***, 577 F.3d 660 (6th Cir. 2009): A woman's statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay ---and so even though testimonial did not violate the defendant's right to confrontation --- because it was offered only to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him. ***Accord United States v. Napier,*** 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government offered a document from Time Warner cable, obtained pursuant to a government subpoena, showing that an email address was accessed at the defendant's home and that the defendant was the subscriber to the account. The court found no confrontation violation because the document was offered not for its truth, but rather "to demonstrate how the Cincinnati office of the FBI located Napier." The court noted that the trial court gave the jury a limiting instruction that the document could be considered only to prove the course of the investigation.

Undercover statements offered to show representations about money-laundering, in a sting operation, were not offered for truth and so admitting them did not violate the Confrontation Clause: ***United States v. King,*** 865 F.3d 848 (6th Cir. 2017) (Sutton, J.): The defendant was the target of a sting operation. The undercover informant represented in several conversations with the defendant that he had drug money to launder, and the defendant responded with the details of how he would launder the money. The defendant argued that the undercover

informant's part of the conversation was testimonial because it was primarily motivated for use in a criminal prosecution. But the court noted that the threshold requirement for violating the Confrontation Clause is that the out-of-court statement is admitted for its truth. That was not the case here. The statements were not offered to prove, for example, that the informant had drug money and wanted to clean it. Rather, the prosecution used the statements to prove that the informant made representations about having drug money, and the defendant believed him.

Statement offered to prove the defendant's knowledge of a crime was non-hearsay and so did not violate the accused's confrontation rights: *United States v. Boyd,* 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had told police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson's statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: "Davidson's statements to Boyd were offered to prove Boyd's knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted."

Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was "minimal at best"; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior

criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate the Confrontation Clause, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant's accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: ***United States v. Gibbs,*** 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched." ***See also United States v. Macias-Farias,*** 706 F.3d 775 (6th Cir. 2013) (officer's testimony that he had received information from someone was offered not for its truth but to explain the officer's conduct, thus no confrontation violation).

Statement offered to prove it was false was not hearsay and so could not violate the defendant's right to confrontation: ***United States v. Porter,*** 886 F.3d 562 (6th Cir. 2018): In a prosecution against a mayor for theft from federal programs and bribery, the government offered statements by an accomplice to investigators. The trial court found that the statements were properly admitted to prove they were false, and that the government established the falsity of statements with independent evidence. The court of appeals held that "because the government's position was that Chet Crace's prior statements to investigators during the April 10, 2015 interview were false, Atkins's statements were not hearsay and did not implicate Porter's confrontation rights."

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": ***United States v. Nettles,*** 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government had an undercover informant contact him and ostensibly offer to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine, stating: "We note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth"); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant's part of conversations were not hearsay, as they were offered to place the defendant's statements in context; because they were not offered for truth their admission did not violate the defendant's right to confrontation); ***United***

States v. Gaytan, 649 F.3d 573 (7th Cir. 2011) (undercover informant's statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: "Gaytan's responses ['what you need?' and 'where the loot at?'] would have been unintelligible without the context provided by Worthen's statements about his or his brother's interest in 'rock'"; the court noted that there was no indication that the informant was "putting words in Gaytan's mouth"); ***United States v. Jackson,*** 940 F.3d 347 (7th Cir. 2019) (noting that the confidential informant's statements were properly offered from context and that the defendant "had not identified any statement where the [confidential informant] put word's into Jackson's mouth"); ***United States v. Foster,*** 701 F.3d 1142 (7th Cir. 2012) ("Here, the CI's statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant's acts and make his statements intelligible. The defendant's statement to 'give me sixteen fifty' (because the original price was 17) would not have made sense without reference to the CI's comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation."); ***United States v. Faruki*****,** 803 F.3d 847 (7th Cir. 2015) (no confrontation violation where out-of-court statements were offered to place the defendant's own statements in context).

For more on "context" see ***United States v. Wright,*** 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant's statement to a confidential information that he was "stocked up" would have been unintelligible without providing the context of the informant's statements inquiring about drugs, "and a jury would not have any sense of why the conversation was even happening." The court also noted that "most of the CI's statements were inquiries and not factual assertions." The court expressed concern, however, that the district court's limiting instruction on "context" was boilerplate, and that the jury "could have been told that the CI's half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI's statements standing alone were not to be considered as evidence of Wright's guilt."

In ***United States v. Smith,*** 816 F.3d 479 (7th Cir. 2016), a public corruption case, the court rejected the use of "context" where placing the defendant's statement in "context" only worked if the informant's statement to the defendant were true. In *Smith,* the court gave an example of an informant saying to the defendant "Last week I paid you $7000 for a letter that my client will use to seek a grant. Do you remember?" And the defendant says "Yes." The court noted that the informant's statement puts the defendant's answer in context, but only if the informant was speaking the truth. In that situation, the informant's statement would be hearsay and potentially trigger the right to confrontation --- but that right was not violated in this case because the informant's statements were not offered for truth but rather were verbal acts establishing a corrupt agreement. ***See also United States v. Amaya,*** 828 F.3d 518 (7th Cir. 2016), where an informant's

statement "that was a big ass pistol" was offered to put the defendant's statement "Hell yea" in context. But the court found that context was unworkable because the informant's statement was only relevant to context if it were true --- only if a gun was present would the "Hell yea" mean anything pertinent to the case. Yet the informant's statement was found not testimonial, because it was simply blurted out, and so was not made with the primary motive that it would be used in a criminal prosecution.

> **Note: The concerns expressed in *Nettles* and the other 7th Circuit cases discussed above --- about possible abuse of the "context" usage --- are along the same lines as those expressed by Justices Thomas and Kagan in *Williams,* when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If context is a pretext and the statement is in fact offered for the truth, then the statement is not being offered for a legitimate not-for-truth purpose.**

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,* 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert" identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted." ***See also United States v. Ambrose,*** 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation).

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness

to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth --- that the witness saw the man he described pointing a gun at people --- but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers' actions in the course of their investigation: "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

> **Note: The Court's reference in *Taylor* to the possibility of exploiting a not-for-truth purpose runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams.***

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,* 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to buy crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant's statement not for the truth of the assertion but as "foundation for what the officer did." The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

> The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context --- even if the CI's

statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

See also United States v. Walker, 673 F.3d 649 (7th Cir. 2012) (confidential informant's statements to the police --- that he got guns from the defendant --- were not properly offered for context but rather were testimonial hearsay: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that 'the informant said he got this gun from X' as proof that X supplied the gun."); ***Jones v. Basinger,*** 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

Note: *Adams, Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams.*

Statements by a confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent --- after defense counsel had questioned the connection of the defendant to the residence --- the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and did not dispute the propriety of the investigation. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details

of what the CI told Officer Singh." ***Compare United States v. Brooks,*** 645 F.3d 971 (8th Cir. 2011) ("In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted --- that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes.* In *Holmes,* it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI's information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here."). ***See also United States v. Shores,*** 700 F.3d 366 (8th Cir. 2012) (confidential informant's accusation made to police officer was properly offered to prove the propriety of the investigation: "From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting."); ***United States v. Wright,*** 739 F.3d 1160 (8th Cir. 2014) (Officer's statement to another officer, "come into the room, I've found something" was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel's argument that the officer entered the room in response to a loud noise: "If the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant's Sixth Amendment rights.").

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the

database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, "it does not implicate the confrontation clause."

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth --- indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding,* 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause: *United States v. Young,* 753 F.3d 757 (8th Cir. 2014): Young was accused of conspiring with Mock to murder Young's husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The statement was remarkably consistent in all details with the alibi that Young had independently provided, and many of the assertions were false. The government offered Mock's statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock's statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock's statement was not offered for its truth but rather "to show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock's statements to Deputy Salsberry are valuable to the government because they are false."

Statement offered for impeachment was not hearsay and therefore admission did not violate the defendant's right to confrontation: ***United States v. Cotton,*** 823 F.3d 430 (8th Cir. 2016): "Cotton first argued that admission of Frazier's post-arrest statement violated his rights under the Confrontation Clause. Because the statement was offered for impeachment [as a prior inconsistent statement of a hearsay declarant] and not to prove the truth of the matter asserted, there was no Confrontation Clause violation in this case."

Informant's part of a conversation with a coconspirator was properly admitted for context and not for truth: ***United States v. Barragan,*** 871 F.3d 689 (9th Cir. 2017): In a prosecution for racketeering and drug crimes, the trial court admitted a taped conversation between a defendant's coconspirator and an undercover informant. The defendant conceded that the coconspirator's statement was admissible under Rule 802(d)(2)(E), but contended that admitting the informant's part of the conversation violated his right to confrontation. But the court found no error, because the informant's statements were offered only to place the coconspirator's statements in context, and the jury was instructed to that effect. The court stated that the informant's statements "were not admitted for their truth, and the admission of such context evidence does not offend the Confrontation Clause."

Accusation offered to rebut the defendant's charge of a sloppy investigation were legitimately offered for a non-hearsay purpose and so admission did not violate the right to confrontation: ***United States v. Johnson,*** 875 F.3d 1265 (9th Cir. 2017): The defendant was

charged with felon-firearm possession. He claimed that the gun belonged to Jakith Martin and argued at trial that the police investigation was sloppy. The government countered with testimony from an officer that the defendant's girlfriend told him that the gun was the defendant's. The girlfriend's statement was definitely testimonial. But the court found no error, because the Confrontation Clause does not apply to a statement that is not hearsay. In this case, the statement was offered not to prove that the defendant possessed the gun, but rather to show that the police investigation was proper (and not sloppy) when it focused on the defendant. The court noted that "Courts must exercise caution to ensure that out-of-court testimonial statements, ostensibly offered to explain the course of a police investigation, are not used as an end-around *Crawford* and hearsay rules, particularly when those statements directly inculpate 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 (9th 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 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause); ***United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014) (In a prosecution for sex trafficking, statements made to an undercover police officer

that set up a meeting for sex were properly admitted as not hearsay and so their admission did not violate the Confrontation Clause: "The prosecution did not present the out-of-court statements to prove the truth of the statements about the location, price, or lack of a condom. Rather, the prosecution offered these statements to explain why Officer Osterdyk went to Room 123, how he knew the price, and why he agreed to pay for oral sex."; the court also found that the statements were not testimonial anyway because the declarant did not know she was talking to a police officer.); ***United States v. Ibarra-Diaz,*** 805 F.3d 908 (10th Cir. 2015) (confidential informant's statements to a police officer about the defendant's interest in doing a drug deal were testimonial, but the right to confrontation was not violated because the statements were offered to "explain why the officer did not put a body wire on the CI for this significant drug transaction --- i.e., because, unlike situations where the detective is in control of the informant from the outset and * * * of the circumstances of the informant's dealings with a potential target, in this instance the CI just called the detective 'out of the blue' about the possible drug transaction"; other statements from accomplices were properly admitted because they were not offered for their truth but to explain the conduct of the detective who heard the statements).

Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez,* 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and to suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

> **Note**: **The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction**

as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."

See also United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant's statements "were not offered for the truth of the matters asserted, but rather to provide context for [the defendant's] own statements"); ***United States v. Van Buren,*** 940 F.3d 1192 (11th Cir. 2019) ("Albo's [testimonial] statements were admitted only to provide context for Van Buren's statements and to show their effect on Van Buren" --- therefore no confrontation violation in admitting those statements).

Present Sense Impression

911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction --- together with the bystander's answers to questions from the 911 operators --- was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander's statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency --- rather the caller was simply recording that a crime was taking place across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive of whether statements about a crime are testimonial. Ultimately the court found that the caller's statements were not testimonial, reasoning as follows:

> [A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. * * * The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession.

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford,* but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in

admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial: *United States v. Solorio,* 669 F.3d 943 (9th Cir. 2012): Appealing from a conviction arising from a "buy-bust" operation, the defendant argued that hearsay statements of DEA agents at the scene --- which were admitted as present sense impressions --- were testimonial and so should have been excluded under *Crawford.* The court disagreed. It concluded that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, "by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly." Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation "was a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs" and also that the defendant was visibly wary of the situation.

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.

> **Note: The court's analysis about certificates of authentication is unaffected by *Melendez-Diaz,* as the Supreme Court stated (in dictum) that certificates that simply authenticate non-testimonial records are not themselves testimonial. Every circuit that has decided the question after *Melendez-Diaz* has upheld authenticating certificates. See below.**

Warrant of deportation is not testimonial: *United States v. Garcia,* 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

Note: Other circuits before Melendez-Diaz reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts

for use in future criminal prosecutions."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation "is recorded routinely and not in preparation for a criminal trial").

Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition that crime has not been committed at the time the certificate is prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. See also *United States v. Lopez,* 747 F.3d 1141 (9th Cir. 2014) (adhering to pre-*Melendez-Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco,* 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal

statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.

Post office box records are not testimonial: *United States v. Vasilakos,* 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz.*

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* --- despite the fact that both records were prepared with the knowledge that they would be used in a prosecution. As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. * * * They were employees simply recording

observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the tox-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 --- especially if it is a hospital, because tox-screens might well be done for all patients and for a medical purpose.

Note that the Seventh Circuit, in a case after *Melendez-Diaz,* adhered fully to its ruling in *Ellis* that business records are not testimonial. *United States v. Brown,* 822 F.3d 966 (7th Cir. 2016) (relying on *Ellis* to find that Western Union records of wire transfers were not testimonial: "Logically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.").

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Note: 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 (10th Cir. 2011), ***United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012), ***United States v. Ayelotan,*** 917 F.3d 394 (5th Cir. 2019), ***United States v. Denton,*** 944 F.3d 170 (4th Cir. 2019), ***United States v. Clotaire,*** 963 F.3d 1288 (11th Cir. 2020), and ***United States v. Anekwu,*** 695 F.3d 967 (9th Cir. 2012) all infra. ***See also Washington v. Griffin,*** 876 F.3d 395 (2nd Cir. 2017) (noting that a certification of a business record "does not transform the underlying notations of the lab analysts into formalized testimonial materials" and relying on the passage from *Melendez-Diaz* which stated that a clerk's authenticating affidavit authenticating an otherwise admissible record does not violate the Confrontation Clause); ***United States v. Clotaire,*** 963 F.3d 1288 (11th Cir. 2020) (relying on the passage from *Melendez-Diaz* to find that a certification authenticating a business record is not testimonial). Cf. ***United States v. Farrad,*** 895 F.3d 859, 876 (6th Cir. 2018)(holding that the defendant forfeited his argument that a 902(11) certificate violated his confrontation rights; but even if not forfeited, "it is unlikely that it would have been a winning argument * * * in light of the Supreme Court's discussion of the 'narrowly circumscribed' exception at common law that allowed a clerk to present a certification authenticating an official record.").

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: ***United States v. Gilbertson,*** 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation --- the crime had not occurred at the time the records were prepared.

Tax returns are business records and so not testimonial: *United States v. Garth,* 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz.*

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

***Note:* The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction are quite probably non-testimonial, because the *Melendez-Diaz* majority states that a certificate is not testimonial if it does nothing more than authenticate another document --- and specifically uses as an example a certificate of conviction.**

In *United States v. Albino-Loe,* 747 F.3d 1206 (9th Cir. 2014), the court adhered to its ruling in *Weiland,* declaring that a routine certification of authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they "did not accomplish anything other than authenticating the A-file documents to which they were attached."

Absence of records in database is not testimonial; and drug ledger is not testimonial: ***United States v. Mendez,*** 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford,* "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

> **Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is about the absence of public records, where the records themselves were not prepared in testimonial circumstances. If that absence had been proved by a *certificate*, then the Confrontation Clause, after *Melendez-Diaz*, would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial. Drug ledgers in particular are absolutely not prepared for purposes of litigation.**

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that "it appears from an examination of the files in this office" that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation --- they "respond[ed] to a prosecutor's question with an answer."

> **Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz.* The clerk's letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.**

Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz: United States v. Moore,* 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

> The Office of the Medical Examiner is required by D.C.Code 5-1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner] --- use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports."

> These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

> Certain duties imposed by the D.C. Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent.

Finally, the court rejected the government's argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence. ***See also United States v. McGill,*** 815 F.3d 846 (D.C.Cir. 2016) (relying on *Moore* to find a Confrontation violation where drug analysis reports and autopsy reports were admitted through testimony from witnesses other than the reports' authors).

State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial: *Nardi v. Pepe,* 662 F.3d 107 (1st Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. The court reasoned as follows:

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez-Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir. 2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with "clearly established" law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

Immigration interview form was not testimonial: *United States v. Phoeun Lang,* 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses. Thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But the court found no error. The court concluded that the form was not "primarily to be used in court proceedings." Rather it was a record prepared as "a matter of administrative routine, for the primary purpose of determining Lang's eligibility for naturalization." For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between "documents produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii)." The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

> **Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the "primary motive" test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification: the statement is testimonial only if it was made to be used in the *defendant's* criminal prosecution. In *Phoeun Lang* the first premise was not met --- the statements were made for administrative purposes, and not primarily for use in *any* criminal prosecution.**

Expert's reliance on standard samples for comparison does not violate the Confrontation Clause because any communications regarding the preparation of those samples was not testimonial: *United States v. Razo*, 782 F.3d 31 (1st Cir. 2015). A chemist testified about the lab analysis she performed on a substance seized from the defendant's coconspirator. The crime lab used a "known standard" methamphetamine sample to create a reference point for comparison with seized evidence. That sample was received from a chemical company. The chemist testified that in comparing the seized sample with the known standard sample, she relied on the manufacturer's assurance that the known standard sample was 100% pure. The court found no confrontation violation because the known standard sample --- and the manufacturer's assurance about it --- were not testimonial. Any statements regarding the known

standard sample were not made with the primary motivation that they would be used at a criminal trial, because the sample was prepared for general use by the laboratory. The court noted that the chemist's conclusions about the *seized* sample would raise confrontation questions, but the government produced the chemist to be cross-examined about those conclusions. As to the standard sample, it was prepared "prior to and without regard to any particular investigation, let alone any particular prosecution."

> **Note: In reaching its result, the *Razo* court provided a good interpretation of *Williams*. The court saw support in the fact that the Alito plurality would find any communications regarding the known standard sample to be non-testimonial because that sample was "not prepared for the primary purpose of accusing a targeted individual." And Justice Thomas would be happy, because nothing about the known standard sample was in the nature of a formalized statement.**

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that certain records about suspicious internet activity were testimonial and their admission violated the defendant's right to confrontation. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report --- called a "CP Report"--- to the National Center for Missing and Exploited Children (NCMEC), listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant's computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. But the court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because the primary purpose for the reports was to record past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a "suspect" screen name, email address, and IP address --- and Yahoo did not treat its customers as "suspects" in the ordinary course of its business; 2) before a CP Report is created, someone in the

legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users' IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that "[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible."

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams*. Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had "no way of knowing whether it will turn out to be incriminating or exonerating." In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: "Yahoo's employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody."*

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user's account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

> **Note: *Cameron* cannot be read to hold that business records admissible under Rule 803(6) can be testimonial under *Crawford.* The court notes that under *Palmer v. Hoffman,* 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz.* The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman:* they were not made for business purposes, but rather for purposes of litigation. Thus according to the court, the Yahoo reports were probably not admissible as business records anyway.**

Airline records of passengers on a plane are not testimonial: ***Tran v. Roden,*** 847 F.3d 44 (1st Cir. 2017): On habeas review of a murder conviction, the court considered whether the admission of a manifest prepared by United Airlines violated the defendants' right to confrontation. The manifest showed that two people with the same names as the defendants were on a flight out of the country. This was evidence of consciousness of guilt. The court found that the manifest was a business record prepared by United, outside the context of litigation, and therefore it was not testimonial. The defendants argued that the record was testimonial because it was *delivered* by United to the prosecution. But the court found this irrelevant, because the question under the Confrontation Clause is whether a document was *prepared* with the primary motive of use in a criminal prosecution. The defendants relied on *Cameron,* immediately above, but the court distinguished *Cameron* by noting that the Yahoo records in that case were *prepared* by Yahoo with the intent to send them to the government in order to investigate and prosecute child pornography.

Telephone records are not testimonial: ***United States v. Burgos-Montes,*** 786 F.3d 92 (1st Cir. 2015): The government introduced phone records of a conspirator. They were accompanied by a certification made under Rule 902(11). The defendant argued that the phone records were testimonial but the court disagreed. The defendant argued that the records were produced by the phone company in response to a demand from the government, but the court found this irrelevant. The records were gathered and maintained by the phone company in the routine course of business. "The fact that the print-out of this data in this particular format was requested for litigation does not turn the data contained in the print-out into information created for litigation."

Routine autopsy report was not testimonial: ***United States v. James,*** 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law --- stating that autopsy reports were not testimonial --- was still valid. The court adhered to its view that "routine" autopsy reports were not testimonial because they are not prepared with the primary motivation that they will be used in a criminal trial. Applying the test of "routine" to the facts presented, the court found as follows:

> Somaipersaud's autopsy was nothing other than routine --- there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. [A government expert] testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report

itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."

The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. [N]either the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that "something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations." It distinguished the 11th Circuit's opinion --- discussed below --- which found an autopsy report to be testimonial, noting that "the decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office." Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit's view.

Note: In considering the effect of *Williams,* the court found that in fact there was no lesson at all to be derived from *Williams,* as there was no rationale on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only cases exactly like it.

Business records are not testimonial: *United States v. Bansal,* 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that "the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

Rule 902(11) certifications are not testimonial: *United States v. Denton,* 944 F.3d 170 (4th Cir. 2019): The court found no error in admitting certifications of business records of Facebook, Google, and Time Warner Cable. These certifications authenticated the business records under Rule 902(11). The court noted that "the Supreme Court has differentiated between an affidavit that is created for the sole purpose of providing evidence against a defendant and an

affidavit that is created to authenticate or provide a copy of an otherwise admissible record. Put simply, the former is testimonial and therefore subject to confrontation, while the latter is not."

Admission of credit card company's records identifying customer accounts that had been compromised did not violate the right to confrontation: *United States v. Keita,* 742 F.3d 184 (4th Cir. 2014): In a prosecution for credit card fraud, the trial court admitted "common point of purchase" records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that "business records are generally admissible absent confrontation." The court concluded that the records were primarily prepared for the administration of Amex's regularly conducted business.

Warrant of removal, offered in an illegal reentry prosecution, is non-testimonial: *United States v. Garcia,* 887 F.3d 205 (5th Cir. 2018): In an illegal re-entry prosecution, to prove that the defendant had been deported, the government offered the warrant of removal that was entered just after the defendant was removed. The defendant argued that the warrant was testimonial under *Melendez-Diaz,* but the court disagreed. The court stated that the problem with the forensic certificates in *Melendez-Diaz* was that they were produced specifically for purposes of trial. In contrast, warrants of removal are prepared "to memorialize an alien's departure --- not specifically or primarily to prove facts in a hypothetical future criminal prosecution."

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 (5th 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 (5th 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 (5th 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 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement --- and because the accomplice was not produced to testify --- admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

> ***Note:*** **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record --- the cohort's production of the records at a proffer session --- was testimonial.**

Pseudoephedrine logs are not testimonial: ***United States v. Towns,*** 718 F.3d 404 (5th Cir. 2013): In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies of pseudoephedrine purchases. The court found that the logs --- and the certifications to the logs provided by the pharmacies --- were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that "the regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage." As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) ---the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

> The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver's license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

Biographical information contained in a Form I-213 is not testimonial: ***United States v. Noria,*** 945 F.3d 847 (5th Cir. 2019): In an illegal-reentry prosecution, the government proved biographical information about the defendant by offering statements made on an I-213 form that documented encounters between the defendant and ICE agents. The defendant argued that the statements on the form were testimonial, but the court disagreed. The court reasoned as follows:

> Here, it is uncontested that the Form I-213s are routinely produced by DHS and are not generated solely for use at trial. Moreover, there is no indication that the specific Form I-213s introduced at Noria's trial are untrustworthy or unusually litigation-focused; by all accounts, they are standard I-213s created contemporaneously with each of Noria's interviews by immigration agents. No doubt, the biographical portion of an I-213 can be helpful to the Government in a later criminal prosecution. However, we agree with the Ninth and Eleventh Circuits that the forms' primary purpose is administrative, not investigative or prosecutorial. After all, immigration agents prepare an I-213 every time

> they encounter an alien suspected of being removable, regardless of whether that alien is ever criminally prosecuted or civilly removed. The forms are then stored in the regular course of business. * * * I-213's serve primarily as administrative records used to track undocumented entries, not as evidence in criminal trials.

The court also rejected the defendant's argument that the reports were not admissible under Rule 803(8), the public records exception to the hearsay rule. That rule does not bar all law enforcement reports in criminal cases, but only those prepared for purposes of litigation. Thus, the public records exception tracks the "primary purpose" test of the Confrontation Clause.

Court rejects the "targeted individual" test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera,* 737 F.3d 988 (5th Cir. 2013): The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant's grandmother, prepared 40 years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant's parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant's mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was *not targeted toward the defendant*, as he was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used "at *a* later trial." Finally, the court contended that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be

confronted with the "*witnesses against him.*" In this case, the grandmother, by way of affidavit, was a witness against the defendant.

> ***Reporter's Note:*** **The court's construction of the Confrontation Clause could come out the other way. The reference to "witnesses against him" in the Sixth Amendment could be interpreted as *at the time the statement was made*, it was being directed at the defendant. The *Duron-Caldera* court reads "witnesses" as of the time the statement is being introduced. But at that time, the witness is not there. All the "witnessing" is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying "against *him*."**
>
> **Another note from *Duron-Caldera:* The court notes that there is no rule to be taken from *Williams* under the *Marks* test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In *Williams,* there is nothing on which the plurality and Justice Thomas agreed.**

Pseudoephedrine purchase records are not testimonial: *United States v. Collins,* 799 F.3d 554 (6th Cir. 2015): Relying on the Fifth Circuit's decision in *United States v. Towns, supra,* the court held that pharmaceutical records of pseudoephedrine purchases were not testimonial. The court noted that while law enforcement officers use the records to track purchases, the "system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions" --- and accordingly was not primarily motivated to generate evidence for a prosecution.

Pseudoephedrine logs are not testimonial: *United States v. Lynn,* 851 F.3d 786 (7th Cir. 2017): Affirming convictions for methamphetamine manufacturing and related offenses, the court found no error in admitting logs of pseudoephedrine purchases prepared by pharmacies. These logs indicated that the defendant and associates had purchased pseudoephedrine, a necessary ingredient of methamphetamine. The defendant argued that introducing the logs violated his right to confrontation because they were prepared in anticipation of a prosecution and so were testimonial. But the court disagreed. It stated that "regulatory bodies may have legitimate interests in maintaining these records that far exceed their evidentiary value in a given case. For example,

requiring identification for each pseudoephedrine purchase may deter misuse or pseudoephedrine-related drug offenses." The logs were therefore not testimonial.

Preparing an exhibit for trial is not testimonial: ***United States v. Vitrano,*** 747 F.3d 922 (7th Cir. 2014): In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because the technician who prepared the phone calls as an exhibit did not testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that "[p]reparing an exhibit for trial is not itself testimonial."

Records of wire transfers are not testimonial: ***United States v. Brown,*** 822 F.3d 966 (7th Cir. 2016): In a drug prosecution, the government offered records of Western Union wire transfers. The court found that the records were not testimonial, noting that "[l]ogically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution." It concluded that the records were "routine and prepared in the ordinary course of business, not in anticipation of prosecution."

> **Note: The Western Union records in *Brown* were proven up by way of certificates offered under Rule 902(11). The court did not even mention any possible concern that those certifications would themselves be testimonial. It focused only on the testimoniality of the underlying records.**

Certifications that a gun dealer was federally licensed were testimonial: ***United States v. Barber,*** 937 F.3d 965 (7th Cir. 2019): The defendant was charged with stealing guns from a federally licensed gun dealer. To prove the federal license, the government offered a License Registration Report – a database search report --- which showed when the license was issued, expiration date, and its status as active. Appended to that report, the government submitted two affidavits from ATF officials, which explained the purposes of the records, that the records were for firearm licensing, that a search of the records was conducted, and concluded that the dealer was licensed during the relevant period. The court found that the affidavits were testimonial because "they go beyond simple authentication of a copy." The court reasoned that the affidavits rested "on an inference about the *continuing validity* of the license, and that inference requires an interpretation of what the records shows or a certification about its substance or effect. In other words, the government is relying on information [in the affidavit] beyond what the license itself says." As an example, the court stated that "the affidavit could imply that ATF has a practice of

documenting on its copy of a license information about suspensions (if any), or it might suggest that the affiant agent ran a search in order to confirm that [the dealer] did not have a licensing issue at the time of the robbery." The court concluded that the defendant was "entitled to know about and challenge whatever process went into generating this type of evidence."

> **Note: The internet search and the affidavits were clearly in anticipation of the prosecution, and were generated to prove an element of the crime. So the case is like those about certificates about the absence of a public record in the illegal re-entry prosecutions. And it is unlike the cases in which business records are authenticated by certificate under Rule 902(11), or in which electronic information is authenticated by certificate under Rule 902(13) and (14). In the latter cases, the underlying information being authenticated is not itself testimonial.**

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz: United States v. Mashek,* 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, the pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law were business records under Federal Rule of Evidence 803(6) and so not testimonial. ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business."); ***United States v. Wells,*** 706 F.3d 908 (8th Cir. 2013) (*Melendez-Diaz* did not preclude the admission of pseudoephedrine logs, because they constitute non-testimonial business records under Federal Rule of Evidence 803(6)).

Rule 902(11) authentication was not testimonial: *United States v. Thompson,* 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for

administrative purposes. As to the exhibit, the court stated that "[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights." The court emphasized that "[b]oth the majority and dissenting opinions in *Melendez-Diaz* noted that a clerk's certificate authenticating a record --- or a copy thereof --- for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial." It concluded that "[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument." ***See also United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

GPS tracking reports were properly admitted as non-testimonial business records: *United States v. Brooks,* 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant's argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit --- not for use at trial. The court stated that "[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union's security company for the purpose of locating a robber and recovering stolen money."

Certificates attesting to Indian blood are not testimonial: *United States v. Rainbow,* 813 F.3d 1097 (8th Cir. 2016): To prove a jurisdictional element of a charge that the defendants committed an assault within Indian Country, the government offered certificates of degree of Indian blood. The certificates certified that the respective defendants possessed the requisite degree of Indian blood. The defendants argued that, because the certificates were formalized and prepared for litigation, they were testimonial and so admitting them violated their right to confrontation. The certificates were prepared by a clerk of an officer of the BIA, and introduced at trial by the assistant supervisor of that office. The certificates reflected information about what was in records

regularly kept by the BIA. The court found that the certificates were not testimonial. It explained as follows:

> Although Archambault [the assistant supervisor] testified that he had these particular certificates prepared for his testimony, BIA officials regularly certify blood quantum for the purpose of establishing eligibility for federal programs available only to Indians. Archambault explained that his office maintained the records of tribal enrollment and of each member's blood quantum. He could look up an individual's enrollment status and blood quantum at any time—that information existed regardless of whether any crime was committed. Unlike the analysts in *Melendez–Diaz* and *Bullcoming,* the enrollment clerk here did not complete forensic testing on evidence seized during a police investigation, but instead performed the ministerial duty of preparing certificates based on information that was kept in the ordinary course of business. An objective witness would not necessarily know that the certificates would be used at a later trial, because certificates of degree of Indian blood are regularly used in the administration of the BIA's affairs. Simply put, the enrollment clerk prepared certificates using records maintained in the ordinary course of business by the Standing Rock Agency, and the BIA routinely issues certificates in the administration of its affairs. Thus, the certificates were admissible as non-testimonial business records.

Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: *United States v. Causevic,* 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter --- specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante,* 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Philippines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines, and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

> Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 129 S.Ct. at 2539-40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *Melendez-Diaz*, despite being labeled a copy of the certificate, Exhibit 1 is "quite plainly" an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

Filed statement of registered car owner, made after impoundment, that he sold the car to the defendant, was testimonial: *United States v. Esparza,* 791 F.3d 1067 (9th Cir. 2015): The defendant was arrested entering the United States with marijuana hidden in the gas tank and dashboard; the fact in dispute was the defendant's knowledge, and specifically whether he owned the car he was driving. At the time of arrest, the registered owner was Donna Hernandez. The government relied on two hearsay statements made in records filed with the DMV by Hernandez that she had sold the car to the defendant six days before the defendant's arrest. But these records were filed *after* the defendant was arrested and Hernandez had received a notice indicating that the car had been seized because it was used to smuggle marijuana into the country. Under the circumstances, the court found that the post-hoc records filed by Hernandez with the DMV were testimonial. The court noted that Hernandez did not create the record "for the routine

administration of the DMV's affairs." Nor was Hernandez merely "a private citizen who, in the course of a routine sale, simply notified the DMV of the transfer of her car. Instead, her car had already been seized for serious criminal violations, and she sent the transfer form to the DMV only after receiving a notice of seizure from [Customs and Border Protection]."

> **Note: This is an interesting case in which a statement was found testimonial in the absence of significant law enforcement involvement in the generation of the statement. As the Court has noted in *Bryant* and *Clark*, law enforcement involvement is critical to finding a statement testimonial, because a statement not made to or with law enforcement is unlikely to be sufficiently formal, and unlikely to be primarily motivated for use in a criminal trial. But at least it can be said that there is formality here --- Hernandez filed formal statements claiming that the ownership was transferred. And there was involvement of the state both in spurring her interest in filing (by sending her the notice) and in receiving her filing.**

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz.* On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* that record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation, after the crime has been committed. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is

use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal --- or, for that matter, any business or public record --- could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction. ***See also United States v. Rojas-Pedroza,*** 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant's argument that it had been undermined by *Bullcoming* and *Bryant;* holding that a Notice of Intent in the defendant's A-File --- which apprises the alien of the determination that he is removable --- was non-testimonial because its "primary purpose is to effect removals, not to prove facts at a criminal trial."); ***United States v. Lopez,*** 762 F.3d 852 (9th Cir. 2014) (verification of removal, recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal "is that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the removal of aliens following a hearing before an immigration judge"; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the Rule's apparent exclusion of law enforcement reports); ***United States v. Albino-Loe,*** 747 F.3d 1206 (9th Cir. 2014) (statements concerning the defendant's alienage in a notice of removal --- which is the charging document for deportation --- are not testimonial in an illegal entry case; the primary purpose of a notice of removal "is simply to effect removals, not to prove facts at a criminal trial"); ***United States v. Torralba-Mendia,*** 784 F.3d 652 (9th Cir. 2015) (I-213 Forms, offered to show that passengers detained during an investigation were deported, were admissible under the public records hearsay exception and were not testimonial: "The admitted record of a deportable alien contains the same information as a verification of removal: The alien's name, photograph, fingerprints, as well as the date, port and method of departure . . . .[T]he admitted forms are a ministerial, objective observation [and] Agents complete I-213 forms regardless of whether the government decides to prosecute anyone criminally.").

Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez,* 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents a --- Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge --- were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

Forms prepared by border patrol agents interdicting aliens found not testimonial: *United States v. Morales,* 720 F.3d 1194 (9th Cir. 2013): In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien's possession, and basic biographical data about the alien, and also provides the alien options, including the making of a concession that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant's argument that these forms were testimonial. It stated as follows:

> 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.

> **Note: The court appears to be wrong about the hearsay rule because statements coming from the alien would be admissible as party-opponent statements in a public record.**

Return of Service, offered to prove that the Defendant had been provided with notice of a hearing on a domestic violence protection order, was not testimonial: *United States v. Fryberg,* 854 F.3d 1126 (9th Cir. 2017): The defendant was convicted for possession of a firearm by a prohibited person. The prohibition was that he was subject to a domestic violence protection order. Critical to the validity of that order was that the defendant was served with notice of a hearing on a permanent protection order. As proof of that the defendant was served with that notice, the government offered the return of service by a law enforcement officer, completed on

the day that service was purportedly made. The court held that the return of service was admissible over a hearsay exception as a public record; it was not barred by the law enforcement prohibition of Rule 803(8) because it was a ministerial, non-adversarial record, proving only that service was made. The court further held that the return of service was admissible over a confrontation objection, because it was not testimonial. The court likened the return of service to the certificate of deportation upheld in *Orozco-Acosta, supra.* The court stated that the primary purpose for preparing the return of service was not to have it used as evidence in a prosecution but rather to inform the court "that the defendant had been served with notice of the hearing on the protection order, which enabled the hearing to proceed." At the time the notice was filed, no crime had yet occurred and so the return of service was not primarily prepared for the purpose of a criminal prosecution.

Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant's conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8), and also that its admission violated his right to confrontation. The court disagreed, reasoning that "a SSA interviewer completes the application as part of a routine administrative process" and such a record is prepared for each and every request for benefits. "No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose." The court quoted *Melendez-Diaz* for the proposition that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because --- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial --- they are not testimonial." The court concluded as follows:

> [N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavit seeking to amend a birth certificate, prepared by border patrol agents for use at trial, was testimonial: *United States v. Macias,* 789 F.3d 1011 (9th Cir. 2015): The defendant was arrested for illegal reentry but claimed that he had a California birth certificate and was a U.S. citizen. He was charged with illegal reentry and making a false claim of citizenship. During his trial he introduced a "delayed registration of birth" document issued by the State of California, and the jury deadlocked. After the trial, border patrol agents conducted an investigation into the defendant's place of birth, interviewing family members and reviewing family documents, and determined that he had been born in Mexico. They then attempted to correct the birthplace on the California document; pursuant to California law, they submitted sworn affidavits in an application to amend the California document. At the second trial, the government introduced the delayed registration as well as the amending affidavit. On appeal, the defendant argued that the amending affidavit was testimonial and its admission violated his right to confrontation. The court reviewed this claim for plain error because at trial the defendant's objection was on hearsay grounds only. The court found that the amending affidavit was clearly testimonial, as its sole purpose was to create evidence for the defendant's second trial. However, the court found that the plain error did not affect the defendant's substantial rights, because the government at trial introduced the defendant's Mexican birth certificate, as well as testimony from family members that the defendant was born in Mexico.

Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu,* 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C.§ 3505 for foreign records in criminal cases. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit's decision in *Yeley-Davis,* immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate non-testimonial records are not themselves testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant

argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id. at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

The court found *Yeley-Davis* "dispositive" in *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014), in which the court admitted a certificate of authenticity of credit card records. The court again distinguished *Melendez-Diaz* as a case concerned with affidavits showing the results of a forensic analysis --- whereas the certificate of authenticity "does not contain any 'analysis' that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial statement of authenticity." ***See also United States v. Keck,*** 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they "were created for the administration of Moneygram's affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation."

Notation on a fax attaching documents sent to law enforcement was not testimonial: ***United States v. Stegman,*** 873 F.3d 1215 (10th Cir. 2017): In a tax fraud prosecution, the government introduced the defendant's records, as sent by the defendant's accountant. The defendant objected that the fax cover sheet transmitting the document contained a notation made by the accountant that was potentially incriminating. The court found that the notation was not testimonial. It explained that the accountant's notation was "cooperative and informal in nature and there is no indication that [the accountant] would have reasonably expected the notation to be used prosecutorially."

Immigration forms containing biographical data, country of origin, etc. are not testimonial: ***United States v. Caraballo,*** 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were non-citizens and not admittable. 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 Untied 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.

See also United States Santos, 947 F.3d 711 (11th Cir. 2020) (Information entered on a naturalization form (Form N-400 application), was not testimonial, because preparing such a record is a matter of administrative routine, for the primary purpose of determining the applicant's eligibility for naturalization).

Summary charts of admitted business records is not testimonial: *United States v. Naranjo,* 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and "[b]usiness records are not testimonial." And "[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial."

Surveillance tapes of ATM transactions are business records and so not testimonial; submitting still frames from the videos is not hearsay and so not testimonial; and foundation by certificate is permissible under *Melendez-Diaz: United States v. Clotaire,* 963 F.3d 1288 (11th Cir. 2020): Identification of the defendant as having made ATM transactions was essential to the prosecution. The government admitted still photos taken from the ATM surveillance tapes; the foundation was through a certificate under Rule 902(11). The defendant challenged, on confrontation grounds, the extraction of still photos and the certification. (As to the video surveillance itself, the court found that it was a business record and non-testimonial).

As to the extraction of still images, the court found that they were business records as well, as they were just a change in format. But the defendant argued that the process of extracting the still frames was for purposes of litigation and therefore testimonial. The court rejected this argument, finding that the surveillance photos themselves were not statements at all, and there was nothing to indicate the photos were somehow "enhanced in a manner that turned them into the testimony of the bank employee who pulled them." It concluded that "[i]n her role as photo processor, Moran was doing nothing but getting the clearest image; she made no assertion about what the image showed or who it might be. We cannot see how the photo itself or the person who pulled it was intending to assert anything." The court further found that the Rule 902(11) certificate was not testimonial as it merely authenticated records that were not themselves testimonial.

Database of purchases of controlled substances constitutes business records and is not testimonial: ***United States v. Ruan,*** 966 F.3d 1101 (11th Cir. 2020): The State of Alabama established a database of all controlled substances dispensed in the state; each doctor or pharmacist is required to report the patient's name, dosage, etc. Law enforcement has access to the database. At his trial for dispensing controlled substances without a legitimate medical reason, the defendant objected to admission of entries from the Alabama database. The court found that the entries were admissible as business records under Rule 803(6). The defendant contended that the records were testimonial, because the database assisted law enforcement in prosecuting violators of controlled substances laws. But the court noted that a statement is testimonial only when "its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution . . . and when the statement is formal, akin to affidavits, depositions, prior testimony, or confessions." Under this narrow test, the database entries were not testimonial, first, "because they are business records." Second, even if they were not business records, the entries are not testimonial because "the fact that pharmacists may be aware when they input the data that law enforcement also has access to the database if needed during an investigation does not transform the data entry into the type of formal statement required for testimonial evidence." [Perhaps the better point is made in *Towns, supra*: controlled substances databases are primarily for purposes of regulation, deterrence, and prevention, as opposed to prosecution.]

As to the certification of the business record, the court found that the defendant's contention was "foreclosed by *Melendez-Diaz."* The court explained that in *Melendez-Diaz*, "the Supreme Court distinguished between authentication and creation of a record." The court "join[ed] other circuits in concluding that business records certifications are not testimonial."

Admission of a summary of non-testimonial records does not violate the Confrontation Clause: ***United States v. Melgen,*** 967 F.3d 1250 (11th Cir. 2020): In a trial on charges of Medicaid fraud, the government offered a summary chart comparing the defendant's billing to peer physicians. The billing records were not testimonial, but the defendant argued that he had a right under the Confrontation Clause to cross-examine those members of the prosecution team who prepared the chart, in order to challenge the criteria they used to make the exhibit. The court rejected this argument. The court noted that prosecutors "routinely make decisions about which evidence they believe is relevant to establishing a particular point --- decisions that may include, for example, which witnesses to call, or, as here, which summaries to enter into evidence." But this process of selection does not make prosecutors a witness against the defendant for purposes of the Confrontation Clause.

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz: United States v. Ignasiak,* 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz*. The court relied heavily on the fact that the autopsy reports were prepared 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.
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> * * *
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> In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

Note: The Court's test for testimoniality is broader than that used by the Supreme Court. The Supreme Court finds statements to be testimonial only when they are *primarily motivated* to be used in a criminal prosecution. The 11th Circuit's "reasonable anticipation" test would cover many more statements, and accordingly the court's decision in *Ignasiak* is subject to question.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

Testifying Declarant

Admission of prior consistent statements under Rule 801(d)(1)(B)(ii), even though testimonial, did not violate the Confrontation Clause: *United States v. Purcell,* 967 F.3d 159 (2nd Cir. 2020): The defendant was charged with promoting prostitution. One of the victims made accusatory statements to investigators. The victim testified at trial, and was cross-examined about inconsistent statements she had made. On redirect the trial court allowed the admission of the initial accusatory statements, as they helped to place the inconsistencies in context and properly rehabilitated the witness. The court found that the prior statements were properly admitted for their truth under Rule 801(d)(1)(B)(ii), which was added by a 2014 amendment. The defendant argued that admitting the prior consistent statements violated his right to confrontation because they were made to law enforcement and so were testimonial. But the court found no confrontation violation, explaining as follows:

> Royer's testimony regarding Wood's statements to the State College police did not implicate Purcell's Confrontation rights, irrespective of whether those statements were "testimonial," because Wood testified at trial. Purcell had a full opportunity to confront the declarant, Wood, and to cross-examine her regarding her out-of-court statements to the State College police.

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction --- those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-

examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause. ***See also, United States v. Smith,*** 822 F.3d 755 (5th Cir. 2016) (defendant's accomplice gave testimonial statements to a police officer, but admission of those statements did not violate the right to confrontation because the accomplice testified at trial subject to cross-examination).

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 (5th 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 (5th 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 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial --- even though the declarant did not recall making the statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted into evidence. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory about the statements. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements." ***See also United States v. Al-Alawi,*** 873 F.3d 592 (7th Cir. 2017) (admission of the victim's videotaped statement to police, accusing the defendant of sexual abuse, did not violate the Confrontation Clause, because the victim testified at trial: "When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

Witness's reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,* 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that "*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person."

Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant's statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. "He may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. ***See also United States v. Lindsey,*** 634 F.3d 541 (9th Cir. 2011) ("Although Gibson's statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey's counsel.").

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial --- even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant's confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant's "failure to seize this opportunity demolishes his Sixth Amendment claim." The court observed that the defendant had a better opportunity to confront the victim "than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation."

Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial --- as is

necessary to qualify a record under Rule 803(5) --- and was subject to unrestricted cross-examination.

Unavailability

Admitting a video deposition of a deported witness violated the Confrontation Clause because the government did not establish that the witness was unavailable: *United States v. Burden,* 934 F.3d 675 (D.C. Cir. 2019): In a trial for an arms control violation, the government offered a video deposition of a witness who was subsequently deported. The defendant had an opportunity to cross-examine the witness at the deposition, but the court nonetheless found a violation of the Confrontation Clause, because the government had not shown that the witness was unavailable to testify at the trial. The court stated that where "the government itself bears some of the responsibility for the difficulty of procuring the witness, the government will have to make greater exertions to satisfy the standard of good-faith and reasonable efforts that it would have if it had not played any role. Failing to factor the government's own contribution to the witness's absence into the Confrontation Clause analysis would warp the government's incentives." Satisfying the good-faith standards requires the government to make reasonable efforts to ensure the witness's presence *before* the witness is deported. Here, the government's efforts to procure the witness did not begin until after he was deported. The government "did not give [the witness] a subpoena, offer to permit and pay for him to remain in the U.S. or to return here from Thailand, obtain his commitment to appear, confirm his contact information, or take any other measures."

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 (5th 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 be 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 (6th Cir. 2018): The defendant objected to the trial court's decision to allow a witness to be deposed. He argued that the witness was available to testify at trial. The court found that the trial court did not err in finding that the witness would not be available to testify at trial. The witness had stage IV cancer and was unable to get out of bed. The court noted that the doctor's letter to the court "was specific as to the nature of Miller's illness and very clearly opined that Miller's health would be jeopardized if she were required to testify at trial." The court concluded that "because Porter was able to, and did, cross-examine Miller at her deposition, and because the government sufficiently demonstrated 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 (10th Cir. 2010): In a drug trial, an officer testified about the investigation that led to the defendant. On cross-examination, defense counsel inquired into the information that the officer received from an informant --- presumably to discredit the basis for the police having targeted the defendant. The trial court then on redirect allowed the government to question the officer and elicit some of the accusations about the defendant that the informant's had made to the officer. The court found no error. It recognized that "a confidential informant's statements to a law enforcement officer are clearly testimonial." But the court concluded that the defendant "opened the door to further questioning of Officer Johnson regarding the information he received from the confidential informant. Where, as here, defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic." The court observed that a waiver would not be found if there was any indication that the defendant had disagreed with defense counsel's decision to open the door. But there was no indication of dissent in this case. ***Accord, United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (waiver found where defense counsel opened the door to testimonial hearsay). ***Contra, and undoubtedly wrong, United States v. Cromer,*** 389 F.3d 662, 679 (6th Cir. 2004) ("the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation").

July 29, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
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Re: **Amending Federal of Evidence 702 – Comments from the Coalition of Litigation Justice, Inc. Supporting Stronger Gatekeeping in Federal Courts**

Dear Ms. Womeldorf:

The members of the Coalition for Litigation Justice, Inc. (the "Coalition") have an interest in ensuring that the rules and legal obligations applied in asbestos and other toxic tort litigation are consistently applied in conformity with sound science and public policy.[1] The Coalition regularly files *amicus* briefs that address legal and scientific issues in toxic tort litigation. The Coalition submits these comments in regard to proposed amendments to Rule 702. We urge the Committee to consider the dramatic impact on the rule of law when judges do not apply the strictures of Rule 702 correctly or with sufficient vigor. We further urge the Committee to modify the Rule and its comments to ensure full and effective application of the gatekeeping obligations by all federal court judges.

INTRODUCTION

The Coalition's members regularly submit *amicus* briefs urging courts to apply expert gatekeeping rules in a manner that prevents unsupported and speculative expert testimony to influence jury decisions. Many of those cases are decided under federal Rule 702. The Coalition's efforts to ensure that courts are utilizing reliable science depends heavily upon the manner in which federal courts interpret and apply Rule 702.

I. The Committee Should Direct Trial Judges to Investigate the Underlying Bases for the Opinion as a Mandatory Element of Rule 702 Review

The Coalition's experience in the last ten years in regard to the application of Rule 702 has been decidedly mixed. Many federal court judges have applied the Rule with sufficient rigor to look behind the expert's claims and statements by reviewing the scientific articles and other

[1] The Coalition consists of its members Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc. a third-party administrator for numerous insurers; and TIG Insurance Company.

claimed support for the opinions. In many instances, as a result of that review, these courts have found that the expert's statements are often unsupported in the literature, or in some cases are outright misrepresentations of the science.

At the same time, there are federal court judges whose inclination is to "let it all in," despite the codification of *Daubert* in Rule 702. These judges studiously avoid examining the expert record other than to cite to the expert's own statements in support of their opinions. This shallow approach to gatekeeping has a predictable outcome – every such opinion allows the expert to testify. These opinions stand in sharp contrast to those by more rigorous judges, who frequently read the cited studies, examine the underlying scientific data, and challenge the expert's logic and overstatements – and then where necessary find that the experts are out of step with the science they claim to rely on.

To illustrate one such instance, the federal MDL judge overseeing a large docket of asbestos cases, despite performing an enormous benefit by dismissing many cases and clearing out that docket, allowed plaintiff experts to testify repeatedly that each and every exposure to asbestos, regardless of degree or dose, is a cause of disease. This "every exposure" theory has been rejected repeatedly by many courts.[2] The MDL court's rulings illustrate the problem – the opinions contain references to the experts' testimony – "Dr. Hammar opines…", "Dr. Hammar relies on…", Dr. Hammar notes …", etc. – with no investigation into the validity of those statements.[3] After remand of one of these cases to its home court in Utah, the Utah federal judge excluded the same experts, finding in part that the experts' statements were not supported by the cited studies.[4]

In a state court example, the intermediate Ohio appellate court decision in *Schwartz v. Honeywell Int'l., Inc.,* 66 N.E.3d 118, 125-128 (Ohio Ct. App. 2016), repeatedly referred to statements made by plaintiffs' experts as support for the reliability of their own testimony. Over *forty times* in the *Schwartz* opinion, the panel simply restated the expert's testimony by noting that the expert "testified," "opined," "found," "discussed," "considered," or "stated" certain opinions. *Id*. at 125-128. Not once did the court actually examine the basis for those statements or decide whether they were credible and derived from a scientific methodology. The Ohio Supreme Court reversed the ruling after determining that the expert testimony was in fact unsupported and unreliable. *Schwartz v. Honeywell Int'l, Inc.,* 102 N.E.2d 477 (Ohio 2018).

[2] For a discussion of the court rulings on the "every exposure" theory, as well as a discussion of the rigor needed for judicial review of low dose cases, *see* William Anderson & Kieran Tuckley, *How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation,* 42 Am. J. Trial Advoc. 39 (2018).

[3] *See e.g., Anderson v. Saberhagen Holdings, Inc*., 2011 WL 605801 (E.D. Pa. Feb. 16, 2011).

[4] *Anderson v. Ford Motor Co*., 950 F. Supp. 2d 1217, 1223 (D. Utah 2013) ("Plaintiff's experts are unable to point to any studies showing that "any exposure" to asbestos above the background level of asbestos in the ambient air is causal of mesothelioma.").

Virtually every court that has admitted similar "every exposure" forms of testimony has made the same error – accepting the *ipse dixit* of the expert to self-qualify the expert's reliability.[5] If the court declines to pull back the curtain, the serious problem goes unchecked. In sharp contrast stand the many federal court opinions rejecting "every exposure" testimony, and every one of them includes significant discussion of the bases of the opinions – i.e., the complete lack of support in the cited studies, logic, and literature.[6]

The Coalition supports an amendment to the comments of Rule 702 instructing trial judges that a review under Rule 702(b) is insufficient if it merely cites to the experts' self-serving testimony as a basis for letting the expert testify. Examples of courts that perform the analysis correctly – including a review of cited scientific support – should be included in the comment to provide illustrations of a proper application of Rule 702 gatekeeping.

II. The Review Requirements of *Daubert* and Rule 702 Must Be Strengthened and Consistently Enforced in Federal Courts in Light of the Dramatic Increase in Trial Verdict Damages

In the last few years, plaintiffs have sought, and often received, enormously high damages awards in product liability and tort cases. This escalation creates massive pressure on the court's Rule 702 review – any error by the judge in letting in nonscientific evidence is far more damaging today than it was a few years ago. The Committee must not allow trial judges to relax their guard over "shaky" or insufficient science.

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[5] *See, e.g., Neureuther v. Atlas Copco Compressors, L.L.C.*, 2015 WL 4978448, at *4 (S.D. Ill. Aug. 20, 2015) (citing only to expert's own statements before finding "nothing invalid" about the testimony); *Waite v. AII Acquisition Corp.*, 194 F. Supp. 3d 1298, 1314-17 (S.D. Fla. 2016), *aff'd on other grounds*, 901 F.3d 1307 (11thh Cir. 2018), *cert. denied*, 139 S. Ct. 1384 (2019) (repeated references to expert's own testimony); *Davis v. Honeywell Int'l Inc.*, 245 Cal. App. 4th 477, 487 (2016) (citing only to expert's own explanation).

[6] Federal and state decisions under Rule 702 or state equivalents include *Flores v. Borg-Warner*, 232 S.W.3d 765, 765 (Tex. 2007); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 321 (Tex. Ct. App. 2007); *In re W.R. Grace & Co*., 355 B.R. 464, 476 (Bankr. D. Del. 2006); *Martin v. Cincinnati Gas & Elec. Co*., 561 F.3d 439, 443 (6th Cir. 2009); *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829, 834 (Tex. Ct. App. 2010); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 552 (Ga. Ct. App. 2011); *Wannall v. Honeywell Int'l, Inc*., 292 F.R.D. 26, 43 (D.D.C. 2013), *aff'd*, 775 F.3d 425 (D.C. Cir. 2014); *Moeller v. Garlock Sealing Techs*., 660 F.3d 950, 950–55 (6th Cir. 2011); *Smith v. Ford Motor Co.*, 2013 WL 214378, at *5 (D. Utah Jan. 18, 2013); *Anderson v. Ford Motor Co*., 950 F. Supp. 2d 1217, 1225 (D. Utah 2013); *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016); *Estate of Barabin v. AstenJohnson, Inc*., 740 F.3d 457 (9th Cir.), *cert denied*, 135 S. Ct. 55 (2014) (returning case for more stringent *Daubert* review); *Stallings v. Georgia-Pacific Corp.*, 675 F. App'x 548, 549 (6th Cir. 2017); *Scapa Dryer Fabrics, Inc. v. Knight*, 788 S.E.2d 421, 425 (Ga. 2016); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 338 (Tex. 2014); *Comardelle v. Pennsylvania Gen. Ins. Co.,* 76 F. Supp. 3d 628, 634 (E.D. La. 2015); *Sclafani v. Air & Liquid Sys. Corp.*, 2013 WL 2477077, at *4 (C.D. Cal. May 9, 2013); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 849 (E.D.N.C. 2015), *reconsideration denied*, 143 F. Supp. 3d 386 (E.D.N.C. 2015); *Vedros v. Northrup Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556, 565 (E.D. La. 2015); *Davidson v. Georgia Pacific LLC,* 2014 WL 3510268, at *5 (W.D. La. July 14, 2014), *vacated and remanded on other grounds*, 819 F.3d 758 (5th Cir. 2016); *Crane Co. v. DeLisle*, 206 So. 3d 94, 106 (Fla. Ct. App. 2016); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207-08 (W.D. Wis. 2016); *Doolin v. Ford Motor Co.*, 2018 WL 4599712, at *12 (M.D. Fla. Sept. 25, 2018); *Krik v. Exxon Mobil Corp.,* 870 F.3d 669, 677 (7th Cir. 2017).

A list of jury verdicts and damages since 2016 in talc and Roundup™ litigation alone demonstrates the escalation in verdict amounts (some were reversed on appeal or are on appeal):

- $80.27 million – *Hardeman* (Roundup™ MDL, reduced to $25 million post-trial)
- $289 million - *Johnson* (Roundup™, California), reduced to $78.5 million post-trial, then to $20.5 in intermediate court of appeal
- $2.055 billion - *Pilliod* (Roundup™, California), reduced to $86.7 million post-trial
- $37.2 million - *Barden* (talc, New Jersey, 4 plaintiffs)
- $70 million - *Giannecchini* (talc, Missouri)
- $29.4 million - *Leavitt* (talc, California)
- $4.69 billion – *Ingham* (talc, Missouri), 22 plaintiffs
- $25.75 million – *Anderson* (talc, California)
- $117 million – *Lanzo* (talc, New Jersey)
- $55 million – *Reistesund* (talc, Missouri)
- $72 million – *Fox* (talc, Missouri)

These verdicts are mostly in state court, but they illustrate the trend, and federal courts are not immune. The experience in the Roundup™ federal MDL trial noted above demonstrates the problem. Judge Chhabria, in his pretrial ruling on summary judgment and *Daubert* motions, found that the admissibility of the plaintiffs' expert evidence was "a very close question," and that the "evidence of a causal link between glyphosate exposure and NHL in the human population seems rather weak."[7] He further concluded that "[t]he evidence, viewed in its totality, seems too equivocal to support any firm conclusion that glyphosate causes NHL. This calls into question the credibility of some of the plaintiffs' experts, who have confidently identified a causal link."[8] In this opinion, the court characterized the plaintiffs' evidence as "shaky."[9] The judge then declared that "plaintiffs appear to face a daunting challenge at the next phase,"[10] and again found that "it is

[7] *In re Roundup Prods. Liab. Litig*., 390 F. Supp. 3d 1102, 1108 (N.D. Cal. 2018).

[8] *Id.* at 1109.

[9] *Id.* at 1151.

[10] *Id.* at 1109.

a close question whether to admit the expert opinions"[11] of even the best of plaintiff's five experts. In a later ruling, the judge found that the plaintiffs' experts "barely inched over the line."[12]

Despite these obvious problems, the court held that, under Ninth Circuit law, he was only allowed to exclude true "junk science," and thus he permitted four of the experts to testify. The result, as noted above, was an $80 million verdict based on "shaky" science. The case is on appeal.

Our system of justice can no longer afford to allow such marginal testimony under Rule 702. Verdicts in the hundreds of millions or even billions of dollars must be based on, if anything, significantly more reliable testimony than even *Daubert* itself would require today. For this reason, the Coalition urges the Committee to continue to enhance court gatekeeping authority under Rule 702, and to include any necessary provisions and comments to ensure that federal verdicts cannot be premised on "shaky" science that barely gets over an extremely low bar.

The Coalition thus supports the comments of Lawyers for Civil Justice and enhancements to increase judicial emphasis on Rule 702(b) and (d) as noted above and as submitted by other commenters.[13]

Respectfully submitted,

The Coalition for Litigation Justice, Inc.

[11] *Id.* at 1151.

[12] *In re Roundup Prods. Liab. Litig*., 358 F. Supp. 3d 956, 957 (N.D. Cal. 2019).

[13] *See* Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Subcommittee on Rule 702, In Support of Amending Rule 702 to Address the Problem of Insufficient Basis for Expert Testimony (Oct. 10, 2018); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation (Mar. 2, 2020).