

**ADVISORY COMMITTEE
ON
RULES OF EVIDENCE**

**Washington, D.C.
April 26-27, 2018**

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TAB 1

TAB 1A

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Washington, D.C.
April 26-27, 2018

I. Opening Business

Opening business includes:

- Approval of the minutes of the Fall 2017 meeting
- A report on the January 2018 meeting of the Standing Committee

II. Symposium on Forensic Evidence, *Daubert* and Rule 702, and Related Issues

This meeting is the first opportunity for the Committee to discuss the issues raised at the Symposium on Forensic Evidence, *Daubert* and Rule 702. The Reporter's memorandum, behind Tab 2, collects some of the issues, provides a case law digest of federal district and circuit court opinions over the last ten years, and discusses a proposal from members of the public to amend Rule 702.

III. Proposed Amendment to Rule 807, the Residual Exception

The Committee's proposed amendment to Rule 807 was approved by the Standing Committee for release for public comment. The Reporter's memorandum, behind Tab 2, analyzes suggestions for change provided by the public, as well as by members of the Standing and Advisory Committees. At this meeting, the Committee will decide whether to make any changes to the proposal, and whether to submit the proposal to the Standing Committee for final approval.

IV. Proposed Amendment to Rule 801(d)(1)(A)

Over the last six meetings the Committee has been working on a possible change to Rule 801(d)(1)(A) that would provide for broader substantive admissibility of prior inconsistent statements. The current working draft would allow substantive admission of a witness's prior inconsistent statement if it was recorded by audiovisual means. The FJC has conducted a survey of judges and practitioners on the working draft, and the Committee has received input from other interested parties. The Reporter's memo, behind Tab 4, analyzes all this information, and sets forth the proposal for the Committee's review. The Committee will determine at this meeting whether to submit a proposal to the Standing Committee for release for public comment, or whether to table the project.

V. Consideration of a Possible Amendment to Rule 606(b) in Response to a Supreme Court Decision

In *Pena-Rodriguez v. Colorado*, the Supreme Court held that the bar posed by Rule 606(b) on juror testimony about jury deliberations was unconstitutional to the extent it excluded testimony about racist statements made during the deliberations. The Committee, last year, decided not to propose any amendment to Rule 606(b), but to keep apprised of case law developments. The Reporter's memorandum behind Tab 5 describes those case law developments, and suggests reconsideration of proposals to amend Rule 606(b) in light of *Pena-Rodriguez*.

VI. Consideration of Possible Changes to Rule 404(b)

The Committee resolved to consider possible amendments to Rule 404(b) in light of recent developments in the case law. The Reporter's memo on the subject, which details the proposals under consideration, is behind Tab 6, along with Professor Richter's memo on state law variations.

VII. Proposal to Amend Rule 106

Judge Paul Grimm has asked the Committee to consider a proposal to amend Rule 106, the rule of completeness, for two purposes: (1) to specify that completing evidence is not barred by the hearsay rule; and (2) to extend its coverage to oral statements. The Committee discussed the proposal at the last meeting and resolved to continue review at this meeting. The Reporter's memorandum on the subject is behind Tab 7.

VIII. Proposal to Amend Rule 609(a)(1)

Magistrate Judge Tim Rice has asked the Committee to consider a proposal to eliminate Rule 609(a)(1), i.e., to bar impeachment with prior convictions that do not involve dishonesty or false statement. Another alternative is to amend the balancing test in Rule 609(a)(1) as it regards weighing the probative value of such convictions and their prejudicial effect. The Reporter's memorandum on the subject, as well as an article proposing an amendment to the balancing test, are behind Tab 8.

VIII. Proposal to Adopt a Rule on the Use of Illustrative Aids

Two members of the public have written an article proposing that the Advisory Committee consider an amendment that would add a rule governing the use of illustrative aids (as opposed to demonstrative evidence). Maine Rule 616 is such a rule. The Reporter's memorandum on this subject, and the article setting forth the proposal, are behind Tab 9.

IX. Crawford Outline

The Reporter's updated outline on cases applying the Supreme Court's Confrontation Clause jurisprudence is behind Tab 10.

TAB 1B

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ADVISORY COMMITTEE ON EVIDENCE RULES

Chair, Advisory Committee on Evidence Rules	Honorable Debra Ann Livingston United States Court of Appeals Thurgood Marshall United States Courthouse 40 Centre Street, Room 2303 New York, NY 10007-1501
Reporter, Advisory Committee on Evidence Rules	Professor Daniel J. Capra Fordham University School of Law 150 West 62nd Street New York, NY 10023
Members, Advisory Committee on Evidence Rules	Honorable James P. Bassett Associate Justice New Hampshire Supreme Court One Charles Doe Drive Concord, NH 03301 Daniel P. Collins, Esq. Munger Tolles & Olson LLP 355 South Grand Ave., 35 th Floor Los Angeles, CA 90071 Honorable Shelly Dick United States District Court Russell B. Long Federal Building 777 Florida Street, Room 301 Baton Rouge, LA 70801 Honorable Robert K. Hur Principal Associate Deputy Attorney General (ex officio) Office of the Deputy Attorney General U. S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530 A.J. Kramer, Esq. Federal Public Defender Indiana Plaza 625 Indiana Avenue, N.W. – Suite 550 Washington, DC 20004 Traci L. Lovitt, Esq. Jones Day 100 High Street, 21 st Floor Boston, MA 02110-1781

<p>Members, Advisory Committee on Evidence Rules (<i>cont'd</i>)</p>	<p>Honorable John Thomas Marten United States District Court United States Courthouse 401 North Market Street, Room 232 Wichita, KS 67202-2000</p> <p>Honorable Thomas D. Schroeder United States District Court Hiram H. Ward Federal Building and United States Courthouse 251 North Main Street, Room 231 Winston Salem, NC 27101-7101</p>
<p>Consultant, Advisory Committee on Evidence Rules</p> <p>Liaison Members, Advisory Committee on Evidence Rules</p>	<p>Professor Liesa Richter William J. Alley Professor of Law Thomas P. Hester Presidential Professor University of Oklahoma School of Law 300 Timberdell Road Norman, OK 73019</p> <p>Honorable Jesse Furman (<i>Standing</i>) United States District Court Thurgood Marshall United States Courthouse 40 Centre Street, Room 2202 New York, NY 10007-1501</p> <p>Honorable Sara Lioi (<i>Civil</i>) United States District Court John F. Seiberling Federal Building and United States Courthouse Two South Main Street, Room 526 Akron, OH 44308</p> <p>Honorable James C. Dever III (<i>Criminal</i>) United States District Court Terry Sanford Federal Building 310 New Bern Avenue, Room 716 Raleigh, NC 27601-1418</p>
<p>Secretary, Standing Committee and Rules Committee Chief Counsel</p>	<p>Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>

TAB 1C

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Advisory Committee on Evidence Rules
Minutes of the Meeting of October 26, 2017
Boston College Law School
Newton Centre, Massachusetts

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 26, 2017 at the Boston College Law School in Newton Centre, Massachusetts.

The following members of the Committee were present:

Hon. Debra Ann Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly D. Dick
Hon. Thomas D. Schroeder
Daniel P. Collins, Esq.
Traci L. Lovitt, Esq.
A.J. Kramer, Esq., Federal Public Defender
Robert K. Hur, Esq., Principal Associate Deputy Attorney General, Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Jesse M. Furman, Liaison from Committee on Rules of Practice and Procedure (by phone)
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. William K. Sessions III, Former Chair of the Committee
Hon. Paul W. Grimm
Elizabeth J. Shapiro, Esq., Department of Justice
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Catherine T. Struve, Assistant Reporter to the Standing Committee (by phone).
Professor Liesa L. Richter, Academic Consultant to the Committee
Dr. Timothy Lau, Esq., Federal Judicial Center
Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice and Procedure
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Patrick Tighe, Esq., Rules Committee Law Clerk

I. Opening Business

Announcements

Judge Livingston opened her first meeting as Chair by noting the very special nature of the Advisory Committee on Evidence Rules, that draws experts hailing from diverse legal fields and parts of the country. She was happy to note that her excellent predecessor, Judge Sessions, was in attendance for the Committee meeting, as well as for the symposium on forensic evidence, *Daubert* and Rule 702 planned for the following day.

Judge Livingston introduced two new members of the Evidence Advisory Committee. She welcomed Judge Shelly Dick, United States District Court Judge for the Middle District of Louisiana, and Judge Thomas Schroeder, United States District Court Judge for the Middle District of North Carolina, to the Committee. Judge Livingston described many notable contributions made by both during their distinguished careers and welcomed their participation on the Committee. Judge Livingston also welcomed two new liaison members to the Advisory Committee --- Judge Jesse Furman, a member of the Standing Committee, and Judge Sara Lioi, a member of the Civil Rules Committee. Judge Livingston noted that both bring amazing experience to the Committee and will be a great resource to the Committee in its work. Finally, Judge Livingston welcomed Rob Hur, Principal Associate Deputy Attorney General, an *ex officio* member of the Advisory Committee.

Following introductions, Judge Livingston paid tribute to Judge Sessions' distinguished service as Chair of the Evidence Advisory Committee, noting that he helped shape the important work of the Advisory Committee with grace, intellect, and good sense. Judge Livingston noted Judge Sessions's many contributions to the Committee's work, including its close review of the hearsay rules leading to proposed amendments to the Ancient Documents and Residual exceptions, its work on electronic evidence and updates to the authentication provisions, and finally its equally important decisions *not* to propose amendments to other rules. Judge Livingston also emphasized the key role Judge Sessions played in bringing the consideration of *Daubert* and forensic evidence to the Committee and in developing the Rule 702 symposium.

Judge Sessions thanked Judge Livingston for her remarks and noted that the Evidence Advisory Committee is an excellent example of how government ought to function, with experts from various fields and with divergent viewpoints listening to one another with mutual respect.

Approval of Minutes

The minutes of the April 21, 2017 Advisory Committee meeting at the Thurgood Marshall Building in Washington DC were approved.

Standing Committee Meeting

Judge Sessions gave a brief report on the June meeting of the Standing Committee. The proposed amendment to the residual exception to the hearsay rule, Rule 807, was presented to the

Standing Committee. The proposal received the unanimous support of the Standing Committee and was approved for public comment. The Standing Committee was also updated as to the remaining topics on the agenda of the Advisory Committee.

II. Proposal to Amend Rule 807

The Reporter noted that the Committee approved a proposal to amend Rule 807, the residual exception to the hearsay rule, at its April, 2017 meeting. Most importantly, the amendment would eliminate the “equivalence” standard in the existing rule in favor of a more direct focus on circumstantial guarantees of trustworthiness for proffered statements, taking into account the presence or absence of corroboration. In addition, the proposed amendment would eliminate the “materiality” and “interests of justice” requirements (as duplicative), while retaining the “more probative” requirement in the existing rule. Finally, the proposed amendment would update and clarify the notice provision in Rule 807. The proposed amendment to Rule 807 has been published for public comment, with the comment period officially closing on February 15, 2018. The Reporter noted that few comments had been received to date but that additional public comments are likely to come in the Spring. The Reporter observed that the few public comments received to date were positive and supportive of the proposed amendment. The Committee will consider all of the public comments at its April 2018 meeting in Washington DC.

III. Potential Amendment to Rule 801(d)(1)(A)

The Reporter explained that the Committee had been exploring the possibility of expanding the substantive admissibility of prior inconsistent statements made by testifying witnesses for the past several meetings, beginning with a symposium hosted by the Committee at the John Marshall Law School in the Fall of 2015. The working draft of a potential amendment would permit prior inconsistent statements of testifying witnesses that are recorded audio-visually and available for presentation at trial to be admitted for their truth. The Reporter explained that the Committee decided at its previous meeting to conduct additional pre-public comment research concerning the implications of such an expansion of Rule 801(d)(1)(A), prior to proceeding with a proposal to issue the Rule for public comment. The Reporter noted that this research would continue until the April 2018 Advisory Committee meeting, at which time the Committee will determine whether to propose an amendment to the Rule or to discontinue its examination of Rule 801(d)(1)(A) for the time being.

Request for input on Rule 801(d)(1)(A) to date has included pre-public comment publication of the working draft of the amendment on the uscourts.gov website, which generated comments only from groups already invited to provide input. In addition, the American Association of Justice, the NACDL, and the Innocence Project have responded to the Committee’s invitation to comment with letters opining on the working draft. The Reporter stated that consideration of those letters would be saved for the April 2018 meeting when all research would be complete, although he noted that the AAJ review of the potential Amendment was largely positive (with a helpful suggestion to consider clarification of the definition of “audio visual recording”) and that concerns raised by both the NACDL and the Innocence Project might be

answered by the Committee's research and a proper understanding of the limited scope of the working draft of the amendment. The Reporter further informed the Committee that the ABA Section on Criminal Justice is planning to submit a report on the working draft for the Spring meeting.

The Reporter informed the Committee that Dr. Lau of the Federal Judicial Center had prepared surveys to collect feedback from judges and practicing lawyers concerning the potential amendment. Dr. Lau received input from the Chair and Reporter of the Advisory Committee in preparing the surveys. Dr. Lau informed the Committee that the surveys had already been circulated and that responses are due by November 17, 2017. Dr. Lau will report on the survey results at the April 2018 Advisory Committee meeting. Judge Campbell asked about questions in the surveys calling for respondents' perceptions of videos of interviews that they have encountered in the courtroom. Dr. Lau explained that those survey items were designed purely for informational purposes to get a sense of the experience of judges and lawyers with audio visual interviews. Judge Campbell emphasized that audio-visual statements admitted through an amended Rule 801(d)(1)(A) could include cell phone, dash cam, "GoPro" or other footage that does not occur in an interview setting and that the Advisory Committee should not base a decision about amending Rule 801(d)(1)(A) on the viewing experiences of survey respondents, but might consider the survey data purely for informational purposes. Another Committee member inquired whether additional surveys could be circulated to state court judges and practitioners in the many states that have expanded their counterparts to Rule 801(d)(1)(A) beyond the limited federal approach, to determine the experience of those states with broader substantive admissibility of prior inconsistent statements. The Reporter explained that the Committee had hosted two symposia (one at John Marshall Law School and another at Pepperdine School of Law) to study the effects of expanded substantive admissibility of prior inconsistent statements, where practitioners in Wisconsin and California described their very positive experience with broad substantive admissibility under their respective state provisions. In addition, the Reporter noted extensive independent research into state variations of Rule 801(d)(1)(A) that permit broader substantive admissibility. Thus, the Committee has already made significant enquiry into the state experience with broader substantive admissibility of prior inconsistent statements.

Although full consideration of an amendment to permit substantive admissibility of audio-visually recorded prior inconsistent statements available for presentation at trial will take place at the April 2018 Advisory Committee meeting, several Committee members made preliminary comments about the potential amendment. One Committee member noted that the primary impact of an amendment would not be at trial (because juries fail to comprehend the limiting instructions currently provided to prevent substantive consideration of prior inconsistent statements falling outside Rule 801(d)(1)(A)). Rather, the primary effect, as illustrated by the remarks of a California prosecutor at the Pepperdine symposium, would be in getting past a Rule 29 motion and getting to the jury with a recorded witness statement. The existence of substantively admissible recorded witness statements would also enable prosecutors to obtain plea bargains in cases where they otherwise might not. Another Committee member responded that there are mixed views about the potential change in the criminal defense community. On the one hand, allowing recorded statements allows defendants (who cannot put witnesses into the grand jury) to obtain substantive evidence from witnesses who may end up testifying favorably for the government at trial. On the other hand, defense counsel have concerns about recordings made of child victims, particularly on

Native American reservations, that may be offered into evidence when the audio visual equipment may be turned on late to capture less than the full interview. Judge Livingston noted that the invited comment from the Innocence Project illuminated potential ramifications of an amendment at the plea bargaining stage, noting that a defendant could be persuaded to plead guilty based upon an early recorded witness statement notwithstanding the possibility that the witness's testimony could change at trial. Judge Livingston further noted the benefits of putting witnesses into the grand jury, where law enforcement and prosecutors are required to interface, and where there are greater assurances of the reliability of pre-trial statements. Judge Campbell noted the heavy caseload arising on reservations in Arizona and the difficult position encountered by criminal defendants trying to refute testimony by polished and articulate FBI agents regarding the content of oral interviews between the agent and defendant. Judge Campbell suggested that any rule that would encourage more recording of interviews would be beneficial to defendants in countering such testimony. Mr. Hur noted that FBI regulations now contain a presumption that favors recording of all custodial interrogations. The Public Defender stated that the criminal defense bar strongly supports recording of statements by defendants, but has concerns about the recording of statements by prosecution witnesses.

The Reporter concluded the discussion of the potential amendment to Rule 801(d)(1)(A) by noting that concerns raised about the amendment by the Innocence Project and others could be fully vetted at the spring meeting when the Committee will make a final determination about whether to propose an amendment to Rule 801(d)(1)(A), but that additional studies advocated by some could take a decade to perform and interpret and would be ill-suited to the rule-making process.

IV. Rule 606(b) and *Pena-Rodriguez* Developments

At its April 2017 meeting, the Advisory Committee considered the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. The Reporter noted that the Committee had considered three possibilities for amending Rule 606(b) at its last meeting, including: 1) an amendment that would capture the precise exception to Rule 606(b), requiring admission of juror statements indicating clear racial or ethnic bias, as articulated in the *Pena-Rodriguez* opinion; 2) an amendment that would expand the *Pena-Rodriguez* exception to the Rule 606(b) prohibition on juror testimony to encompass all juror conduct implicating a party's constitutional rights; and 3) a generic "constitutional" exception to Rule 606(b) that would capture the *Pena-Rodriguez* holding for now, but that would adapt to any future expansion of that rule by the Supreme Court (akin to the constitutional exception found in Rule 412(b)(1)(C)). The Reporter explained that the Committee had declined to pursue any amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding.

At its April 2017 meeting, the Committee asked the Reporter to monitor Rule 606(b) cases for any development or expansion that would alter the Committee's previous decision. The Reporter provided the Committee with recent Rule 606(b) cases and informed the Committee that federal courts had thus far rejected efforts to expand the *Pena-Rodriguez* exception to Rule 606(b) beyond the clear statements of racial animus at issue in that case.

Several Committee members expressed concern that there is no language in Rule 606(b) warning litigants and judges that the Rule is unconstitutional if applied to exclude post-verdict testimony relating clear juror statements of racial bias under *Pena-Rodriguez*. Committee members noted that the point of the Evidence Rules is to allow judges and lawyers to rely on the Rules for a correct and complete set of principles upon which they may depend and that judges and lawyers should not have to consult treatises to learn that Rule 606(b)'s clear mandate cannot be constitutionally applied in certain circumstances. One Committee member suggested reconsideration of an amendment that would codify only the narrow holding of *Pena-Rodriguez* in rule text. The Reporter explained the difficulty in drafting language that would capture the *Pena-Rodriguez* holding without risking expansion to include other juror conduct that violates constitutional rights, such as jury consideration of a criminal defendant's failure to testify. Further, the Reporter explained the difficulty in characterizing even the *Pena-Rodriguez* holding in rule text with any precision --- noting a recent Sixth Circuit case in which jurors made clearly racist statements about other jurors and their unwillingness to convict the accused. In that case, the majority distinguished *Pena-Rodriguez*, emphasizing that the juror in *Pena-Rodriguez* made racist statements specifically about the accused. Over a lengthy dissent, the majority applied Rule 606(b) to prohibit juror testimony about the racist remarks. Another Committee member suggested that the habeas standard requiring a violation of "clearly established law" might be employed to draft an amendment that would avoid expansion should the Committee consider possible amendments in the future.

The Reporter concluded the discussion of Rule 606(b) by promising to continue monitoring the Rule 606(b) case law for the Committee and to keep the Committee apprised of developments.

V. Rule 404(b)

The Reporter explained that the Committee had been discussing potential amendments to Rule 404(b) since the symposium the Committee hosted at Pepperdine in the Fall of 2016. The Committee's examination of Rule 404(b) was prompted by recent case law in some circuits demanding more rigor in the Rule 404(b) analysis in criminal cases. In particular, the Committee has explored three strands of recent precedent. First, the Seventh and Third Circuits (and at least one panel of the Fourth) have demanded that prosecutors and trial judges articulate with precision the chain of inferences leading from an uncharged crime, wrong, or other act to the purported proper purpose for admitting it. These Circuits have forbidden the admission of any act through Rule 404(b) that depends for its probative value on the defendant's propensity to behave in a certain way. In addition, these Circuits also have insisted upon "active contest" by a criminal defendant of the element to which the uncharged act is relevant, rejecting a simple plea of not guilty as demonstrating such an "active contest." Finally, several Circuits have eliminated or restricted the "inextricably intertwined" doctrine that allows uncharged acts purportedly connected with the charged offense in some way to be admitted without a Rule 404(b) analysis --- these circuits appear to opt for a direct/indirect distinction, finding that Rule 404(b) is applicable whenever the bad act is offered as indirect evidence of the charged crime.

At the Spring meeting, Committee members inquired as to the level of care being taken in performing a Rule 404(b) analysis in criminal cases in other circuits. In particular, the DOJ representative suggested that courts were taking great care in policing the requirements of Rule 404(b) in criminal cases, particularly at the district court level. The Reporter explained that the agenda materials contained an examination of recent cases decided since the Spring meeting, including all circuit court opinions and a representative sample of district court opinions to give the Committee a picture of the handling of Rule 404(b) at both the trial and appellate levels in all circuits.

The Reporter explained that the cases clearly revealed a split in authority at both the appellate and trial levels with respect to Rule 404(b) evidence. At the appellate level, opinions in the First, Second, Fourth, Fifth, Eighth, and Ninth Circuits recently admitted other acts evidence against criminal defendants to show intent and knowledge without any explanation of non-propensity inferences supporting admissibility. Several circuits continue to treat Rule 404(b) as a “rule of inclusion,” with recent Eighth Circuit cases emphasizing that point and making admission of Rule 404(b) evidence almost automatic. Decisions in the Fifth, Eighth, and Eleventh Circuits broadly applied the inextricably intertwined doctrine to admit other acts evidence outside Rule 404(b). Conversely, recent opinions in the Third, Fourth, and Tenth Circuits approached Rule 404(b) evidence with caution and thorough analysis. District court opinions were similarly split, with some district court opinions taking great care in analyzing the admissibility of Rule 404(b) evidence and others taking none at all.

The Reporter also noted that the Committee had been provided with a memorandum prepared by Professor Richter, detailing state law variations on Rule 404(b). Professor Richter described the findings in that memo, explaining that several states have added protections to their Rule 404(b) counterparts, including procedural protections like enhanced notice and articulation requirements, as well as substantive protections like enhanced balancing tests that provide greater protection to criminal defendants. These additional protections appear to be operating well without unduly constraining the government’s ability to admit bad act evidence for a proper purpose.

The Reporter noted the Committee’s proper and essential role in resolving circuit splits with respect to Evidence Rules and emphasized the split between the various circuits, as well as within the Fourth Circuit. The Reporter explained that various amendments could be considered to resolve the split, but noted that no votes were to be taken at this meeting and that additional research and discussion were anticipated prior to any decision.

The Reporter noted that the Committee had decided at its last meeting to drop consideration of an “active contest” requirement as a potential amendment. The Committee was therefore continuing consideration of three possible amendments to the substantive provisions of Rule 404(b): (1) an amendment that would require precise articulation of the chain of inferences supporting admissibility of an uncharged act and a prohibition on acts that depend on propensity inferences; (2) an amendment to require all uncharged acts not “directly” proving the charged offense to proceed through a Rule 404(b) analysis; and/or (3) an amendment modifying the regular Rule 403 balancing test for criminal defendants to require that the probative value of an uncharged act outweigh unfair prejudice to the defendant. In addition the Committee was continuing to consider possible changes to the notice provision.

The Public Defender stated that he had conducted an informal survey of federal defenders on Rule 404(b), and that they were unanimously and vehemently opposed to the current application of Rule 404(b) in most of the circuits. In particular, he noted the difficulty judges and defendants have in asking prosecutors to identify a proper Rule 404(b) purpose with any clarity. He lamented the circular nature of the reasoning attending Rule 404(b) arguments and rulings, i.e., that an act is admissible to prove intent because it shows intent and knowledge. The Public Defender emphasized the extreme prejudicial effect that bad act evidence has on the defendant and explained that the government often spends more time at trial presenting evidence of “other acts” than it does to present evidence of the charged offense. In sum, he concluded that Rule 404(b) is misused on a regular basis and that an amendment is necessary. He offered to prepare a memo collecting examples from federal defenders.

Thereafter, Mr. Hur, the DOJ representative, explained that the Department of Justice has very strong views on the subject of Rule 404(b). As a threshold matter, Mr. Hur noted that the DOJ does not agree that there is a problem with Rule 404(b) that needs to be fixed. The DOJ has taken the position in a Supreme Court filing that there is no circuit split with respect to Rule 404(b). He emphasized that anecdotal complaints about the Rule’s application were not evidence of a problem and that he personally had as many anecdotes of being put through his paces by trial judges protecting against admission of Rule 404(b) evidence. While there may be cases where the analysis is not rigorous, DOJ can identify as many where trial courts are handling Rule 404(b) with care. Using the analysis of Rule 404(b) set forth by the Supreme Court in *Huddleston*, courts are doing what they do best – sorting the admissible from the inadmissible. The Reporter responded that the conflict between the circuits is clearly apparent in the decisions where some characterize Rule 404(b) as a “rule of inclusion” and maintain that intent is automatically at issue whenever a defendant pleads not guilty, and others treat the rule as one of exclusion and prohibit reliance on propensity inferences in any case. Mr. Hur replied that factual distinctions are crucial in Rule 404(b) cases and that the cases represent factual differences rather than a circuit split.

Elizabeth Shapiro of the DOJ stated that Rule 404(b) issues were percolating in the courts and that courts should be allowed to continue working on Rule 404(b) issues. The Reporter expressed concern that Rule 404(b) issues had been percolating for a very long time and that uniformity in the courts could be a very long time coming, if it comes at all.

One Committee member articulated the concern that the Rule as currently drafted allows the prosecution to rely on a laundry list of purported proper purposes to make unsupported arguments for admission. With the amount of discretion vested in trial judges, appellate courts are reluctant to tinker in Rule 404(b) decision-making, leaving unsupported assertions of admissibility unchecked. An amendment that forces lawyers to articulate the proper purposes for admitting Rule 404(b) evidence will lead to better outcomes and create a better record for the appellate court. The Committee member stated that Rule 404(b) has been abused more than any other rule in criminal cases and the possibility of percolation in the Circuit courts does not absolve the Committee of responsibility for fixing it.

The Chair noted that evidence of extrinsic acts may be crucial to fact-finding and may be the only way to establish state of mind in some cases. The Chair then read the famous quote from

Justice Jackson regarding American character evidence rules --- codified now in Rules 404(a) and 405 --- highlighting the risk of pulling even one misshapen stone from the “grotesque structure” and emphasizing that all decisions regarding such evidence are moderated by discretionary authority of the trial court.¹ The Chair noted that in her personal experience, it is not easy to have Rule 404(b) evidence admitted, and that she does not favor an amendment that focuses reviewing courts on the verbal formulations employed by district courts in explaining their decisions, as opposed to the soundness of their decisions. She noted at the appellate level there may be significant and searching discussion about a Rule 404(b) issue followed by a rather cursory ruling on the evidence. The Reporter responded that while an articulation requirement and a propensity ban might intrude on judicial discretion, a modification of the balancing test applicable to criminal defendants would not constitute the same type of intrusion on discretion --- indeed it would preserve and promote judicial discretion.

Another Committee member noted concerns about the role of Rule 404(b) in plea bargaining. Where very few cases go to trial, defense expectations about the broad admissibility of other acts evidence may result in a decision to plead guilty. Rule 404(b) thus presents a larger issue than whether the jury hears other acts evidence in the few cases that go to trial.

Mr. Hur stated that prosecutors are required to give Rule 404(b) notice even in cases where defendants plead guilty. He argued that the influence of Rule 404(b) at the plea bargaining stage is a virtue rather than a flaw because defendants plead guilty fully aware of the evidence they would face at trial. Further, Mr. Hur noted that trial judges rarely rule on Rule 404(b) motions in advance of trial, preferring to monitor the evidence as it comes in, thus eliminating any concern that Rule 404(b) *in limine* rulings are causing defendants to plead guilty.

In response, the Federal Public Defender remarked that his experience was very different from that described by Mr. Hur. He explained that the government never gives detailed notice of Rule 404(b) evidence and that defense lawyers have to fight to obtain necessary information. He also noted that Rule 404(b) motions are almost always ruled upon prior to trial because the lawyers need to know what is coming in to prepare opening statements. Furthermore, he expressed the view that the real reason the government wants other acts evidence is for the prejudicial propensity purpose, and that the limiting instruction provided with Rule 404(b) evidence is incomprehensible to the jury. He opined that forty-plus years of percolation in the courts is too long to wait for improvement and stated that he favors the modification to the Rule 403 balancing test to make it more protective. Finally, he stated that knowing what is coming is not sufficient for a defendant when what is coming is often automatic admission of the defendant’s bad acts.

The Chair argued that Rule 404(b) reversals are not infrequent and suggested that Rule 404(b) may be the most common ground for reversal in a criminal case. Other Committee members suggested that improper jury instructions could be more common bases for reversal and that Rule 404(b) reversals may be more numerous than other evidentiary reversals simply because the rule is utilized so often. Another Committee member emphasized that trial judges sometimes confront many motions prior to trial and may give Rule 404(b) careful consideration and then write a very brief order; district court opinions may not reflect the true consideration trial judges are

¹ See *Michelson v. United States*, 335 U.S. 469, 486 (1948) (discussing the rules on allowing the defendant to admit character evidence).

giving this evidence. Another Committee member suggested that an amendment to improve the notice in criminal cases could be quite helpful, stating that the government fails to give sufficiently detailed notice and that better notice would assist trial judges in giving thoughtful consideration to Rule 404(b) evidence at an earlier stage. The Reporter observed that an enhanced notice requirement, if violated, would not necessarily result in exclusion of the Rule 404(b) evidence.

A Committee member asked the DOJ representative for the Department's view on an amendment that would alter the balancing test to require the probative value of the Rule 404(b) evidence to outweigh the unfair prejudice to the defendant. Ms. Shapiro expressed the view that the Rule 404(b) balancing test should be less protective than the Rule 609(a)(1)(B) test because not all Rule 404(b) acts are convictions (though many are). She complained that less bad act evidence would be admitted if the balancing test were altered. Mr. Hur suggested that a modification of the balancing test was inconsistent with the will of Congress and the Supreme Court in *Huddleston*. The Reporter responded that the Rule 403 test was applied to Rule 404(b) evidence by the Supreme Court in *Huddleston* because it was the test that was applicable to all evidence under the Rules. Changing the balance under an amendment would thus not overrule *Huddleston* --- any more than changing the ancient documents exception to the hearsay rule "overrules" judicial interpretations of the previous rule.

Judge Campbell asked two questions: (1) whether the modified balancing test would reverse the characterization of Rule 404(b) as a "rule of inclusion" as some circuits do, and (2) where the "rule of inclusion" characterization originated. The Reporter responded that the modified balancing test would eliminate the "rule of inclusion" characterization because it would require probative value to outweigh prejudice and would thus, slightly favor exclusion. He further explained the history of the "rule of inclusion" language as described in the Third Circuit *Caldwell* decision: because the enumerated list of proper purposes in Rule 404(b)(2) is not exhaustive or exclusive, it "includes" other potential proper purposes not specifically enumerated. Thus, the Rule was characterized as a rule of "inclusion." That characterization did not originally mean that the Rule favored admissibility of other acts evidence as many circuits now hold. Judge Campbell asked whether the modified balancing test would eliminate the concern about other acts evidence relying on propensity inferences. The Reporter explained that the balancing approach would not specifically outlaw propensity per se, but would counsel greater caution in admitting Rule 404(b) evidence that presents a risk of unfair propensity prejudice. So the effect on using propensity inferences would be indirect.

Judge Campbell then asked whether there was any way for the Committee to gather data about the frequency of exclusion of Rule 404(b) evidence, noting that appellate opinions provide a somewhat skewed sample of cases in which the evidence was admitted. Apart from a survey or a detailed multi-year study of district court docket entries, the Reporter explained that the reported opinions are the only basis for evaluating the operation of Rule 404(b). The Public Defender noted that exclusions of Rule 404(b) evidence would not necessarily demonstrate that courts are keeping the evidence out because the government often asks to admit five or six prior acts in a single case and trial courts often respond by allowing only a few. Mr. Hur expressed the view that this demonstrates the proper operation of Rule 404(b) because trial judges are carefully sorting and allowing some prior acts, but excluding others. Others on the Committee suggested that partial admission suggested more of a "split the baby" approach than careful parsing of prior convictions.

At the conclusion of the discussion, the Committee resolved to continue consideration of: (1) a potential propensity ban/articulation requirement; (2) a modified balancing test that would require probative value of Rule 404(b) acts to outweigh unfair prejudice to a criminal defendant; and (3) language that would tie the coverage of Rule 404(b) to all bad act evidence that is offered as “indirect” evidence of the crime charged; and (4) enhanced notice requirements. Committee members commended the Reporter for the thorough and excellent preparation of materials and resolved to continue the study of potential amendments to Rule 404(b) at the Spring 2018 meeting.

VI. Rule 106 Rule of Completeness

The Honorable Paul W. Grimm, United States District Court Judge for the District of Maryland, presented a proposal to amend Rule 106 (governing completeness of writings or recordings) based upon the results of extensive research he conducted in drafting an opinion in *United States v. Bailey*, Crim No. PWG-16-0246 (D. Md. May 24, 2017). Judge Grimm explained that the rule of completeness constitutes an exception to the general principle that prevents a party from interrupting the trial presentation of an opponent and that requires parties to await their case to put in counter proof. Prior to the Evidence Rules, the common law allowed interruption by an opponent to prevent misleading the fact-finder with partial and distorted information. Specifically the common law doctrine allowed for completion of acts and oral conversations, as well as writings and recordings. It allowed such completion only when a proponent presented a selected portion of an act, conversation, or writing that would cause unfairness by misleading the jury as to the true nature of that act, conversation, or writing. It allowed completion with the remainder of the conversation, act, or writing regardless of whether it was independently admissible under the hearsay rule. Finally, the common law required acceleration of the presentation of the completing information, requiring the proponent of the act, conversation, or writing to admit the remaining portion necessary to avoid misleading the jury.

Judge Grimm noted that Federal Rule of Evidence 106 codified the common law only partially, allowing completion only of writings and recorded statements and omitting oral statements for unspecified “practical reasons.” In addition, Rule 106 is silent on whether a writing or recorded statement may be used to complete a misleading portion of that statement when the completing portion is not independently admissible for its truth under the hearsay rules. Judge Grimm explained that the limited scope of Rule 106 causes particular concern in criminal cases. He gave an example of a case where the FBI conducted an oral interview of a criminal defendant and made a later record of that oral interview, documenting both inculpatory and exculpatory statements by the defendant. The government filed a motion *in limine* revealing its intention of calling the FBI agent who conducted the interview to testify to the defendant’s inculpatory statements and asking the court to prevent the defense from seeking admission of the exculpatory portions of the same interview to place those inculpatory statements in context. Specifically, the government argued that it could present the defendant’s inculpatory statements pursuant to the hearsay exception for party opponent statements, but that the defendant could not use that exception to admit his own exculpatory statements. On its face, Rule 106 does not help resolve this situation because it does not cover oral statements and is silent about completing with information that is not independently admissible under the hearsay rules.

Judge Grimm noted the concerns about unfairness if a selective and misleading portion of a statement is admitted and a criminal defendant is either forced to wait until the defense case to correct it --- or, more importantly, may be unable to correct it at all due to the hearsay rule, coupled with a decision not to testify. Judge Grimm explained that the federal courts are struggling with this issue and that the circuits handle it in conflicting ways. Some circuits exclude completing statements that are not independently admissible and that would constitute hearsay --- even if they are necessary, in fairness, to complete an opponent's presentation. Other circuits allow statements necessary to complete on the theory that completing statements need not be admitted for their truth and may show context without being used substantively. Some courts allow completion of oral statements using the court's broad powers to control the mode and order of proof under Rule 611(a) and others use Rule 403 and the risk of distortion to foreclose use of incomplete statements altogether. Others find that common law standards continue to exist to supplement Rule 106. Judge Grimm therefore recommended that the Committee consider amending Rule 106 to cover oral statements and to allow completing statements necessary in fairness to prevent misleading the jury, regardless of whether those statements would be independently admissible under the hearsay rule.

The Reporter directed the Committee to a draft of a potential amendment to Rule 106 conforming to Judge Grimm's proposal, emphasizing that the draft rule was for purposes of discussion only and that no vote would be taken at this meeting concerning the proposal. The Reporter explained that the draft rule would add oral statements to Rule 106 and would allow statements necessary in fairness to complete to be admitted for their truth notwithstanding the absence of an applicable hearsay exception.

A discussion of the draft amendment to Rule 106 followed. One Committee member inquired whether hearsay exceptions other than Rule 801(d)(2)(A) covering party opponents' statements could create an issue where part of a single statement would fit the hearsay exception, but another part of the same statement would not. The Reporter noted that it was indeed possible for statements admitted through other hearsay exceptions to create a similar issue. For example, a portion of a 911 call could constitute an excited utterance, but a later portion of the same 911 call after excitement had waned might not satisfy the exception. The Committee member expressed concern about creating a new categorical hearsay exception for all completing statements under the auspices of Rule 106. Another Committee member noted the ubiquitous nature of long e-mail chains that a party could argue would have to be admitted in their entirety for their truth under an amended Rule 106. Judge Grimm responded that trial judges have to draw meaningful lines about how much of an e-mail chain would be necessary in fairness to complete the material originally offered and that the amendment would not make the entire chain admissible --- it would not change the law on whether a completing portion is necessary. The Reporter noted that Rule 106 is anchored by the requirements that: 1) the portion of a statement originally presented must be misleading, and 2) the completing portion would clear up that misleading impression. Thus, the amendment would not authorize admission of all statements in their entirety. Nothing in the draft amendment would change the court's analysis of email strings.

The Chair queried whether it would be necessary to create a hearsay exception for completing portions of statements and suggested that allowing nonhearsay use of completing

statements to provide context would be sufficient. Judge Grimm acknowledged that allowing use of the completing information for its truth would not be necessary to correct the misleading impression left by the original selective portion of the statement. The Reporter provided two reasons why allowing use of the completing information for its truth would be justified. First, if the original proponent has put in a portion of a statement for its truth in a manner that misleads and distorts the truth, there is a solid argument that the proponent does not deserve protection from the accurate portrayal of the information through a hearsay exception for the completing portion of a statement. Second, allowing the completing portion of the statement only for its nonhearsay contextual value would require a confusing limiting instruction that jurors are unlikely to follow. The Committee has endeavored to minimize such confusing and ineffective limiting instructions through amendments like the one to Rule 801(d)(1)(B). Affording full use of completing statements would be consistent with those efforts.

Committee members discussed the difficulty for trial judges attempting to apply the Rule to lengthy video recordings typical in FBI and DEA investigations. Committee members noted that there could be two hour recordings that a judge would have to view in order to apply Rule 106. Of course, the existing rule of completeness already covers recordings, and so these challenges are imposed under the existing Rule.

Ms. Shapiro opined that courts are handling completion of video recorded statements well under the existing Rule 106 and cautioned that an amendment specifically authorizing a hearsay exception for completing statements could be subject to abuse, with defendants constantly objecting to interrupt and hinder the prosecution's presentation thinking that a new hearsay exception should justify admission of video and other statements for their truth only in their entirety. She further expressed concern that the expansion of the Rule to cover oral statements could cause abuse, even though courts currently apply the completeness rule to oral statements under Rule 611(a). While Rule amendments have in the past been found necessary to rectify conflicts in the courts, Ms. Shapiro argued that this was unnecessary in the Rule 106 context, because only a few circuits are preventing completion of misleading statements by invoking the hearsay rule. Judge Grimm respectfully disagreed that the federal courts are handling the issue well given his extensive research on the subject, and opined that it was simply unfair to allow a party to introduce a misleading portion of a statement and then lodge a hearsay objection to prevent a necessary clarification. The Reporter opined that there was no such thing as a "small" circuit split; whenever there are different results among the circuits on an Evidence Rule, it undermines the basic reason for having Rules of Evidence --- uniformity.

Committee members then discussed how disputes about the content of oral statements would be handled if the Rule were expanded to cover oral statements. Judge Grimm noted that courts would continue to enjoy discretion to require an opponent to wait until its case in chief to present evidence of completing oral statements in circumstances where there is a significant dispute about the content of the oral statements, so as to minimize the interruption of the proponent's case. The Reporter noted that trial judges enjoy considerable discretion under Rule 403 to handle disputes about whether oral statements have actually been made.

Judge Campbell suggested that proponents of incomplete statements will not risk misleading the jury due to the possibility of having the distortion revealed to the jury later in the

case. The Reporter responded, however, that completing statements made by a criminal defendant would never be revealed to the jury except through Rule 106 if the court holds that they are inadmissible hearsay and the defendant does not testify.

At the conclusion of the discussion, the Committee members determined that the issue of Rule 106 deserved further consideration and resolved to continue discussion of a potential amendment to Rule 106 at the next meeting. The Reporter was asked to prepare a draft amendment that would allow for completion, but only for a nonhearsay contextual purpose and not for the truth of the completing statements.

VII. Rule 609(a)(1) Impeachment

The Reporter informed the Committee that the Hon. Timothy R. Rice, United States Magistrate Judge for the Eastern District of Pennsylvania and former member of the Criminal Rules Committee, had proposed that the Evidence Advisory Committee consider an amendment abrogating Rule 609(a)(1) of the Federal Rules of Evidence. Judge Rice's article proposing abrogation based upon principles of "restorative justice" was distributed to the Committee in preparation for the meeting. The Reporter summarized Rule 609(a)(1), which permits testifying witnesses to be impeached at trial by evidence of felony convictions that are less than ten years old at the time of trial, even though they are not for crimes involving dishonest acts or false statements. For a testifying criminal defendant, the Rule provides a more protective balancing test than that found in Rule 403 --- requiring the probative value of the conviction for impeaching the witness's character for truthfulness to outweigh the prejudicial effect. The Rule 403 balancing test applies to all other witnesses. Under Judge Rice's proposal, impeachment with convictions that do not involve dishonesty or false statement would be eliminated entirely. The proposal would retain automatic impeachment of all witnesses with convictions involving dishonest acts or false statements, regardless of severity, under Rule 609(a)(2).

The Reporter called the Committee's attention to the legislative history behind Rule 609(a)(1) set out in detail in the agenda materials, emphasizing that the admissibility of such felony convictions to impeach and the applicable balancing tests were the result of a compromise following extensive Congressional involvement in the drafting of Rule 609 as part of the original rulemaking process. The Reporter outlined the potential amendment options for the Committee:

- Abrogate Rule 609(a)(1), eliminating non-dishonesty felony conviction impeachment for all witnesses.
- Abrogate Rule 609(a)(1)(B), eliminating non-dishonesty felony conviction impeachment for testifying criminal defendants only.
- Maintain Rule 609(a)(1), but modify the balancing test to provide enhanced protection to testifying criminal defendants in particular.

The Reporter noted that it would be necessary to amend Rule 608(b) if Rule 609(a)(1) were abrogated in whole or in part, in order to prevent admission of the bad acts underlying inadmissible felony convictions from being used to impeach on cross-examination under the auspices of Rule 608 (instead of Rule 609).

Judge Campbell queried whether there is any data concerning the impact Rule 609(a)(1) has had on criminal defendants' decisions not to testify. The Reporter responded that studies provided no definitive answer to that question, but noted that data from the Innocence Project revealed that a high percentage of defendants who were proven innocent through DNA evidence had not testified in their own defense. He observed that it is impossible to determine with any precision whether Rule 609(a)(1) was involved in all of those decisions, but explained that there is some sense that Rule 609(a)(1) plays a role in defendants' decisions to stay off the stand. The Public Defender stated that it is anecdotally well-accepted that defense lawyers don't put defendants with felony convictions on the stand. He stated that there could be other reasons for keeping a defendant from testifying (such as a *Miranda*-barred statement that remains a permissible basis for impeachment), but that the most important reason to keep a defendant from testifying remains the existence of felony convictions. Another Committee member expressed an interest in paring down Rule 609, noting that it provides a distraction that lacks substance at trial.

The Chair acknowledged the effect that Rule 609(a)(1) plays in keeping criminal defendants from testifying, but expressed concern regarding any amendment that would disrupt one of the hardest-fought compromises of the original rule-making process – a compromise that has persisted for the past forty-plus years. She further noted that the “restorative justice” philosophy underscoring Judge Rice’s proposal (one aimed at bringing convicted persons back into society) did not seem to be an appropriate basis for amending an evidence rule, emphasizing that evidence rules are designed to secure truth and that Congressional support for Rule 609(a)(1) impeachment arose from the philosophy that prior felony convictions reflect poorly on truthfulness as a testifying witness. The existing protective balancing test gives judges discretion to control the admissibility of felonies against testifying criminal defendants. The Chair also expressed concern about the Committee’s workload and the appropriate sequencing of projects, noting the exhaustive consideration of Rule 702 expected to begin after the symposium on forensic evidence the following day.

The Reporter responded that workload and sequencing posed no obstacle to a potential Rule 609(a)(1) amendment, emphasizing that the Committee could decide to propose a modification quickly that could be transmitted to the Standing Committee before a multi-year project on forensic evidence began. The Reporter noted several problems with the application of the existing Rule, such as: 1) the questionable connection it draws between truthful testimony and non-dishonesty felony convictions; 2) its failure to account for the fact that the testifying criminal defendant is automatically impeached by his strong incentive to be acquitted; and 3) its application by courts to admit felony convictions very similar to the charged offense.

The Reporter also emphasized that the Committee could retain Rule 609(a)(1), but propose a more rigorous application of the balancing test applied to criminal defendant-witnesses, if it concluded that the existing test was failing to fulfill Congress’s original protective intent. That more limited amendment could be consistent with, rather than upending, the hard-fought

congressional compromise, as that compromise was clearly intended to provide more protection for criminal defendant-witnesses. The Reporter highlighted a 2008 law review article by Professor Jeffrey Bellin in the U.C. Davis Law Review, which posits that the courts have thwarted the original congressional intent to protect criminal defendants with multi-factor tests favoring admissibility, and proposes a more targeted and cautious approach to the admissibility of felony convictions. The Reporter noted that an amendment consistent with Professor Bellin's proposal could be crafted in place of abrogation.

With respect to potential abrogation, several Committee members expressed reluctance to substitute the Committee's value judgment about the connection between non-dishonesty felonies and truthful testimony for the value judgment expressed in the congressional compromise currently embodied in the Rule.

One Committee member queried whether particular standards apply to a decision to abrogate a rule. Professor Coquillette responded that many rules are abrogated and that no specific standards govern. He agreed, however, that different degrees of caution are appropriate when Congress has been involved actively in rule-making, stating that a Committee should take a hands-off approach to rules like Rules 413-415 where Congress actually did the drafting, and should exercise some caution for rules like 609(a) where Congress was heavily involved in drafting. The Reporter acknowledged the importance of caution, but noted that: Congress in reality enacted all the Rules; circumstances and judicial interpretation of the Rules can change over time; and Congressional involvement does not mean that the Committee cannot explore amendments. He also pointed up that the Committee had only recently proposed abrogation of the ancient documents exception to the hearsay rule.

Judge Sessions commented that the Committee's role is to make the Evidence Rules fair, efficient, responsible and forward-looking and that, while any amendment must meet an appropriate threshold for change, the Committee should feel free to proceed with needed changes.

As the discussion continued, Committee members noted that Rule 609(a)(1) may work in a criminal defendant's favor, permitting impeachment of testifying government witnesses with non-dishonesty felonies. One Committee member observed that impeachment of government witnesses with felony convictions in federal gun and drug cases is commonplace. Another Committee member responded that non-dishonesty felonies have a very different prejudicial effect for testifying criminal defendants, who risk use of their convictions to prove the charges they are denying. Cooperating government witnesses often admit wrongdoing at trial but the only consequence is that their credibility is diminished.

The discussion then returned to a potential amendment that would retain impeachment with non-dishonesty felony convictions, but would enhance the balancing approach courts are currently taking to such convictions when offered against a criminal defendant-witness. Judge Campbell asked what evidence suggested that the existing balancing test was not being applied appropriately. The Reporter noted the cases in the Reporter's memo that showed: 1) the failure of courts to consider the criminal defendant's obvious impeaching bias in performing the balancing test; 2) the cases in which non-dishonesty felonies very similar to the charged offense are admitted; and 3) the use of a balancing test that has factors that cancel each other out (e.g., considering the

importance of obtaining the defendant's testimony as a factor against impeachment, and considering the importance of the defendant's credibility as a factor in favor). The Reporter also emphasized that the Supreme Court's opinion in the *Luce* case makes it impossible to review the cases in which the defendant stays off the stand to avoid anticipated impeachment with prior convictions. Committee members noted that it is also impossible to see how often such felonies are excluded under the existing balancing test and suggested that it would be important to gather more data before deciding that the current balancing test is broken. Other Committee members expressed a reluctance to micromanage trial judges with further refinements to the balancing test, stating that defense lawyers could use the existing balancing test to argue for better results. Another Committee member noted that an important goal of law review articles like Professor Bellin's is to influence the courts (and not just rule-makers) to apply the Rules appropriately. The Reporter acknowledged this, but queried whether it was realistic to hope for such an effect given that Professor Bellin's article sounded an alarm about Rule 609 in 2008 and no change in the case law could be detected.

The Committee concluded that Rule 609(a)(1) impeachment presents an important issue and resolved to continue its discussion of the Rule at its spring meeting. The Committee directed the Reporter to perform additional research regarding how Rule 609(a)(1) is being administered in the federal courts. Some Committee members noted that there should be a presumption against abrogation in the ensuing consideration of the Rule, given that Congress had carefully balanced competing interests in the existing Rule.

VIII. Closing Matters

Committee members agreed to postpone discussion of a proposed rule on "Illustrative Aids and the Treatment of 'Demonstrative Evidence'" until the Spring meeting.

In closing the Chair thanked the Boston College Law School for hosting the meeting, thanked the Committee members and all participants for their valuable commentary at the meeting, and noted the Symposium on "Forensic Expert Testimony, Rule 702, and *Daubert*" scheduled for the following day. The meeting was then adjourned.

IX. Next Meeting

The Spring meeting of the Evidence Rules Committee will be held in Washington D.C. on Thursday April 26 and Friday, April 27, 2018.

Respectfully submitted,

Liesa L. Richter
Daniel J. Capra

TAB 1D

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
 Meeting of January 4, 2018 | Phoenix, Arizona

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting at the JW Marriott Camelback Inn in Scottsdale, Arizona, on January 4, 2017. The following members participated in the meeting:

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

The following attended on behalf of the Advisory Committees:

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| Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate
Reporter | Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate
Reporter

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

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

Providing support to the Committee were:

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

OPENING BUSINESS

Judge Campbell called the meeting to order. He introduced the Committee's new members, Judge Srinivasan of the U.S. Court of Appeals for the District of Columbia, Judge Kuhl of the Los Angeles Superior Court, and attorney Bob Giuffra of Sullivan & Cromwell's New York Office, as well as other first-time attendees supporting the meeting.

He announced that Chief Justice Roberts appointed Cathie Struve Associate Reporter to the Standing Committee and that Dan Coquillette will retire as Reporter to the Standing Committee at the end of 2018. Dan Coquillette will continue to serve as a consultant to the Standing Committee. Judge Campbell thanked Professor Coquillette for his tremendous support and guidance throughout the years.

Judge Campbell also welcomed Judge Livingston as the new Chair of the Advisory Committee on Evidence Rules. He also informed the Standing Committee that Professor Greg Maggs was nominated to the U.S. Court of Appeals for the Armed Forces, and once confirmed, Professor Maggs will be ineligible to continue as Reporter to the Advisory Committee on Appellate Rules. He thanked Professor Maggs for his service.

For the new members, Judge Campbell explained the division of agenda items at the Standing Committee's January and June meetings. The January meeting tends to be an informational meeting with few action items, which is true for today's meeting. The January meeting typically serves to get the Standing Committee up to speed on what is happening in the advisory committees so that the Standing Committee is better prepared to make decisions at its June meeting, where proposals are approved for publication or transmission to the Supreme Court. The Committee's January meeting also serves to provide feedback to the advisory committees on pending proposals. Judge Campbell encouraged all Committee members to speak up on issues and topics raised by the advisory committees.

Rebecca Womeldorf directed the Committee to the chart, included in the Agenda Book, that summarizes the status of current rules amendments in a three-year cycle. This chart shows

the breadth of work underway in the rules process, whether technical or substantive rules changes. The chart also details proposed rules pending before the U.S. Supreme Court that, if approved, would become effective December 1, 2018. Between now and May 1, 2018, the Committee will receive word if the Supreme Court has approved the rules. If so, the Court and the Committee will prepare a package of materials for Congress. Around the end of April, there will be an order on the U.S. Supreme Court's website noting that the proposed rules have been transmitted to Congress. If Congress takes no action, this set of rules becomes effective December 1, 2018.

The chart also notes which proposed rules are published for comment and public hearings, whether in D.C. or elsewhere in the country. If there is insufficient interest, the public hearings are cancelled. So far, we have not had requests to testify about these published rules, but have received some written comments. These rules will most likely come before the Committee for final approval in June 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 12-13, 2017 meeting.**

TASK FORCE ON PROTECTING COOPERATORS

Judge Campbell and Judge St. Eve updated the Committee on the Task Force on Protecting Cooperators. Judge Campbell began by reviewing the origins of the Cooperators Task Force, from a letter by the Committee on Court Administration and Case Management ("CACM") detailing various recommendations to address harm to cooperators to Judge Sutton's referral of CACM's recommendation for various rules-related amendments to the Criminal Rules Committee. Director Duff also formed a Task Force on Protecting Cooperators to address various practices within the judiciary, the Bureau of Prisons ("BOP"), and the Department of Justice ("DOJ") that might address the problem in a comprehensive way.

Judge St. Eve provided an overview of the Task Force, noting that Judge Kaplan serves as Chair. She explained that the Task Force has explored what is driving harm to cooperators and what the Task Force can do to address the problem. There are four separate working groups within the Task Force – namely, a BOP Working Group, a CM/ECF Working Group, a DOJ Working Group, and a State Practices Working Group. Judge St. Eve reviewed the work completed or underway by each working group. The State Practices Working Group explored and did not identify any state practices that could be adopted by the federal courts to address harm to cooperators.

One challenge the Task Force faces is the variety of policies and procedures used by federal district courts across the country to reduce harm to cooperators, from the District of Maryland to the Southern District of New York. The DOJ Working Group is trying to synthesize and identify commonalities among disparate local policies and procedures.

The BOP Working Group found consistent themes and issues, and Judge St. Eve noted that BOP has been incredibly cooperative throughout this process. The BOP does not collect statistics documenting the extent of the harm to cooperators. Harm is occurring, primarily at high and medium security prisons, not low security facilities. Within these high and medium security prisons, prisoners are often forced by other inmates to “show their papers,” such as sentencing transcripts and plea agreements, to demonstrate that they are not cooperators. These papers can be electronically accessed through PACER and CM/ECF.

As a result of these findings, the BOP Working Group will recommend that the BOP make these sentencing-related documents contraband within the prisons. Because some prisoners need access to these documents, BOP will work with wardens to establish facilities within the prisons where prisoners can securely access these documents. The Group is also recommending that BOP punish individuals for pressuring and threatening cooperators. Some recommended changes will require approval from BOP’s union prior to implementation.

Another major issue is developing other types of limitations to place on PACER and CM/ECF to reduce the identification of cooperators, consistent with First Amendment and other concerns. On January 17, the CM/ECF Working Group will meet in Washington D.C. to hear from federal public defenders on this issue. The full Task Force meets on January 18.

Judge Campbell noted that the Committee does not have jurisdiction over BOP Policy or CM/ECF remote access. However, the question for the Committee is whether and what rules-based changes can be made to further help address this problem.

Judge Bates asked whether the Task Force has received any feedback from the defense bar about limiting incarcerated individuals’ access. Judge St. Eve noted that a federal defender is on the Task Force and that federal defenders support limiting access within BOP so long as prisoners can still access their documents when necessary for appeals and other court proceedings.

Professor Coquillette asked why the BOP cannot collect empirical data, and Judge St. Eve responded that the Task Force considered proposing such a recommendation. The Task Force decided against this recommendation after the BOP voiced concerns that collecting the data will create more harm than good. Judge Campbell noted the FJC survey, which provides anecdotal evidence in which judges reported over 500 instances of harm to cooperators, including 31 murders, and that much of this harm stemmed from the ability to identify cooperators from court documents. This FJC survey was a major impetus for the CACM letter. One committee member noted that he believes that the problem of harm to cooperators is better addressed by the BOP, instead of through rules changes. Judge St. Eve emphasized that BOP officials – especially BOP staff working at high and medium security facilities – know that harm to cooperators is a problem and are committed to better addressing it.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy provided the report of the Advisory Committee on Criminal Rules, focusing largely on the Advisory Committee's decision to oppose adopting CACM-recommended rules to reduce harm to cooperators. As noted earlier, CACM recommended that the Standing Committee amend various criminal rules to reduce harm to cooperators. The Committee referred the CACM recommendation to the Criminal Rules Committee, which created the Cooperator Subcommittee, also chaired by Judge Kaplan.

At the Advisory Committee meeting in October 2017, the Cooperator Subcommittee presented its research and recommendations about CACM-based rules amendments. In drafting rule amendments consistent with CACM's proposal, the Subcommittee balanced competing interests – namely, transparency and First Amendment concerns with harm reduction concerns. After many meetings, the Subcommittee concluded that amendments to Criminal Rules 11, 32, 35, 47, and 49 would be required to implement CACM's recommendations, and the Subcommittee drafted these amendments for further discussion.

The Subcommittee's draft amendments engendered a lively discussion at the Advisory Committee meeting. Judge Kaplan and the DOJ abstained from voting. The Advisory Committee as a whole voted on two questions. First, the Advisory Committee unanimously agreed that the draft rules amendments would implement CACM's proposals. Second, the Advisory Committee agreed, albeit with two dissenting votes, not to recommend these amendments.

With this overview, Judge Molloy sought discussion about whether the Committee agreed with Advisory Committee's decision. To assist the Committee, Professors Beale and King provided an overview of the various proposed amendments to Criminal Rules 11, 32, 35, 47, and 49, that had been considered.

One Committee member questioned how defense bar advocacy is impaired when plea agreements are sealed on a case-by-case basis because defense attorneys are not losing any information that they otherwise would have. Professor King noted that sealing practices vary district-by-district, and so, a rule about sealing on a case-by-case basis would not reduce access to that information in districts that rarely or never seal. Professor King also noted that the defense bar indicated that the terms of plea agreements are important, that they need this information in order to assess their client's proposed plea agreement, and that sealing plea agreements in every case would impair their ability to do this. Another member asked about whether sealing the plea agreements in every case would prevent others from identifying cooperators. Professor Beale responded that it would prevent others from identifying cooperators through plea agreements, but that there are other ways to learn about cooperators – through lighter sentences, Brady disclosures, etc. She articulated that the Advisory Committee did not think that Rule 11 was an effective response to the problem, especially given that this rule change would be a transition to secrecy.

One member asked whether constitutional challenges have been raised in districts that have implemented aggressive sealing tactics in order to protect cooperators. Judge St. Eve noted that she is not aware of any constitutional challenges. This may reflect that these districts have received

buy-in as to sealing practices from prosecutors, defenders, and judges prior to implementation. Professor Beale noted that some instances of constitutional challenges by an individual do exist.

Judge Campbell interjected to respond to a few comments raised by committee members. First, he stated that there is no way to absolutely prevent cooperator identity from becoming known but that this does not mean steps cannot be taken that will reduce the dissemination of such information. Moreover, there seem to be ways to reduce the identification of cooperators without increased sealing, whether by changing the appearance of the docket on CM/ECF or adopting the “master sealed event” approach implemented in the District of Arizona. Judge Campbell emphasized that the Advisory Committee should not give up on amendments that would not result in more secrecy.

More generally, many Committee members asked questions about the overall implications of CACM-based rules changes. One member inquired whether these rules changes would (negatively) affect non-cooperators who would no longer be able to demonstrate their non-cooperation status. Professor King noted that this is a tricky issue and that the effect of rule-based changes on non-cooperators is one reason why the defense bar has no unanimous position on this topic. Another member asked whether the CACM-based rules changes would encourage more cooperation. From the Task Force perspective, Judge St. Eve said it is not part of the Task Force’s mission to consider whether rules or policy changes would encourage more cooperation. The Task Force’s charter focuses on ways to reduce harm to cooperators. One member voiced support for more judicial education on how to reduce harm to cooperators.

Another member noted that harm to cooperators has been occurring long before CM/ECF and that cooperator information can be learned from many sources other than CM/ECF. This member asked whether the Task Force believed that there would be some benefit from a national policy instead of the disparate local policy approach. Judge St. Eve stated that the Task Force thinks a national policy is the best option, and the DOJ is considering a national approach as well. However, due to local variation, the Task Force is facing the challenging question of what that national policy should be. Professor Capra noted that in 2011 a Joint CACM/Rules Committee considered this issue and determined that a national policy or approach is not feasible. Judge St. Eve stated that the Task Force is aware of this 2011 conclusion. Professor Beale noted one advantage to a rules-based change is that proposed rules would be published for public comment. In addition, rules promulgated through the Rules Enabling Act process would also obviously have national enforcement effect.

In light of this discussion, Judge Campbell asked whether the Committee agreed with the Advisory Committee’s decision not to adopt the CACM rules-based changes. Before soliciting feedback, Judge Campbell noted that the DOJ did not take a position on these CACM rules-based amendments because DOJ wants to wait until the Task Force concludes its work. He also stated that some Advisory Committee members questioned whether the Advisory Committee could revisit rules changes depending on the outcome of the Task Force’s work. Unless the Committee disagrees with the decision not to adopt the CACM rules-based changes at this time, the Advisory Committee opted, if necessary, to revisit these rules after the Task Force concludes its work.

Many members voiced agreement with the Advisory Committee's decision to reject the CACM rules-based amendments. One member supported the District of Arizona's approach, and another noted that, without empirical data about the causes of the problem, the Advisory Committee's position seemed wise. This member also stated that CM/ECF seems to be a problem and that CM/ECF should be changed. Another member thought consideration of any rules changes should wait until the CM/ECF Working Group makes its recommendations. One member suggested that achieving a national policy is difficult and the source of the problem stems from the BOP. This member believed that the harms from rules-based changes exceed the benefits.

Judge Molloy concluded his report by providing updates about the Advisory Committee's other work. After the mini-conference on complex criminal litigation, the Advisory Committee recommended that the FJC prepare a Manual on Complex Criminal Litigation, which would parallel the Manual on Complex Civil Litigation. The Advisory Committee is also considering a few new rules amendments. First, the Cooperator Subcommittee is considering amending Rule 32(e)(2) to remove the requirement to give the PSR to the defendant. This change could help address one aspect of the cooperator identification problem. Second, the Advisory Committee rejected a proposal to amend Rule 43 to permit sentencing by videoconference. Third, the Advisory Committee is considering re-examining potential changes to Rule 16 regarding expert disclosure in light of an article by Judge Paul Grimm. Lastly, the Advisory Committee is considering changes to Rule 49.2, which would limit remote access in criminal cases akin to the remote access limitations imposed by Civil Rule 5.2. However, the Advisory Committee is holding in abeyance its final recommendation on this rule change until after the Task Force concludes its work.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates presented the report of the Advisory Committee on Civil Rules, which included only informational items and no action items.

Rule 30(b)(6): The Subcommittee on Rule 30(b)(6) began with a broad focus, but it has narrowed the issues under consideration, primarily through examination and input from the bar. There is little case law on this topic in part because these problems are often resolved before judicial involvement or with little judicial involvement. The Subcommittee received more than 100 written comments on its proposed amendment ideas, and the feedback revealed strong competing views, often dependent upon whether the commenter typically represents plaintiffs or defendants.

Based on this input, the Subcommittee on Rule 30(b)(6) is focusing on amending Rule 30(b)(6) to require that the parties confer about the number and description of matters for examination. The Subcommittee is, however, still tinkering with the language. The Subcommittee is also receiving additional input on some select topics, including whether to add language to Rule 26(f) listing Rule 30(b)(6) depositions as a topic of consideration.

In terms of timeline, the Subcommittee will make a recommendation to the Advisory Committee at its April 2018 meeting. Its recommendation, if any, will be presented to the Standing Committee in June 2018.

One member asked why the judicial admissions issue was eliminated as an issue to be addressed. The Subcommittee concluded that there is little utility to a rules-based approach to this problem. Although tension in the case law exists, the cases are typically sanction-based cases related to bad behavior. The Subcommittee is concerned that a rule change directed to the judicial admissions issue could create more problems than it would solve.

Some members voiced support for adding a “meet and confer” element to Rule 30(b)(6), noting that it would help encourage parties to agree on the topics of depositions before the deposition and thereby reduce litigation costs. Others were skeptical that the parties would actually meet and confer to flesh out topics for the depositions. One member suggested that the benefit of this rule change would not exceed the work necessary to change the rule. Judge Campbell noted that this is a unique problem for a frequently used discovery tool. The Advisory Committee investigated this problem ten years ago and concluded that it was too difficult to devise a rule change to reduce the problem. Based on the comments raised, Judge Campbell wondered whether education of the bar, through a best practices or guidance document for Rule 30(b)(6), may be a better solution than a rule change.

Social Security Disability Review: The Administrative Conference of the United States (“ACUS”) proposed creating uniform procedural rules governing judicial review of social security disability benefit determinations by the Social Security Administration. The Social Security Administration supports ACUS’s proposal. The Advisory Committee is in the early stages of considering this proposal, and in November 2017, it met with representatives from ACUS, the Social Security Administration, the DOJ, and claimants’ representatives. At this meeting, it became clear that a rules-based approach would not address the major issues with respect to social security review, including the high remand rate, lengthy administrative delays, and variations within the substantive case law governing social security appeals.

The Advisory Committee created a Social Security Subcommittee to consider the ACUS proposal. The Subcommittee will focus on potential rules governing the initiation of the case (e.g., filing of a complaint and an answer) and electronic service options. The Subcommittee will not consider discovery-based rules because this does not appear to be a major issue.

Some broad issues remain for the Subcommittee’s determination, including the kind of rules it would devise, the placement of the rules (e.g., within the Civil Rules), concerns relating to substance-specific rulemaking, and whether to devise procedural rules for all administrative law cases. The Subcommittee thus far is not inclined to draft procedural rules for all types of administrative law cases, which can vary greatly. Although the Social Security Administration would like rules regarding page limits and filing deadlines, the Civil Rules do not typically include such specifications. The Subcommittee will provide an update to the Advisory Committee at its April meeting and to the Standing Committee in June.

One member asked about trans-substantivity, noting that the admiralty rules do not fit well within the Civil Rules and that rules governing judicial review of one administrative agency seem to raise even greater trans-substantivity concerns because such rules would be less general. This member asked whether the Subcommittee has considered that procedural rules for all administrative law cases would seem to raise fewer trans-substantive concerns than social security rules alone. Judge Bates said that the Subcommittee has not considered this issue yet but will be considering trans-substantivity concerns. Professor Cooper raised an empirical question about the extent to which all administrative law review cases focus primarily or solely on the administrative record.

One member encouraged the Subcommittee to consider Appellate Rules 15 and 20 when devising particular rules governing review of social security benefits decisions. Professor Struve seconded this suggestion. Another member asked about how the specialized rules for habeas corpus and admiralty came about under the Rules Enabling Act. Professors Cooper and Marcus provided an overview of the formation of these rules and noted that the habeas corpus rules are a good analogy for creating specialized rules for social security decisions.

Another member asked whether the Subcommittee is considering the patchwork of local district court rules governing social security review. The Subcommittee is looking at the panoply of local rules and how these rules impact the time for review at the district court level. Professor Cooper noted that there is not a wide divergence in the amount of time it takes courts to review social security decisions. Judge Campbell noted that 52 out of 94 district courts have their own procedural rules and that, according to the Social Security Administration's estimates, uniform rules would save the agency around 2-3 hours per case. Because the Social Security Administration handles around 18,000 cases per year, uniform rules would result in significant cost savings for the agency.

Multidistrict Litigation ("MDL") Proceedings: The Advisory Committee has received some proposals to draft specialized rules governing MDL proceedings, some of which parallel legislation pending in Congress such as HR 985. The business and defense interests have submitted these proposals, and none is from the plaintiff side. Judge Bates provided an overview of these various proposals, noting the focus on mass tort litigation.

The Advisory Committee has created a MDL Subcommittee, headed by Judge Bob Dow (who also headed the Class Action Subcommittee). The Subcommittee has a significant amount to learn. The Subcommittee has received written comments from the defense bar but it has yet to hear from the plaintiffs' bar, the Judicial Panel on Multidistrict Litigation, judges who have handled significant numbers of MDLs, and the academic community. The Subcommittee is currently creating a reading list as well as identifying research projects. The Subcommittee also has to explore how it wants to proceed, and given these factors adoption of rules, if any, will be a long and careful process. The Subcommittee will take six to twelve months of information gathering. Judge Campbell clarified that the Rules Enabling Act process guarantees that it would take at least three years before any rules are adopted (assuming any are proposed), but that these proposals are receiving careful attention.

Some members noted that this an important and valuable area to investigate given that MDLs comprise a significant portion of the federal docket. Because these cases often require considerable flexibility, innovation, and discretion, others expressed skepticism about the necessity or ability to devise a specialized set of rules for MDL proceedings. Another member noted that devising such rules may be difficult given that mass tort MDLs raise different issues and problems than antitrust MDLs, for example.

One member suggested that the Subcommittee consider the process for appointing lead counsel in light of Civil Rule 23(g)'s objective standard and how lead counsels are appointed under the Private Securities Litigation Reform Act. Another member recommended speaking with experienced MDL litigators. Other members recommended attending a variety of MDL conferences occurring around the country in 2018 as well as considering the best practices materials compiled by the MDL Panel.

Third-Party Litigation Finance: The Advisory Committee has received a proposal which would require automatic disclosure of third-party litigation financing agreements under Rule 26(a)(1)(A)(v). Although this proposal does not pertain only to MDLs, the MDL Subcommittee is charged with exploring it. The Advisory Committee considered similar proposals in 2014 and 2016 but did not recommend any changes to the Civil Rules. Like the previous proposals, this proposal presents a definitional problem regarding what constitutes third-party litigation financing. It is also controversial, with a clear division between the plaintiff and defense bars, and it presents significant ethical questions. It is not clear that the Advisory Committee would have reconsidered this proposal again so soon, but because third-party litigation financing issues were raised within the MDL proposals, the Advisory Committee decided to examine the issue further as part of the rulemaking proposals for MDLs.

Other Proposals: The Advisory Committee received a proposal to amend Rule 71.1(d)(3)(B)(i) to discard the preference for publishing notice of a condemnation action in a newspaper published in the county where the property is located. The Advisory Committee will further explore this proposal, and the Department of Justice has indicated that it does not have a problem with eliminating the preference. The Advisory Committee wants to further explore the implications of eliminating the preference.

Another proposal received by the Advisory Committee was to amend Rule 16 so that a judge assigned to manage and adjudicate a case could not also serve as a "settlement neutral." The Advisory Committee removed this matter from its agenda because it is not clear that there is a problem that a rule amendment could or should solve.

The Advisory Committee was also asked to explore the initial discovery protocols for the Fair Labor Standards Act – a request which parallels earlier efforts regarding initial discovery protocols for employment cases alleging adverse action. The Advisory Committee hopes judges consider these protocols favorably, but it did not think the Advisory Committee should endorse these protocols. The Advisory Committee concerns itself with rules adopted through the Rules Enabling Act process and does not endorse work developed by other entities outside the rulemaking process.

Pilot Project Updates: Two courts, the District of Arizona and the Northern District of Illinois, have enlisted in the Mandatory Initial Discovery project. It is too early to report feedback on its results. Judge Campbell noted that the project has been going well in the District of Arizona, stating that initial feedback has been positive and that the district has experienced fewer issues than expected. He suspects, however, that problems may arise during summary judgment and trial phases for cases filed after May 1 when parties request that district judges exclude evidence not disclosed during the mandatory initial discovery periods. The district judges in Arizona are anticipating this and are prepared to handle the problems as they arise. Judge Campbell also applauded the FJC's efforts with developing and implementing this project. Judge St. Eve reported that the Mandatory Initial Discovery project rolled out very smoothly in the Northern District of Illinois and that the district has received positive feedback thus far.

The Expedited Procedures project has been stalled for want of participating district courts. The Advisory Committee has enlisted Judge Jack Zouhary to spearhead its efforts to drum up participation. The Advisory Committee has found courts often indicate initial support for the pilot, but ultimately decline to participate. Their support typically wanes due to vacancies, caseloads, or lack of unanimous participation by judges within a district. The project's requirements have been modified to permit more flexibility and to allow for less than unanimous participation by district judges within a given district.

Judge Zouhary noted his district agreed to participate in the Expedited Procedures project because his district already had similar rules in place, albeit using different terminology. A letter of endorsement for the project has been drafted, and some organizations, including the American College of Trial Lawyers, the Federal Bar Association, the FJC, the NYU Civil Jury Project, and the American Board of Trial Advocates, have expressed excitement for the project and are considering joining the letter.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta gave the report of the Advisory Committee on Bankruptcy Rules. At its September 2017 meeting, the Advisory Committee recommended publishing changes to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Because the proposed amendments relate to a bankruptcy rule and an appellate rule that were published in August 2017, however, the Advisory Committee is waiting to review any comments before finalizing proposed language. The Advisory Committee plans to present the proposed changes at the Committee's June meeting.

Judge Ikuta discussed four additional information items: (1) withdrawal of a prior proposal to amend Rule 8023 (Voluntary Dismissals), (2) updates to national instructions for bankruptcy forms, (3) a suggestion to eliminate Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals), and (4) preliminary consideration of a proposal to restyle the bankruptcy rules.

The Advisory Committee decided to withdraw its prior recommendation to amend Rule 8023. Judge Ikuta said the proposed amendment was intended to be a reminder that a bankruptcy trustee who is party to an appeal may need bankruptcy court approval before seeking to dismiss the appeal. The Advisory Committee's Department of Justice representative raised a concern, however, that the change would be difficult for appellate clerks to administer. The Advisory Committee agreed that the proposed amendment could cause confusion, which outweighed the benefit of the proposed change. It therefore voted to withdraw the proposal from consideration.

The Advisory Committee updated national instructions for certain forms. Judge Ikuta explained that the December 1, 2017 amendments to Rule 9009 (Form) restricted the ability of bankruptcy courts to modify official forms, with certain exceptions. One exception allows for modifications that are authorized by national instructions. After learning the courts routinely modify certain notice-related forms to provide additional local court information, and that model court orders included as part of some official forms are often modified by courts to provide relevant details, the Advisory Committee approved national instructions that would permit these practices to continue.

The Advisory Committee is also looking into a suggestion from a bankruptcy clerk that it should eliminate or amend Rule 2013. The intent of the rule is to avoid cronyism between the bankruptcy bar and the courts. It requires the bankruptcy clerk to maintain a public record of fees awarded to trustees, attorneys, and other professionals employed by trustees and to provide an annual report of such fees to the United States trustee. The suggestion stated that compliance with this rule is spotty, and because a report regarding fees can be generated and provided on request, there is no need to keep systematic records. Judge Ikuta said that the Advisory Committee, with help from the FJC, will gather more information about current compliance with the rule before taking any steps. It expects to consider the issue at its spring 2018 meeting.

Finally, the Advisory Committee is considering whether it should commence the process of restyling the Bankruptcy Rules. The Advisory Committee is taking a phased approach before making this big decision. First, it is studying whether any restyling is warranted, given the close connection of the Bankruptcy Rules to the Bankruptcy Code and the use of many statutory terms throughout the rules. The Advisory Committee will also consider the views of its stakeholders, and it has asked the FJC to help it obtain input from users of the Bankruptcy Rules regarding the pros and cons of restyling. Because any input would be more meaningful and valuable if bankruptcy judges and practitioners could consider some exemplars of restyled rules, the Advisory Committee has asked the Committee's style consultants to assist in developing such exemplars from the eight rules in Part IV of the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston provided the report for the Advisory Committee on Evidence Rules. The Advisory Committee met on October 26 and 27, 2017, at the Boston College Law School, where the law school and Dean Vincent Rougeau were gracious hosts. She advised that she had no action items to report, but that there were several information items.

The Advisory Committee held a symposium in connection with its meeting. The symposium focused on forensic expert testimony, Rule 702, and Daubert. The topics discussed included the 2016 President's Council of Advisors on Science and Technology's ("PCAST") report on forensic science in criminal courts and a potential "best practices" manual. The conference participants shared an interest in ensuring that expert testimony comported with Rule 702, but the focus was not on potential amendments to Rule 702, but instead, the applications of the rule. Some conference attendees suggested that a best practice manual might be more helpful than potential rule amendments. Judge Livingston stated that the Advisory Committee will discuss the findings from the conference at its spring 2018 meeting.

Judge Campbell noted that a panel of judges and lawyers at the Boston College event also raised concerns about possible abuses of Daubert motions in civil cases, and he suggested that the Civil Rules Advisory Committee be apprised of these concerns. Dan Capra noted a potential circuit split related to the admissibility of forensic evidence.

Next, Judge Livingston advised that the Advisory Committee published a proposed amendment to Rule 807, and that the public comment period is open until mid-February. The Advisory Committee will discuss all comments at its meeting in the spring.

The Advisory Committee is also considering a possible amendment to Rule 801(d)(1)(A). It sought informal input on a possible amendment in the fall of 2017, and it also obtained results from a survey conducted by the FJC. The Advisory Committee will consider the input at its spring meeting. A committee member noted that one possible area of consideration for the Advisory Committee is jury instructions regarding prior consistent statements.

The Advisory Committee is considering a possible amendment to Rule 404(b); however, disagreement exists within the Advisory Committee regarding a circuit split between the Third and Seventh Circuits. There is further disagreement about how the rule is being employed, and the Advisory Committee has discussed the three principal purposes of the rule, including the chain of reasoning, the balancing test, and additions to the notice provision. Judge Campbell noted the similarities to the discussion surrounding Rule 30(b)(6), where there is a disagreement regarding whether an amendment is needed. Another member added that while much of the discussion is about criminal cases, any changes would impact civil cases as well.

Other items that will be considered by the Advisory Committee at its spring meeting include possible amendments to Rule 606(b) (in light of the Supreme Court's decision in *Pena-Rodriguez v. Colorado*) and to Rules 106 and 609(a)(1).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares provided the report for the Advisory Committee on Appellate Rules, which included several informational items and one discussion item. First, as to the discussion item, Judge Chagares reviewed the proposed amended rules pending before the Supreme Court for consideration, including the proposed amendments to Rule 25(d). The proposed amendment to Rule 25(d) would eliminate the requirement of proof of service when a document is filed through a court's electronic-filing system, replacing "proof of service" with "filed and served." Given the

pending amendment to Rule 25(d), the Advisory Committee decided that references to “proof of service” in Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) should be removed. Judge Chagares explained that these proposed amendments are technical and that the Advisory Committee did not believe publication of the technical changes was necessary.

During this discussion, several committee members raised concerns about the use of “filed and served” in Rule 25(d), suggesting elimination of the term “and served.” Judge Campbell noted that while a document filed electronically is served automatically, those not filed electronically need the instruction in the rule. Committee members made suggestions for various stylistic edits to the proposed rule amendments, and the Committee’s style consultants offered their views on the proposed language and edits, including present versus past tense. One committee member raised concerns about eliminating the proof of service language in Rule 39, given the subject-matter of the rule. Judge Campbell suggested adding to the committee notes an instruction regarding service and a reference to Rule 25. The group discussed possible language for the committee notes, and Judge Campbell recommended that the Advisory Committee consider these comments and present the revised package of rules and committee notes to the Committee in June, after consideration of the discussion at the meeting.

Following this meeting, the Advisory Committee, in consultation with the Standing Committee, determined to withdraw the proposed amendments to Rule 25(d) from the Supreme Court’s consideration. The Advisory Committee will consider the comments made at the Standing Committee meeting regarding Rule 25(d), as well as those regarding Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1), and it will present an amended set of proposed rule amendments for the Committee’s consideration at its June 2018 meeting.

Judge Chagares reviewed several information items. The Advisory Committee considered at its November 2017 meeting a suggestion to amend Rule 29 to permit cities and Indian tribes to file amicus briefs without leave of court. The Advisory Committee considered but deferred action on the proposal five years ago, and after discussion at its November 2017 meeting, the Advisory Committee decided to take no further action. It is a problem that rarely, if ever, arises in litigation. Judge Campbell noted that most Indian tribes appear before federal court via private firms, not through government lawyers, and this could cause more recusal issues.

Judge Chagares advised that the Advisory Committee considered several other issues at its November 2017 meeting. These included a proposal to amend Rule 3(c)(1)(B), which as currently drafted may present a potential trap for the unwary. After discussion, a subcommittee was formed to study the issue. The Advisory Committee also considered a suggestion to amend Rules 10, 11, and 12 in light of advances made with electronic filing and the impact on the record on appeal. After discussion, the Advisory Committee determined that most clerks’ offices have procedures to manage these issues, and that with upcoming upgrades to CM/ECF, some issues raised may be resolved. The Advisory Committee thus determined to remove the suggestion from its agenda. The Advisory Committee discussed a potential issue related to Rule 7 and whether attorney fees are “costs on appeal” under the rule. The Advisory Committee determined to refer the issue to the Civil Rules Committee and to form a subcommittee to monitor any developments.

Finally, Judge Chagares noted several items that the Advisory Committee may consider at upcoming meetings, including concerns about judges deciding issues outside of those addressed in briefing, the use of appendices, and the dismissal of appeals after settlement agreements. A Committee member raised a concern that the dismissal issue could be substantive rather than procedural, and Judge Chagares stated that this concern would be considered by the Advisory Committee when the issue is discussed.

REPORT OF THE ADMINISTRATIVE OFFICE

Rebecca Womeldorf provided the report from the Rules Committee Staff (“RCS”). The Standing Committee reviewed Scott Myers’ report regarding instances where committees need to coordinate regarding proposed rule changes which implicate other rules. Ms. Womeldorf added that treatment of bonds for costs on appeal under Appellate Rule 7 and treatment of the proof of service references across the Appellate and Civil Rules will continue to require coordination between these various committees.

Julie Wilson provided an overview of congressional activity implicating the Federal Rules. In general, Ms. Wilson noted that, although the RCS is monitoring many pending bills, not much movement has occurred in the past few months. Ms. Wilson first briefly reviewed pending congressional legislation which would directly amend the Federal Rules. The Senate Judiciary Committee held in November 2017 a hearing on “The Impact of Lawsuit Abuse on American Small Businesses and Job Creators,” which focused on a variety of bills which would directly amend the Federal Rules, including the Lawsuit Abuse Reduction Act (“LARA”). No action, however, has occurred regarding these pieces of legislation, including LARA, since that hearing. The RCS continues to monitor these bills for further development.

The RCS has also offered mostly informal feedback and comments to Congress on other bills which would not directly amend but rather require review of the Federal Rules by the Standing Committee. This includes the Safeguarding Addresses from Emerging (SAFE) at Home Act, which was introduced in September 2017 by Senator Roy Blunt and would require federal courts and several agencies to comply with state address confidentiality programs. This proposed legislation raises concerns about service under the Federal Rules, and RCS communicated this feedback to Senator Blunt’s staffer but has not heard anything in response. Representative Bob Goodlatte also introduced in October 2017 the Article I Amicus and Intervention Act, which would limit federal courts’ authority to deny Congress’s ability to appear as an amicus curiae. The RCS communicated its concern to congressional staffers that this legislation would lengthen the time of appeals.

A few developments occurred in the past month as well. On November 30, 2017, the House Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing on “The Role and Impact of Nationwide Injunctions by District Courts.” Although the hearing did not concern a specific piece of legislation, Rep. Goodlatte reiterated his interest in this issue, and Professor Samuel Bray, who submitted a proposal to the Civil Rules Committee earlier this year regarding nationwide injunctions, spoke at this hearing. The RCS will continue to monitor for the introduction of any specific pieces of legislation regarding nationwide injunctions.

The Committee lastly considered what advice it could provide to the Executive Committee regarding which goals and strategies outlined in the *Strategic Plan for the Federal Judiciary* should receive priority attention over the next two years. After discussion, the Committee authorized Judge Campbell to report the sense of the Committee on these issues to the Judiciary's Planning Coordinator.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the Committee members and other attendees for their participation. The Committee will next meet on June 12, 2018, in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2

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FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Forensic Evidence, *Daubert* and Rule 702
Date: April 1, 2018

As you know, the Committee held a Symposium on forensic evidence, Rule 702 and *Daubert* in October 2017, at Boston College Law School. Published transcripts of the Symposium and some accompanying articles were distributed by email to Committee members before the Spring meeting.

The Committee has not yet had an opportunity to discuss the takeaways from that Symposium. The Spring 2018 meeting provides that opportunity. And this memo is intended to assist the Committee in its discussion.

The memo provides background and analysis on the following matters:

- 1. Forensic Evidence.** This section discusses what the Committee's role might be in addressing the reliability problems that have been raised with regard to many forms of forensic evidence. The section also provides a case law digest of Federal cases on forensic evidence that have been decided since 2008 (around the time of the National Academies of Science report).¹
- 2. *Daubert* hearings.** This section describes some of the concerns that were raised at the Symposium about the prevalence, cost, and time-consuming nature of *Daubert* motions, the problems of discovery in criminal cases.
- 3. Rule 702, sufficiency of basis and application of method.** This section discusses a proposal that the Committee had briefly considered at a prior meeting: the conflict in the cases over whether the questions of sufficiency of basis and application of methods are matters of weight or admissibility. Rule 702 clearly states that these are questions of admissibility, but many courts

¹ Of course there are a lot of state cases on forensic evidence. The article by Chris Fabricant, published in the Fordham Law Review together with the Symposium (and previously distributed to the Committee) provides a survey of these cases.

treat them as questions of weight. The issue for the Committee is whether something/anything can be done about these wayward decisions.

It must be emphasized that nothing in this memo raises an action item for this Committee. This meeting is an opportunity to set goals for going forward on one or more of the problems that have been raised.

I. Forensic Evidence Issues

The goal of the Symposium was to provide the Committee information regarding the challenges to the reliability of a number of forensic methods raised by the reports of the National Academies of Science (NAS) and the President’s Council of Advisors on Science and Technology (PCAST).

A. A Freestanding Rule on Forensic Evidence

One major question at the Symposium was whether the Committee might address the topic of forensic evidence through rulemaking. For purposes of discussion at the Symposium, the Reporter prepared a draft of a rule that would apply to forensic expert witnesses. The discussion draft provided as follows:²

Rule 707. Testimony by Forensic Expert Witnesses

If a witness is testifying on the basis of a forensic examination [conducted to determine whether an evidentiary sample is similar or identical to a source sample], [or: “testifying to a forensic identification”] the proponent must prove the following in addition to satisfying the requirements of Rule 702:

- (a) the witness’s method is repeatable, reproducible, and accurate for its intended use—as shown by empirical studies conducted under conditions appropriate to that use;
- (b) the witness is capable of applying the method reliably—as shown by adequate empirical demonstration of proficiency—and actually did so; and
- (c) the witness accurately states, on the basis of adequate empirical evidence, the probative value of [the meaning of] any similarity or match between the evidentiary sample and the source sample.

² Some of the commentators appeared to treat the discussion draft as a formal proposal, but it was never intended as such. The PCAST report does not propose a change to the Evidence Rules; rather it proposes a best practices manual or a committee note.

Memorandum to Advisory Committee on Evidence Rules
Re: Forensic Evidence, *Daubert* and Rule 702
April 1, 2018

A fair number of Symposium participants argued that the above rule would create as many problems as it solves. The major problems with the discussion draft are: 1) whether it adequately describes the expertise that it intends to cover (i.e., what does “forensic” mean); and 2) that it overlaps problematically with the requirements of Rule 702.

I have a data point to add – the kind of statistically insignificant information that scholars are now calling “empirical evidence.” As part of my Fall Evidence exam, I gave the students the discussion draft and asked for their reactions. I had 250 students, from Fordham and NYU. About 90% of the students opined that the discussion draft should be rejected because it either 1) was superfluous because the topic was covered by Rule 702, or 2) was problematic because it seemed to go further than Rule 702 but it would be difficult for the courts to tease out the differences.

This was just a discussion draft. It may be that the Committee can come up with a freestanding rule that focuses on forensic evidence without problematically tracking or overlapping with Rule 702. It is for the Committee to decide whether to pursue such a rule.

B. A Specific Addition to Rule 702 to Cover the Overstatement Problem

Many speakers at the Symposium argued that one of the major problems with forensic experts is that they overstate their conclusions. A report from NAS proposes that courts should forbid experts from stating their conclusion to a “reasonable degree of [field of expertise] certainty,” because that term has no scientific meaning and serves only to confuse the jury. Both the NAS and PCAST reports emphasize that forensic experts have overstated results and the courts have done little to prevent this practice – the courts are often relying on precedent rather than undertaking an inquiry into whether an expert’s opinion overstates the meaning of a match.

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

If the Committee is interested in pursuing such a change, it might look like this:

Rule 702. Testimony by Expert Witnesses

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

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; ~~and~~

- (d) the expert has reliably applied the principles and methods to the facts of the case; and
- (e) the witness does not overstate the probative value of any opinion.

Adoption of this language would provide regulation for expert testimony beyond forensics. For example, there are instances in which experts on cell site location have overstated the precision of cell site location. And indeed it might reach to limit any testimony that provides a conclusion to a reasonable degree of scientific certainty. If the Committee is interested in pursuing such a proposal it will be prepared for full consideration at the next meeting.

C. Separate Rules for Scientific and Non-Scientific Experts

At the Symposium, Judge Rakoff suggested that the Committee explore whether there should be separate admissibility rules for scientific and non-scientific expert testimony. It would seem, however, that there are a number of problems with such a venture. The most obvious is that the line between “scientific” and “technical” may be difficult to draw – as courts have found in the area of forensic experts. Another problem is how those standards would differ in any way that would be useful. As the Court in *Kumho Tire* held, the *Daubert* test is flexible enough to cover both scientific and non-scientific expert testimony – and the same appears to be true for Rule 702 after the 2000 amendment. It is hard to know which of the admissibility requirements: sufficient facts or data, reliable methodology, and reliable application – would be stated differently.

On the other hand, there may be some value in breaking out experts that base their opinion solely on experience, because such experts have never fit all that well within the term “reliable methodology.”

If the Committee is interested in pursuing separate rules for different kinds of experts, a proposal to that effect will be worked up for the next Committee meeting.

D. Non-Rulemaking Initiatives

In addition to – or instead of – a change to the rules, the Committee might think of other alternatives in which it might have an impact in improving and regulating forensic evidence. This section talks about some options, with no intent to provide an exclusive list.

1. Best Practices Manual: The PCAST report proposes that the Committee prepare a Best Practices Manual – which would of course, in this area, have to be prepared with the assistance of the scientific community. There is precedent for a Committee-generated Best Practices Manual in an area where the Committee had decided that rulemaking was not appropriate – the Manual on Authentication of Electronic Evidence, which was sent to all Federal judges last year. But there are several limitations on this alternative. Most importantly, the precedent establishes that a Best Practices Manual cannot be published as a work of the Committee – because

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the Committee's authority is for rulemaking, and a Committee-sponsored Best Practices Manual could look like an attempt to establish Evidence Rules outside the rulemaking process. This means that the Manual if written would come out under the names of the individual authors, and somewhere in the introduction it would be stated that the project started from the Advisory Committee's interest in this area. Obviously, a work by the individual authors would not be as influential as the work would be if it were issued by the Advisory Committee.

Another possible drawback to a Best Practices Manual for forensic evidence is that it would be difficult to write. The authentication manual was not difficult because it was all about law. A manual on forensic evidence would probably require a dip into the deep end of the science pool. So there would be critical questions of which scientists should be enlisted to assist, how far the manual drills down into the science, etc.

A third possible reason for caution is that the Manual would be treading in an area where there is a lot of controversy on what is required to establish reliability for the feature-comparison methods. The costs of negotiating that controversy might not be worth the possibly limited payoff of a Best Practices Manual. Moreover, as shown in the case digest, courts have generally not budged from precedent in the face of reports from the National Academy of Sciences and PCAST. So on what basis can it be concluded that a Best Practices Manual will have any effect?

Finally, it might be argued that there already *is* a judiciary-sponsored Best Practices Manual on forensic evidence: the FJC Manual on Scientific Evidence contains a chapter on forensics. It is currently being updated. The head of the project, Joe Cecil, will be speaking to the Committee at its Spring meeting. Questions would include whether two separate projects on forensic evidence would result in duplication of effort, and whether the FJC Manual has had or will have any influence on courts or litigants. If citations are any indication, it appears so far that the Manual has had limited effect.

If the Committee does decide to launch a Best Practices Manual, the first step would be to put together a group of Committee members, lawyers, judges, professors, and scientists. That work could begin before the next meeting.

2. Committee Note: PCAST suggests that the Advisory Committee prepare a Committee Note to Rule 702 that would provide necessary standards for forensic evidence. As stated at the Symposium, a Committee Note cannot be promulgated independently of a Rule amendment. One suggested solution to that limitation is to make a minor change to the text and then append a comprehensive Committee Note to that. This alternative may raise objections from some members of the Standing Committee. Since around 2008, there has been an unwritten policy that Committee Notes are supposed to be terse, citation-free, and limited to explaining the amendment itself.³ It is unclear whether the current Standing Committee members share this view

³ A quick look at the Evidence Committee Notes from the period of 1996-2008, and comparing them to the later notes, is illustrative.

– which is essentially that Committee Notes should be as unhelpful as possible – but if there is such a view, then obviously a Committee Note along the line of PCAST’s suggestion would be problematic.

In theory, a Committee Note as envisioned by PCAST would be a Best Practices Manual but with the imprimatur of the Advisory Committee. As such it would have greater authority, would surely be relied upon and cited frequently, and would have the advantage of being subjected to a formal public comment period.

3. Outreach Efforts: Another possibility for Committee input is to assist in judicial education and lawyer education efforts regarding forensic evidence. Possibilities for members include presentations at FJC training conferences, lectures to prosecutors and defense lawyers, and input into standards promulgated by private and government organizations.⁴

E. Case Digests

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

1. Federal Appellate Cases on Forensic Evidence

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

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

We think that *Daubert* was satisfied here. When the district court denied a separate hearing it went through the exercise of considering the use of ballistic

⁴ The Reporter, over the last 22 years, has made about 100 presentations to judges and practitioners about new amendments to the Evidence Rules.

expert testimony in other cases. Then, before the expert's testimony was presented to the jury, the government provided an exhaustive foundation for Kuehner's expertise including: her service as a firearms examiner for approximately twelve years; her receipt of "hands-on training" from her section supervisor; attendance at seminars on firearms identification, where firearms examiners from the United States and the international community gather to present papers on current topics within the field; publication of her writings in a peer review journal; her obvious expertise with toolmark identification; her experience examining approximately 2,800 different types of firearms; and her prior expert testimony on between 20 and 30 occasions. Under the circumstances, we are satisfied that the district court effectively fulfilled its gatekeeping function under *Daubert*.

The court did impose a qualification on admitting ballistics testimony:

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

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

Ballistics – limitation on overstatement: *United States v. Parker*, 871 F.3d 590 (8th Cir. 2017): In a trial on charges of illegal possession of firearms, the defendant argued that the trial court erred in allowing testimony of a ballistics expert. The trial court prohibited the expert from testifying that she was "100% sure" or "certain" that the relevant guns matched the relevant shell casings. The defendant argued that the expert violated that restriction by describing the general reliability of the ballistics testing process. But the court, after reviewing the trial transcript, concluded that the expert's testimony "stayed within the bounds set by the district court." By implication, this may mean that it would be error for a ballistics expert to testify to "100% certainty of a match" – because such an opinion is not scientifically supportable.

Ballistics – reasonable degree of ballistics certainty: *United States v. Johnson*, 875 F.3d 1265 (9th Cir. 2017): In a felon-gun possession case, the expert testified that two bullets matched to a “reasonable degree of ballistics certainty.” The court found that this “qualification” was sufficient to justify admission of the expert testimony – i.e., the expert did not state, categorically that there was a match. The court rejected the defendant’s argument – based on a report and recommendation from National Commission of Forensic Science – that the “reasonable degree of ballistics certainty” test was itself insupportable and misleading. The court did not address the Commission report but instead simply relied on lower court cases employing the standard and stated that there was “only one case in which a ‘reasonable degree of ballistics certainty’ was found to be too misleading.” That case is *United States v. Glynn*, 578 F.Supp.2d 567 (S.D.N.Y. 2008). Finally, the court rejected the defendant’s argument that ballistics is inherently unreliable and fails to satisfy the Daubert factors. But instead of rebutting the defendant’s attack on ballistics as unscientific, the court simply relied on precedent and stated that the defendant had not cited a case in which ballistics testimony was “excluded altogether.”

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

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

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

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

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

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

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

Drug identification: *United States v. Carlson*, 810 F.3d 544 (8th Cir. 2016): The court affirmed convictions for selling misbranded synthetic drugs, finding no abuse of discretion in the admission of testimony from a DEA chemist regarding the substantial similarity in chemical

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structure between scheduled controlled substances and the products sold by the defendants. The entirety of the court's analysis is as follows:

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

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

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

Fabric-impression analysis found unreliable in part by trial court: *United States v. Williams*, 576 F.3d 385 (7th Cir. 2009): The defendants challenged the trial court's admission of an expert's conclusion that an impression on a glass door at the robbery scene was left by a non-woven fabric and could have been made by a glove. The expert also sought to testify that the impression was consistent with the pair of gloves containing Williams's DNA, but the district court excluded that testimony because it considered the underlying science, fabric impression analysis, unreliable under *Daubert*. The defendants argued that the admitted testimony relied on the same science as the excluded testimony – fabric impression analysis – and therefore also should have been excluded. The court of appeals did not rule on the argument, finding any error to be harmless.

Fingerprint identification: *United States v. Straker*, 800 F.3d 570 (D.C.Cir. 2015): The court rejected the defendant's argument that fingerprint identification, using the ACE-V method, was unreliable. The expert testified that there are two different types of error – the error rate in the methodology and human error. She further testified that there is a "zero rate of error in the methodology." She did not articulate the rate of human error, though she acknowledged the potential for such error. The defendant argued that the failure to articulate the rate of human error in the ACE-V methodology rendered her testimony based on that methodology inadmissible. But

the court disagreed, arguing that “the factors listed in *Daubert* do not constitute a definitive checklist or test” and that “[n]o specific inquiry is demanded of the trial court.” The court stated that the reliability of the ACE-V methodology was “properly taken for granted” because courts routinely find fingerprint identification based on the ACE-V method to be sufficiently reliable under *Daubert*.

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

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

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

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

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

Fingerprint identification: *United States v. Calderon-Segura*, 512 F.3d 1104 (9th Cir. 2008): This is an unusual case in which the defendant challenged fingerprint identification testimony which found a match when comparing two inked thumb-print exemplars. The court noted that the defendant’s challenge relied on questions about *latent* fingerprints, whereas the reliability and admissibility of comparison of two inked fingerprints is “well-established.” The court emphasized that the defendant made no showing that the exemplars “lacked clarity, were fragmented, or contained any other defects or artifactual interference that might call into question the accuracy or reliability of their identification.”

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

the relevant expert community” and also referred to testing “by other experts in the industry.” The court concluded that while acceptance by a community of unbiased experts “would carry greater weight, we believe that acceptance by other experts in the field should also be considered. And when we consider that factor with respect to fingerprint analysis, what we observe is overwhelming acceptance.”

Fingerprint identification: *United States v. Scott*, 403 Fed. Appx. 392 (11th Cir. 2010): The defendant challenged the expert’s use of the ACE-V method. The court simply relied on precedent to reject the challenge. In *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005), the court had concluded that the error rate of latent fingerprint examination was infinitesimal, and that latent fingerprint examiners follow a uniform methodology. The *Abreu* court also gave significant weight to the fact that latent fingerprint methodology was generally accepted – by the field of latent fingerprint examiners (which is not a large surprise). The *Scott* court concluded as follows:

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

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

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

Footwear-impression analysis found valid: *United States v. Turner*, 287 Fed. Appx. 426 (6th Cir. 2008): The defendant appealed the district court’s denial of his motion to exclude the boot-print analysis of the government’s expert. The court found no error. The court noted that both the government and defense expert testified that photographic analysis was recognized as a valid method of shoe-print analysis within the scientific community. The government expert testified that the government lab methods were tested by an independent agency once during the year, and that he had never failed a proficiency test. Also, the government presented evidence indicating that a book entitled *Footwear Impression Evidence* by William J. Bodziak stated that “[p]ositive identifications may be made with as few as one random identifying characteristic.” The court rejected arguments that an electrostatic method should have been used, and that the four points of comparison used by the government expert were insufficient to conclude that the boot and the print on the glass matched. It stated that “the government and defense experts disagreed as to whether the photographic or the electrostatic method would be better to use on the boot print at issue – not whether the photographic method was a valid method, tested and accepted by the larger scientific community. In addition, the record reveals that the experts also disagreed about the number of points of comparison necessary for a positive match between the boot and the print. These disputes go to the weight of the evidence rather than its admissibility.”

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

Gun residue testing upheld: *United States v. Stafford*, 721 F.3d 380 (6th Cir. 2013): In a felon-firearm prosecution, the defendant challenged gunshot-residue evidence. He argued that the testing is imprecise and that there is no consensus in the discipline as to how many particles must be identified in order to find a positive for residue. But the court found that the expert’s test had revealed five particles, and that this was more than the minimum allowed by the most stringent standard used by experts in the field. The defendant also argued that he could have been exposed to gunshot residue without ever having fired a gun. The court conceded that this was so, but concluded that this affected the probative value of the test result, not the reliability of the conclusion that five particles of gunshot residue were found on the defendant’s hands.

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

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

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

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

The court noted that the AFTE guidelines provide that a qualified examiner may determine that there is a match between a tool and a tool mark when there is “sufficient agreement” in the pattern of two sets of marks – meaning that “it exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with agreement demonstrated by toolmarks known to have been produced by the same tool.” The court noted that because toolmark determinations “involve subjective qualitative judgments” the accuracy of an examiner’s assessment “is highly dependent on skill and training.” The court concluded that the expert’s opinion that there was sufficient agreement between her test marks and the puncture marks found in the tires of a vehicle was “unreliable under the AFTE’s own standard because she has virtually no basis for concluding that the alleged match exceeds the best agreement demonstrated between tool marks known to have been produced by different tools.”

Post-Mortem Root Banding of Hair: *Restivo v. Hesseman*, 846 F.3d 547 (2nd Cir. 2017): In an unusual case, Restivo was convicted of murder, exonerated by DNA, and sued police officers for malicious prosecution. The victim’s hair was found in Restivo’s van and Restivo contended that an officer took hair from the victim at an autopsy and then planted it in the van. Experts

testified that the hair in the van exhibited post-mortem root banding (PMBR) which will not be found unless the hair was on a dead body for a number of hours. The parties conceded that if the victim was ever in the van, she was still alive. Thus, Restivo sought through expert testimony to prove the existence of PMBR on the hairs found in the van in support of his theory that they were planted after the autopsy. The trial court found that certain aspects of PMRB had not been established to “a reasonable degree of scientific certainty” [which is a standard that scientists don’t use and that the National Commission on Forensic Science has rejected]. But the trial court nonetheless admitted the testimony as non-scientific testimony that was reliable under *Kumho Tire*. The trial court found that the experts were using the same degree of intellectual rigor in reaching their opinion as they would in their real life as experts. The court also found that the rate of error was low, and that the experts’ opinions were consistent with the academic literature. The court of appeals found no abuse of discretion.

2. Federal District Court Cases on Forensics

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

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

Ballistics: *United States v. Sleugh*, 2015 WL 3866270 (N.D. Cal. 2015): The court allowed a ballistics expert to testify. The defendant argued that photographs of the two shell casings appeared dissimilar to a layperson’s eye. This did not trouble the court, because the defendant “conceded Smith is highly qualified and did not point out any flaws in Smith’s methodology that would render his resulting opinion unreliable.” The court emphasized that the

expert had reached only limited conclusions, and accurately rendered those limitations – he stated that his comparison only pointed to the possibility that a firearm of the class depicted was used during the shooting, and conceded that many others may have been used instead.

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

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

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

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

Because of the limitations on the reliability of firearms identification evidence discussed above, [the expert] will not be permitted to testify that his methodology allows him to reach this conclusion as a matter of scientific certainty. [The expert] also will not be allowed to testify that he can conclude that there is a

match to the exclusion, either practical or absolute, of all other guns. He may only testify that, in his opinion, the bullet came from the suspect rifle to within a reasonable degree of certainty in the firearms examination field.

Ballistics: *United States v. Otero*, 849 F. Supp. 2d 425 (D.N.J. 2012): The court denied a motion to exclude the government's expert on the subject of firearms and toolmark identification. The court addressed the impact of the NAS report:

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

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

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

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

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

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

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

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

On the *Daubert* factors, the court concluded that 1) the “AFTE methodology has been repeatedly tested”; 2) “The AFTE itself publishes within the field of toolmark and firearms identification.”; 3) “Studies have shown that the error rate among trained toolmark and firearms examiners is quite low” (citing studies finding error rates between 0.9% and 1.5%); 4) “the AFTE’s ‘sufficient agreement’ standard is the field’s established standard * * * but the fact that a standard exists does not necessarily bolster the AFTE methodology’s reliability or validity, as it remains a subjective inquiry”; and 5) the AFTE theory “has been widely accepted in the forensic science community.”

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

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

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

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

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

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

Ballistics: *United States v. Wrensford*, 2014 WL 3715036 (D.V.I. July 28, 2014): The court allowed a ballistics expert to testify to a match. It noted that “although the comparison methodology and the sufficient agreement standard inherently involves the subjectivity of the examiner’s judgment as to matching toolmarks the AFTE theory is testable on the basis of achieving consistent and accurate results.” The court relied heavily on precedent. It found that the method of comparison was peer reviewed by validation studies published in the journal of the Association of Firearm and Toolmark Examiners. The court found the method was generally accepted – in the field of firearm and toolmark experts. It also relied on the fact that results must be confirmed by a second firearm examiner. The court also concluded, on the basis of the expert’s assertion, that the rate of error was “close to zero.” Finally the court rejected the argument that the subjectivity inherent in the process was sufficient grounds for excluding an expert’s opinion:

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

Bite mark (mis)identification: *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036 (N.D. Ill. 2015): The plaintiff was convicted of rape and assault. At his trial two bite mark experts testified that it was the defendant who bit the victim. He was eventually exonerated and brought a civil rights action against the dentists. The court granted summary judgment for the dentists. On the question of bite mark evidence, the court discussed the NAS report and other articles, and concluded that it is “doubtful that ‘expert’ bite mark analysis would pass muster under Federal Rule of Evidence 702 in a case tried in federal court.” But the court noted that nonetheless “state courts have regularly accepted bite mark evidence—including in all three States in the Seventh

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Circuit.” So the question was not whether bite mark evidence is now found to be unreliable, but whether was, at the time of the defendant’s trial, so outrageous as to amount to a malicious use of unreliable evidence. The defendant argued that the dentist’s opinions in this case were so far outside the norms of bite mark matching, such as they were in 1986, that their testimony violated due process. But the court determined that while the experts overstated their conclusions and made analytical errors, nothing they did rose to the level of a due process violation.

Chemical traces: *United States v. Zajac*, 749 F. Supp. 2d 1299 (D. Utah 2010): The defendant was charged with bombing a library, and he moved to exclude expert testimony regarding trace evidence – the consistency between the adhesives on the bomb and those found at the defendant’s residence. The court noted that the 2009 NAS Report found problems with current forensic science standards in many areas, including paint examination. “While this case pertains to adhesives rather than paints, both are polymers that require microscopic examination, instrumental techniques and methods, and scientific knowledge for proper identification. Thus, the NAS Study is instructive here and lends support to the efficacy of [the expert’s] tests.” The court stated that *Daubert* did not require the expert to “conduct every conceivable test to determine consistency with absolute certainty. Instead, her tests had to be reliable rather than merely subjective and speculative.” The expert in this case used four different instruments to determine consistency, and while that did not go to the level of confidence specified that the defendant desired, “*Daubert* does not require a validation study on every single compound tested through these instruments.” The court noted that the instruments were designed to analyze many compounds and “there is no evidence before the court that Michaud misapplied techniques or methods when she conducted her analysis.” Ultimately the court concluded that the tests were sufficient for the expert to be able to opine on the visual, chemical, and elemental consistency between the adhesives on the bomb and those found at the defendant’s residence. However, the court held that the expert could not testify to a conclusion that the adhesives came from the same source, as that would be overstating the results.

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

The Court concludes that Dr. Lyter’s failure to use basic quality control protocols—including those required in the two papers he purportedly relies on—demonstrates that he lacks “good grounds” for his conclusions. *Amorgianos*, 303 F.3d at 267-69 (upholding trial court’s determination that proposed expert

testimony was unreliable because expert witness “failed to apply his own methodology reliably”). * * *

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

Dr. Lyter has not provided any justification for these substantial deviations from the methodology he claims to have followed, other than his subjective belief that these quality control protocols are unnecessary. Precedent makes clear, however, that an expert is not free to deviate—without justification—from the requirements of a methodology he claims to have followed.

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

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

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

The defendant argues that, as a matter of law, low copy number DNA samples produce inherently unreliable comparison results and, therefore, must be excluded from evidence or, in the alternative, warrant a *Daubert* hearing in all circumstances to determine whether the resulting findings were reliable. The defendant has not provided any binding authority—or, indeed, any legal authority—finding as a matter of law that a small sample size results in data that is inherently unreliable. At most, the defendant’s authority suggests there may be a correlation between sample size and the frequency of stochastic effects—

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randomized errors resulting from contamination that could potentially render a comparison unreliable. See *McCluskey*, 954 F.Supp.2d at 1277 (“LCN testing carries a greater potential for error due to difficulties in analysis and interpretation caused by four stochastic effects: allele drop-in, allele drop-out, stutter, and heterozygote peak height imbalance.”); see also *United States v. Morgan*, 53 F.Supp.3d 732, 743 (S.D.N.Y.2014) (“Although the presence of stochastic effects tends to correlate with DNA quantity, it is possible that a 14–pg sample may exhibit fewer stochastic effects than a 25–pg sample and therefore provide better results.”). However, as the defendant’s own authority explains, the critical inquiry remains whether there is evidence of unreliability (e.g., stochastic effects) in a particular case; there is no per se rule regarding sample size as called for by the defendant.

To rebut the defendant’s reliability challenge on this basis, the government offered assurances that its serologist had not observed any stochastic effects. The defendant has had access to the serologist’s report and hundreds of pages of underlying data for some time, and has not put forth a contrary proffer or evidence of unreliability in this specific case. Under such circumstances, and in light of the limited scope of the challenge and the general admissibility of DNA comparison testing, the Court finds no need to hold a *Daubert* hearing on this question on the present record.

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

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

Gordon cannot point to any evidence that Kim failed to abide by established protocol. Instead, he challenges the assumptions underlying her interpretation of the data. Gordon has all the information he needs regarding Kim’s analysis to cross-examine her at trial. It would be improper to exclude such evidence from the

purview of the jury when the lab utilized reliable methods that meet the standards under *Daubert*.”

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

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

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

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

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

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

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

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

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

As to low copy number (LCN) Testing – which is a way of testing DNA that has become degraded or is only a small sample – the court observed that "PCR/STR analysis of low-level DNA

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has been tested, and has been found to exhibit stochastic effects rendering the DNA profiles unreliable.” Moreover peer review and publications “have raised serious questions about the reliability of testing low amounts of DNA and accounting for stochastic effects.” And the reliability of LCN testing is not generally accepted in the relevant scientific community.

DNA Identification – LCN testing: *United States v. Morgan*, 53 F. Supp. 3d 732 (S.D.N.Y. 2014): The defendant was charged with felon-firearm possession. He moved to exclude any evidence of low copy number (“LCN”) DNA test results of samples taken from the gun at issue. The court denied the motion, concluding that the methods of LCN DNA testing that the New York City Office of the Chief Medical Examiner (“OCME”) employed are sufficiently reliable to satisfy *Daubert*. The court stated that “[a]lthough the Court in *United States v. McCluskey* ruled LCN testing evidence from a New Mexico lab to be inadmissible, its finding rested, at least partially, on that lab’s lack of certification and validation of its LCN testing.” [In fact that was only a very small part of the *McCluskey* court’s reasoning.] The court held that the government “has clearly established that [the] validation studies are scientifically valid and bear a sufficient analytical relationship to their protocols. Thus, Morgan’s objections go to the weight to be accorded to the evidence, not to its admissibility. * * * Although OCME could have conducted more validation studies with degraded or crime-stain mixture samples, under *Daubert*, scientific techniques need not be tested so extensively as to create an absolute certainty in their reliability. Thus, additional validation studies using crime-stain or degraded mixture samples might have bolstered the strength of OCME’s conclusions, but are not prerequisites to a finding of reliability sufficient to satisfy the *Daubert* test.”

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

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

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

Fingerprints: *United States v. Love*, 2011 WL 2173644 (S.D. Cal.): The court denied a motion to exclude an expert’s conclusion that the defendant’s fingerprints matched fifteen latent prints. It recognized that “the NAS Report called for additional testing to determine the reliability

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of latent fingerprint analysis generally and of the ACE–V methodology in particular” and that the Report “questions the validity of the ACE–V method.” But the court concluded that “*Daubert*, *Kumho*, and Rule 702 do not require absolute certainty.” Instead, “they ask whether a methodology is testable and has been tested.” The court concluded that “latent fingerprint analysis can be tested and has been subject to at least a modest amount of testing—some of which, like the study published in May 2011, was apparently undertaken in direct response to the NAS’s concerns.” The court also noted that “the ACE–V methodology results in very few false positives” and that “despite the subjectivity of examiners’ conclusions, the FBI laboratory imposes numerous standards designed to ensure that those conclusions are sound.” Concluding on the NAS report, the court stated that “[i]nstead of a full-fledged attack on friction ridge analysis, the report is essentially a call for better documentation, more standards, and more research.”

Fingerprints ---PCAST Report: *United States v. Casaus*, 2017 WL 6729619 (D. Colo.): The defendant moved to exclude latent fingerprint identification evidence, challenging the reliability of the ACE-V method. The court denied the motion. The defendant relied heavily on the PCAST report, but the court relied on precedent:

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

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

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

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

[C]ourts have rejected this precise argument [that latent fingerprint analysis is unreliable] and have concluded that while there may be a need for further research into fingerprint analysis, this need does not require courts to take the “drastic step” of excluding a “long-accepted form of expert evidence” and “bedrock forensic identifier.” *Stone*, 2012 WL 219435, at *3 (quoting *United States v. Crisp*, 324 F.3d 261, 268, 270 (4th Cir.2003)); see also *United States v. Cerna*, 2010 WL 3448528 (N.D.Cal.) (noting that the “NAS report may be used for cross-examination or may offer guidance for fact-specific challenges,” and that the methodology “need not be perfect science to satisfy *Daubert* so long as it is sufficiently reliable”); *United States v. Rose*, 672 F.Supp.2d 723, 725–726 (D.Md.2009).

Fingerprints – after PCAST: *United States v. Bonds*, 2017 WL 4511061 (N.D. Ill.): The court upheld the use of latent fingerprint identification under the ACE-V method. The defendant argued that ACE-V is not a reproducible and consistent means of determining whether two prints have a common source and that ACE-V’s false positive rate is too high to justify reliance on it in a criminal trial. He relied on the PCAST report, which raises concerns about the subjective nature of fingerprint analysis and calls for efforts to validate the methodology through black box studies. But the court relied on precedent to reject the PCAST findings. It noted that the defendant’s arguments have been rejected by the Seventh Circuit in *Herrera, supra*, which noted that the “methodology requires recognizing and categorizing scores of distinctive features in the prints, and it is the distinctiveness of these features, rather than the ACE-V method itself, that enables expert fingerprint examiners to match fingerprints with a high degree of confidence.” The court stated that “[a]lthough the PCAST Report focuses on scientific validity, the Court agrees with *Herrera*’s broader reading of Rule 702’s reliability requirement.” The court also noted that the PCAST report was not completely negative on latent fingerprint analysis, as PCAST concluded that “latent fingerprint analysis is a foundationally valid subjective methodology—albeit with a false positive rate that is substantial and is likely to be higher than expected by many jurors based on longstanding claims about the infallibility of fingerprint analysis.” The court concluded that “[a]lthough the PCAST Report suggested that accurate information about limitations on the reliability of the evidence be provided, this information concerning false positive rates, in addition to the other concerns raised in the PCAST Report * * * goes to the weight of the fingerprint evidence, not its admissibility. Bonds will have adequate opportunity to explore these issues on cross-examination.”

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

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

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

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

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

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

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

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

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

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

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

Comment: There are many challengeable assertions in the court’s application of the *Daubert* factors. To take what is probably the most important: the *Daubert* Court’s reference

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to testing goes to whether the *method* can be verified empirically. That methodology-based focus is different from whether the *expert* is trained.

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

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

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

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

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at 269 (holding a district court was ‘within its discretion in accepting at face value the consensus of expert and judicial communities that the fingerprint identification technique is reliable’).” The court stated that the NAS report has “usefully pointed out areas in which standards governing friction ridge analysis should continue to develop” but that its critique was “insufficiently penetrating to warrant the exclusion of Dwyer’s testimony.”

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

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

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

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

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

Federal appellate courts have been unanimous in approving expert testimony in the field of handwriting analysis. Rather than to exclude handwriting analysis as “junk science,” as urged by defendant, the Court finds the process of

handwriting analysis sufficiently reliable to satisfy *Daubert* and the Federal Rules of Evidence and declines to depart from the clear majority of courts weighing in on the issue. Moreover, despite the uneven treatment of handwriting experts by district courts, every appellate court to have considered the issue of handwriting testimony has held that the expert's ultimate opinion was admissible.

Handwriting: *Boomj.com v. Pursglove*, 2011 WL 2174966 (D. Nev.): The court rejected a challenge to testimony of a handwriting expert. It relied heavily on the fact that “[t]he Ninth Circuit and six other circuits have already addressed the admissibility of handwriting expert testimony and determined that handwriting expert testimony can satisfy the reliability threshold.” It concluded that “handwriting analysis is a tested theory, it has been subject to peer review and publication, there is a known potential rate of error and there are standards controlling the technique’s operation, and it enjoys general acceptance within the relevant scientific community.”

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

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

Even though the district court in *United States v. Oskowitz*, 294 F.Supp.2d 379, 383–384 (E.D.N.Y.2003) partially limited a handwriting expert's testimony, the Second Circuit has “never held that a handwriting expert may not offer an opinion on the ultimate question of authorship.” *A.V. by Versace, Inc.*, 2006 U.S. Dist. LEXIS 62193 at *269 fn. 14. In fact, no Second Circuit district court has wholly excluded “the testimony of a handwriting expert based on a finding that forensic document examination does not pass the *Daubert* standard.” *Id.* And, the Second Circuit itself has routinely alluded to expert handwriting analysis without expressing any discomfort as to its admissibility. *See, e.g., United States v. Tin Yat Chin*, 371 F.3d 31, 39 (2d Cir.2004) (referring to defendant's proffer of a handwriting expert); *United States v. Badmus*, 325 F.3d 133, 138 (2d Cir.2003) (discussing government's use of expert testimony to identify defendant's handwriting on series of documents).

Handwriting – excluded: *Almeciga v. Center for Investigative Reporting*, 2016 WL 2621131 (S.D.N.Y.): Judge Rakoff rejected the opinion of a handwriting expert that a signature on a release was forged. His analysis is extensive. He noted that while courts were originally skeptical of allowing handwriting experts to testify, the practice became prevalent after the Lindbergh case. But he also noted that in the last few years some courts have become more

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skeptical, because “even if handwriting expertise were always admitted in the past (which it was not), it was not until *Daubert* that the scientific validity of such expertise was subject to any serious scrutiny.” Judge Rakoff observed that in the Second Circuit, “the issue of the admissibility and reliability of handwriting analysis is an open one. See *United States v. Adeyi*, 165 Fed.Appx. 944, 945 (2d Cir.2006) (“Our circuit has not authoritatively decided whether a handwriting expert may offer his opinion as to the authorship of a handwriting sample, based on a comparison with a known sample.”) As such, the Court is free to consider how well handwriting analysis fares under *Daubert* and whether Carlson's testimony is admissible, either as ‘science’ or otherwise.”

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

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

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

Rate of Error: There is little known about the error rates of forensic document examiners. * * * Certain studies conducted by Dr. Moshe Kam, a computer scientist commissioned by the FBI to research handwriting expertise, have suggested that forensic document examiners are moderately better at handwriting identification than laypeople. For example, in one such study, the forensic document examiners correctly identified forgeries as forgeries 96% of the

time and only incorrectly identified forgeries as genuine .5% of the time, while laypeople correctly identified forgeries as forgeries 92% of the time and incorrectly identified forgeries as genuine 6.5% of the time. * * * Although such studies may seem to suggest that trained forensic document examiners in the aggregate do have an advantage over laypeople in performing particular tasks, not all of these results appear to be statistically significant and the methodology of the Kam studies has been the subject of significant criticism. * * * [I]n a 2001 study in which forensic document examiners were asked to compare (among other things) the “known” signature of an individual in his natural hand to the “questioned” signature of the same individual in a disguised hand, examiners were only able to identify the association 30% of the time. Twenty-four percent of the time they were wrong, and 46% of the time they were unable to reach a result.

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

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

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

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

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

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

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

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

Handwriting: *DRFP L.L.C. v. Republica Bouvariana De Venezuela*, 2016 WL 3996719 (S.D. Ohio 2016): In a suit on promissory notes, with an allegation of forgery, the defendants offered the testimony of a handwriting expert. The court rejected the plaintiff’s motion to exclude the expert.

Skye argues that Browne’s methodology is inherently subjective and empirically unreliable. Skye points to Browne’s own testimony that handwriting analysis is not scientific, it is not capable of empirical testing, all persons vary their signatures from one time to the next, no data can establish the frequency with which stylistic details recur in a person’s signature, and it is impossible for Browne to determine his own error rate. Each of these critiques focuses on handwriting evidence in general, rather than on Browne’s credentials or his specific methodology. The Sixth Circuit, however, has squarely ruled that handwriting analysis falls into the ‘technical, or other specialized knowledge’ component of Federal Rule of Evidence 702. *U.S. v. Jones*, 107 F.3d 1147, 1157-59 (6th Cir. 1997).

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

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

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

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

The government cites to a number of studies as demonstrating that handwriting is unique, including some showing that twins’s writings were individualistic and others demonstrating computer software’s ability to measure selected handwriting features. Defendant contends that these studies are problematic, and that even one of the government’s own studies states that “the individuality of writing in handwritten notes and documents has not been established with scientific rigor.” * * *

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

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

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

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

the accuracy of examiners' assessments is "highly dependent on their skill and training." * * * Even with new technology, "the decision of the [tool mark] examiner remains a subjective decision based on unarticulated standards."

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

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

II. Issues Raised at the Symposium Regarding *Daubert* Hearings

At the Symposium, a number of participants raised issues about *Daubert* hearings that the Committee may wish to investigate. Some of the points raised were:

- *Daubert* hearings are proliferating; in complex cases, virtually every witness is subjected to a *Daubert* hearing.
- *Daubert* hearings are often used not only to get an expert excluded, but also to pummel the expert so that the witness is damaged at trial – kind of like a prize fight where the strategy is to hit hard in the first rounds to soften the opponent up for the later rounds.
- *Daubert* hearings are often very time-consuming, and they can slow down the trial and impose substantial costs.
- Efficient case management principles are required to tee up *Daubert* issues early in the process.
- *Daubert* rulings and hearings in criminal cases are made more difficult by the fact that the government's discovery obligations are more limited than they are in civil cases.
- Creative solutions, such as hot-tubbing the experts, or a tutorial for the judge, might improve the process.

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- Procedural hurdles are sometimes placed before the parties that make it difficult for them to fully present their expert’s opinion and methodology. Specifically, an opportunity to cure should be provided.
- Opponents should have to make a prima facie case of unreliability before being entitled to a *Daubert* hearing.
- Some judges, to avoid delaying the trial, do a “drive by” on *Daubert*.
- Page limitations should be imposed, and parties should be required to locate in their submitted papers the specific areas of disagreement between the parties and specific grounds for excluding experts.
- Trial dates should not be moved to accommodate *Daubert* hearings.

Most of these problems and suggestions above are probably more accurately labeled as procedural, rather than evidentiary. For example, the call for broader discovery of expert testimony in criminal cases is now on the agenda of the Criminal Rules Committee. The Evidence Rules Committee may wish to consider whether any of the above suggestions and problems are worth addressing, and if so whether the solution lies in Evidence rulemaking or instead as part of some joint project with the Civil and Criminal Rules Committees.

III. Factual Basis and Reliable Application Treated as Questions of Weight and Not Admissibility

Two members of the public – Professor David Bernstein and Eric Lasker, Esq.– have submitted a proposal to amend Evidence Rule 702. It is the Committee’s responsibility to consider suggestions from the public for change to the Evidence Rules. This proposal was submitted more than a year ago and it was tabled to await consideration after the Symposium, when other issues regarding expert testimony would also be on the agenda.

The proposal to amend Rule 702 is set forth in an article in 57 *William and Mary Law Review* 1 (2015). This memo summarizes the suggestions for change and the stated reasons for change, and analyzes whether an amendment may be necessary. The memo is divided into three parts. Part One discusses the 2000 amendment to Rule 702, which is the focus of the article. Part Two discusses the author’s complaints about case law that ignores or misapplies Rule 702 as it has been amended, and sets forth the authors’ proposed amendment to Rule 702, which is intended to bring wayward courts back into line. And Part Three provides the Reporter’s observations on the authors’ proposed amendments.

I. The 2000 Amendment to Rule 702

The authors focus on the section of Rule 702 that was amended in 2000, in response to *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), and its progeny. That part of Rule 702 sets forth the following reliability-based requirements for expert testimony to be admissible:

- (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.

The 2000 amendment was designed to distill and codify the many strands of doctrine that started in *Daubert* and that were developed in later case law in both the Supreme Court (*General Electronic v. Joiner* and *Kumho Tire v. Carmichael*) and in the lower courts. The goal was to provide some structure for courts and litigants, so that they would not have to trudge through all the case law to determine what standards needed to be met before the trial judge could admit expert testimony.⁵

II. Admissibility Requirements Added by the 2000 Amendment

The 2000 amendment added three admissibility requirements to Rule 702. As restyled, these are subdivisions (b), (c) and (d). Strictly speaking, only subdivision (c), requiring reliable principles and methods, can be found explicitly in *Daubert*. But when the Advisory Committee looked over the vast post-*Daubert* case law, as well as the underlying principles in *Daubert*, *Joiner* and *Kumho*, it saw that the other two requirements had been established as well. The other two requirements – sufficient basis and proper application – are obviously required if the goal is to assure that expert testimony must be reliable to be admissible. They are really inseparable from the requirement of reliable principles and methods. A short discussion of these factors will explain the point.

Subdivision (b) – Sufficient facts or data: The requirement of sufficient facts or data means that an expert’s opinion must be grounded in sufficient investigation or research. Some have called it the “homework” requirement – the expert must have done her homework before testifying. To take a simple example, an expert should not be permitted to testify to causation in a toxic tort case

⁵ Another goal, frankly, was to issue a Committee Note that would provide substantial and detailed guidance into the meaning of *Daubert* and its progeny; that would instruct on how to use the *Daubert* factors; and that would assist courts and litigants in determining which questions about experts would go to weight and which to admissibility. Because a Committee Note cannot be freestanding, an amendment was necessary; the amendment was intended to codify and expand upon, not to depart from, *Daubert*. The Rule 702 Committee Note, by the way, has been cited by courts more times than any other Committee Note in the Evidence Rules.

on the basis of studies that have been conducted, if she has only looked at a small percentage of those studies. Reviewing studies might well be a reliable method for coming to a conclusion, but if you don't read enough of them – or if you cherry-pick them – the opinion that is drawn will be unreliable. Similarly, assume that a hydrologist is called to testify that contaminated water from an industrial plant flowed into the plaintiff's well four miles away. The reliable method for that conclusion is to take samples at various points to track the underground water flow. But if the expert has taken only one sample, she would be relying on insufficient facts or data. Finally, assume that an accidentologist would testify to the cause of an accident, but never bothered to view the accident scene. No matter how reliable the methodology, the claim can be made that the opinion is speculative because it is insufficiently grounded in the facts or data. *See, e.g., Pelletier v. Main Street Textiles, LP*, 470 F.3d 48 (1st Cir. 2006) (expert on safety practices was properly excluded because he never inspected the facilities and equipment at issue, and so he lacked sufficient facts or data on which to base an opinion).

Subdivision (d) – Reliable application: The Court in *Daubert* declared that the “focus, of course, must be solely on principles and methodology, not on the conclusions they generate.” 509 U.S. at 595. Yet as the Court later recognized, “conclusions and methodology are not entirely distinct from one another.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Under the amendment, as under *Joiner*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would never reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. As the Advisory Committee Note states, the 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.” This insight – about the need for court review of how the method was applied – came from Judge Becker, in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3^d Cir. 1994), where he stated that “any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.” The question of reliable application was at the heart of the PCAST report – which emphasized that even reliable methodologies result in unreliable information if the methodology is put to an inappropriate purpose (like bite-mark evidence).

In sum, the 2000 amendment specifies that sufficient basis and application of method are admissibility requirements – the judge must be satisfied by a preponderance of the evidence that the expert has relied on sufficient facts or data, and that the expert has reliably applied the methods. It is not the case that the judge can say, “I see the problems, but they go to the weight of the evidence.” After a *preponderance* is found, then any slight defect in either of these factors becomes a question of weight. But not before.

The Case for an Amendment to Rule 702

Bernstein and Lasker’s primary complaint is that some lower courts have essentially ignored Rule 702 subdivisions (b) and (d). The authors state that despite the Rules Committee’s clear instruction that sufficient facts or data and reliable application are both admissibility requirements (to be established to the court by a preponderance of the evidence), some courts have treated them as questions of weight – so any doubt about foundation or application go to the jury. The authors conclude that while the 2000 amendment “appeared sufficient at the time to rein in recalcitrant judges who had tried to evade the *Daubert* trilogy’s exacting admissibility standards, with the benefit of hindsight, it is now clear that the Judicial Conference failed to account for the tenacity of those who prefer the pre-*Daubert* approach to expert testimony.”

The authors conclude, rather insultingly, that “the partial failure of the 2000 amendments can be attributed to faulty draftsmanship, because the amendments’ language is insufficiently blunt to restrain judges who are inclined to resist a strong gatekeeper rule.”⁶

A. Examples of Wayward Case Law

The authors cite a number of instances in which lower courts have appeared to disregard either Rule 702(b) or Rule 702(d), ending up with rulings that are “far more lenient about admitting expert testimony than any reasonable reading of the Rule would allow.” Here are some examples provided, as well as a few newer cases:

1. Rule 702(b) (Sufficient Basis) Examples

Milward v. Acuity Specialty Products Group, Inc., 639 F.3d 11 (1st Cir. 2011): Here the court states that “when the factual underpinning of an expert’s opinion is weak it is a matter affecting the weight and credibility of the testimony – a question to be resolved by the jury.”

United States v. Tavares, 843F.3d 1(1st Cir. 2016): The court rejected the defendant’s argument that a police officer’s conclusion about the rate of useable fingerprints from examined firearms was based on an insufficient foundation: “we think that any question about the factual underpinnings of Auclair’s opinion goes to its weight, not to its admissibility.”

⁶ It’s nice, though, that they say that the Advisory Committee, in promulgating the 2000 amendment, “had no discernable agenda beyond improving the quality of expert testimony admitted in American courts.” Nice, but not quite accurate. The correct statement is that the Committee “had no discernable agenda other than implementing the standards of *Daubert* and its progeny and providing a uniform structure for assessing expert testimony in light of all the case law.” There is a difference in the two descriptions. Any attempt to “improve the quality of expert testimony” came from the courts, not the Advisory Committee. Many public comments argued that the 2000 amendments favored defendants in civil cases because of its strict standards. The response from the Committee was that any complaint about rigorous standards should be addressed to the Court – as they came from the Court in the *Daubert* trilogy.

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Bresler v. Wilmington Trust Co., 855 F.3d 178 (4th Cir. 2017): An expert's damage estimates were found properly admitted. The court stated 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. **Contra**, *Niese v. Ford Motor Co.*, 848 F.3d 219 (4th Cir. 2017): the district court erred under *Daubert* in treating factual sufficiency as a question of weight and not admissibility.

Kuhn v. Wyeth, Inc., 686 F.3d 618, 633 (8th Cir. 2012): An expert who ignored studies was excluded by the district court, but the court of appeals found an abuse of discretion, holding that the sufficiency of an expert's basis is a question of weight and not admissibility. *See also United States v. Finch*, 630 F.3d 1057 (8th Cir. 2011) (the sufficiency of the factual basis for an expert's testimony goes to credibility rather than admissibility, and only where the testimony "is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded").

In re Chantix Prods. Liab. Litig., 889 F.Supp.2d 1272, 1288 (N.D. Ala. 2012) (finding that an expert's decision to ignore data from clinical trials "is a matter for cross-examination, not exclusion under *Daubert*").

In re Urethane Antitrust Litig., 2012 WL 6681783, at *3 (D.Kan.) ("The extent to which [an expert] considered the entirety of the evidence in the case is a matter for cross-examination.").

Bouchard v. Am. Home Prods. Corp., 2002 WL 32597992, at *7 (N.D. Ohio) ("If the plaintiff believes that the expert ignored evidence that would have required him to substantially change his opinion, that is a fit subject for cross-examination.").

2. **Rule 702(d) (Reliable Application) Examples**

Walker v. Gordon, 46 F. App'x 691, 696 (3rd Cir. 2002) ("because [plaintiff] objected to the application rather than the legitimacy of [the expert's] methodology, such objections were more appropriately addressed on cross-examination and no *Daubert* hearing was required").

United States v. Gipson, 383 F.3d 689, 696 (8th Cir. 2004): The court drew a distinction between "on the one hand, challenges to a scientific methodology, and, on the other hand, challenges to the application of that methodology." It stated that "when the application of a scientific methodology is challenged as unreliable under *Daubert* and the methodology itself is otherwise sufficiently reliable, outright exclusion of the evidence in question is warranted only if the methodology was so altered by a deficient application as to skew the methodology itself." The court relied on pre-2000 authority for this proposition.

City of Pomona v. SQM N.Am. Corp. 750 F.3d 1036, 1047 (9th Cir. 2014): The case involved contamination of water, and the City's expert conducted a test to determine the source of the contaminant. There are protocols for conducting such testing and the expert deviated from the

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protocols. The court found that “expert evidence is inadmissible where the analysis is the result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community to pass muster under *Daubert*.” For this proposition the court relied on pre-2000 9th Circuit case law. The court reversed a lower court decision to exclude the expert.

Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1343 (11th Cir. 2003): The court found it “important to be mindful” of a distinction between the reliability of a methodology and of the application of the methodology in the case, and rejected a *Daubert* challenge based on unreliable application, relying on case law that preceded *Daubert*.

United States v. McCluskey, 954 F.Supp.2d 1227, 1247-48 (D.N.M. 2013) (“the trial judge decides the scientific validity of underlying principles and methodology” and “once that validity is demonstrated, other reliability issues go to the weight – not the admissibility – of the evidence”).

Proctor & Gamble Co. v. Haugen, 2007 WL 709298, at *2 (D.Utah) (“Where the court has determined that plaintiffs have met their burden of showing that the methodology is reliable, the expert’s application of the methodology and his or her conclusions are issues of credibility for the jury.”).

Oshana v. Coca-Cola Co., 2005 WL 1661999, at *4 (N.D.Ill.) (“Challenges addressing flaws in an expert’s application of reliable methodology may be raised on cross-examination.”).

United States v. Adam Bros. Farming, 2005 WL 5957827, at *5 (C.D.Cal.) (“Defendants’ objections are to the accuracy of the expert’s application of the methodology, not the methodology itself, and as such are properly reserved for cross-examination.”).

See also Faigman, Slobogin and Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 11 Nw. U.L.Rev. 860, 863 (2016):

Only a minority of courts have required that the judge preliminarily determine that the expert’s conclusion was reliably reached using a reliable methodology. Most courts hold that the judge’s sole concern is whether the expert followed an acceptable methodology, and other decisions have even punted some types of methodological issues to the jury.

3. *Other Complaints of Judicial Non-compliance*

The authors have a few other complaints about some of the post-2000 cases:

a. *Erroneous standard of review*

Some appellate courts have allegedly failed to apply the abuse of discretion standard to trial court determinations excluding expert testimony. The example that the authors give is *Johnson v. Mead Johnson & Co.*, 745 F.3d 557, 562 (8th Cir. 2014), where the court stated that the “liberal admission of expert testimony” called for by *Daubert* “creates an intriguing juxtaposition with our oft-repeated abuse-of-discretion standard of review.” The authors accuse the court of “paying lip service” to the abuse of discretion standard but actually applying de novo review to the trial court’s exclusion of expert testimony. If courts in fact are abandoning the abuse of discretion standard, that would be clear error, because the central holding of *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) is that appellate courts must apply the abuse of discretion standard of review to the trial court’s decision to admit or exclude expert testimony.

b. *Failure to regulate the reliability of the expert’s basis*

Some courts have allegedly failed to assess the reliability of the information on which an expert relies. This would be a misapplication not of Rule 702, but rather of Rule 703, which requires experts to limit consideration of facts or data to that which is reasonably relied upon by other experts in the field. As *Daubert* noted, Rule 702 must be read together with Rule 703. The Committee Note to the 2000 amendment to Rule 702 clarifies the relationship between these two rules in regulating the facts or data on which an expert relies:

When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information – whether admissible information or not – is governed by the requirements of Rule 702.

In other words, with regard to the expert’s basis of information, Rule 702 imposes a *quantitative* requirement, while Rule 703 imposes a *qualitative* requirement. The authors, however, argue that this nuance is lost on some courts, and that “despite the direction in *Daubert* that Rule 702 be read in tandem with Rule 703, Rule 703 is frequently ignored in *Daubert* analyses.” The authors cite as an example the Seventh Circuit case of *Manpower, Inc., v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013), where the court stated that “the reliability of data and assumption 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.”

c. *Failure to require testing*

As the 2000 Committee Note emphasizes, an important factor set forth in *Daubert* (and thus in the Rule) is that the expert’s methodology must be subject to testing. They note correctly that the Advisory Committee chose not “to delineate specific standards that courts must employ in

regulating expert testimony, and it did not add any specific language about the scientific method or testability to amended Rule 702.” Rather, testability is found in *Daubert* itself and in the Committee Note.

The Committee has always avoided setting forth lists of relevant factors in the text of Evidence Rules, on the ground that a Rule is not a treatise, and any list is bound to be underinclusive. Also, adding something specific about scientific expert testimony would have been odd because one of the major points of the amendment was to make clear that the *Daubert* gatekeeping standards apply to *all* expert testimony, scientific and nonscientific.

In any case, the authors contend that the Committee’s decision not to explicit add testability to a list of relevant factors “arguably opened the door for a renewed assault on the scientific methodology requirement for the admission of scientific testimony.” The example given for this “assault” is the First Circuit’s decision in *Milward v. Acuity Specialty Products Group, Inc.* 639 F.3d 11 (1st Cir. 2011), in which the court allowed an expert to opine about the cause of leukemia by using a “weight of the evidence” methodology. According to the authors, the weight of the evidence methodology is not scientific because it is only a hypothesis and it is not subject to testing.

B. The Authors’ Proposed Solution

The authors propose the following amendments to Rule 702, designed to prevent the judicial waywardness that they criticize:

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 the testimony satisfies each of the following requirements:

- (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 that reliably support the expert’s opinion;
- (c) the testimony is the product of reliable and objectively reasonable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case and reached a⁷ conclusion without resort to unsupported speculation.

⁷ The authors use the word “his” but the Federal Rules are gender-neutral.

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Appeals of district court decisions under this Rule are considered under the abuse-of-discretion standard. Such decisions are evaluated with the same level of rigor regardless of whether the district court admitted or excluded the testimony in question.

This Rule supersedes any preexisting precedent that conflicts with any⁸ section of this Rule.⁹

Reading from the top, the explanation for the changes is as follows:

Amendment 1 (to the introduction) is to correct any possible misimpression that it is enough for admissibility to satisfy any one of the requirements, i.e., to emphasize that each of the requirements must be met.

Amendment 2 (to subdivision (b)) is to require courts to assure that experts are basing their information on reliable facts or data – a qualitative assessment.

Amendment 3 (to subdivision (c)) purports to add a specific requirement that the expert’s methodology be subject to testing.

Amendment 4 (to subdivision (d)) is apparently intended to reinforce the point that the trial court must evaluate application as well as methodology.

Amendment 5 (first hanging paragraph) would codify the *Joiner* abuse of discretion standard of review.

Amendment 6 (second hanging paragraph) would prohibit courts from relying on pre-amendment case law that conflicts with the Rule’s requirements.

IV. Reporter’s Comments

The authors are absolutely right that there are a number of lower court decisions that do not comply with Rule 702(b) or (d). As seen above, some courts have defied the Rule’s requirements – which stem from *Daubert* – that the sufficiency of an expert’s basis and the application of methodology are both admissibility questions requiring a showing to the court by a preponderance of the evidence.

One question is whether the underlying premises should be reconsidered in light of the wayward case law – should the questions of sufficient basis and reliable application continue to

⁸ The authors had “any or all” but I am pretty sure that Joe Kimball would say that any means all.

⁹ These hanging, unnumbered and unlettered paragraphs are a stylistic no-no. They would have to be reconfigured if they were going to be added to the rule.

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be considered questions of admissibility rather than weight? There is a strong argument that the Committee's substantive decisions were correct then and remain correct now. The requirements stem from *Daubert's* conclusion that it is the trial judge who is the gatekeeper of reliability. It is hard to see how expert testimony is reliable if the expert has not done sufficient investigation, or has cherry-picked the data, or has misapplied the methodology. The same "white lab coat" problem – that the jury will not be able to figure out the expert's missteps – would seem to apply equally to basis, methodology and application. So the question seems to be not whether the Rule should be changed substantively, but whether the Rule can be usefully changed to make sure that courts apply it in the way it was intended to be applied.

A look at the case law indicates that wayward courts are not confused by what Rule 702(b) and (d) say. It does not appear to be a matter of vague language. The wayward courts simply don't follow the rule. They have a different, less stringent view of the gatekeeper function. So it would seem that any language change would not be one of clarification of text, but rather one which ends up to be something like:

"We weren't kidding. We really mean it. Follow this rule or else."

As will be seen in the discussion of the specific amendments proposed, nothing in those proposals does anything to clarify vague language. It is all in the nature of telling courts what they should already know.

So let's discuss the specific suggestions for amending Rule 702:

Amendment 1 – Specifying that each of the subdivisions must be met is what the stylists call a "redundant intensifier." The Rule as it exists makes it perfectly clear that each of the subdivisions must be satisfied before an expert's testimony can be admitted. The connector is "and"; it is not "or."

It can be argued that adding the intensifier couldn't hurt. But actually it could. There could be a collateral effect, across the rules – no other Rule has such a provision saying that all factors apply when they are connected by "and". See, e.g., Rules 701, 804(b)(1), 804(b)(3) – each of which have several admissibility requirements in subdivisions, with an "and" connector. A lawyer reading those rules, which do not contain an intensifier, could after this amendment to Rule 702 make the argument that she only had to satisfy one, or a few, of the requirements in these other rules. In other words, if superfluous language is going to be added to Rule 702, why not to all the other rules that are similarly structured?

Amendment 2 – The amendment would add a reliability component to the basis requirement. The problem with that is that Rule 703 *already* contains a reliability component that regulates an expert's basis. It should be noted that an earlier draft of the Rule 702 amendment *did* set forth a reliability component to the basis requirement. Public commentary indicated that this would create difficulty for courts and litigants in trying to unpack two separate rules that would

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each deal with the reliability of information relied upon by an expert. After extensive discussion and review, the Committee determined that the best course would be to place the *quantitative* requirement in Rule 702, while retaining the *qualitative* requirement in Rule 703. And the Committee Note, as set forth above, explained the different emphasis of each Rule. There doesn't seem to be any need to revisit that decision. Moreover, the courts that refuse to consider the reliability of an expert's basis do not seem to be confused by the text of the Rules. They simply are disregarding the Rules. So it would seem to be futile to try to fix that recalcitrance with a textual change.

Finally, the proposed amendment is quizzical because it eliminates the word "sufficient" from Rule 702(b) – thus taking the quantitative regulator out of the rule. There seems to be no reason to do that.

Amendment 3 – Adding "and objectively reasonable" to the methodology requirement is an attempt to emphasize the *Daubert* requirement of testing. One possible problem with this change, however, is that it is targeted mainly to scientific expert testimony. But Rule 702 applies to all expert testimony, and while testing is important across the board, it can be less important for modes of analysis that are based on experience and judgment (such as expertise that operates mainly on experience).

It may well be that adding a reference to "objective reasonableness" would have been a good idea in 2000. But whether adding it now – at most a mild improvement – is worth the cost of amending the Rule is another thing. Though perhaps it could be the launching pad for a Committee Note establishing Best Practices for forensic experts.

Amendment 4 – Adding a prohibition on speculative opinions to subdivision (d) is somewhat confounding. An expert's opinion might also be speculative because he relies on insufficient information (e.g., he never investigated the accident scene), or because his methodology is unreliable. Speculativeness is not unique to misapplication. So it is unclear why a reference to speculativeness should be located in subdivision (d). Put another way, all three requirements are essentially designed to prevent the expert from providing speculative testimony.

Second, the authors' complaint about subdivision (d) is that courts are just not following it – they are treating challenges to application as going to the weight and not the admissibility of the expert's opinion. Adding a prohibition on speculative testimony does not address that problem. What would directly address the problem is "we really mean it" language. That language would address the problem of recalcitrance – but would it solve the problem?

Amendment 5 – Codifying Supreme Court case law on abuse of discretion review can be criticized on a number of grounds. First, if the courts are not following a directly applicable Supreme Court precedent, what would make them follow the text of a rule?

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Second, the Federal Rules of Evidence generally govern trial courts. They generally do not cover appellate courts. There are exceptions, such as Rule 201, which covers judicial notice by appellate courts, and Rule 103, which to some extent governs appellate courts by setting standards for preserving claims of trial error. But there is nothing in the Rules of Evidence about standards of review. There would seemingly have to be a stronger reason to go down that road than the fact that a few courts are allegedly paying “lip service” to the abuse of discretion standard.

Third, there is a risk of collateral consequences if an abuse of discretion standard is added to Rule 702. Why not add the same requirement to Rule 403, or the hearsay rule? By negative inference, confusion will be raised if the abuse of discretion standard is added to Rule 702 and nowhere else.

Fourth, the case has not really been made that the courts are ignoring *Joiner* or the abuse-of-discretion standard, at least in any way that can be regulated. In the allegedly offending *Johnson* case, discussed above, the court specifically states that it *is* applying the abuse of discretion standard. The court provides a little thought piece of how that standard might be affected by liberal standards of admissibility of expert testimony, but in the end it says it is applying the abuse of discretion standard. Even if that is “lip service,” how does adding an abuse of discretion standard to the rule prevent the court from coming to the same exact result, and writing the same exact opinion? What the authors are really asking for is a rule that says: “Don’t say you are applying the abuse of discretion standard when you are not really doing that.” That kind of instruction does not sound like a proper subject for an evidence rule.

Amendment 6 – A provision that the rule supersedes pre-amendment conflicting case law is problematic, because it goes to the fundamental nature of codification. When a rule is enacted, *by definition* it supersedes prior case law that conflicts with the new rule. But on the other hand, clarification might be appropriate, given the fact that pre-rules doctrine still applies in other rules, like 106. So clarification might be useful.

V. Conclusion

It is certainly a problem when Evidence Rules are disregarded by courts. And while the authors in some instances might be overstating the degree of judicial waywardness, the fact remains that some courts are ignoring the requirements of Rule 702(b) and (d). That is frustrating. It is what Rick Marcus refers to as “the Rulemaker’s Lament.” As Rick states, “[t]he rulemakers may endorse one view and disapprove another; for a judge who embraced the disapproved view, there may be a tendency to resist the rule, or at least not to embrace its full impact.”¹⁰ But it is hard to conclude that the problem of courts straying from the text will be solved by more text.

¹⁰ Richard Marcus, *The Rulemakers’ Laments*, 81 Fordham L. Rev. 1639, 1643 (2013). Rick provides a number of examples of judicial reluctance to implement rule amendments, including amendments to Civil

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On the other hand, it may be possible to tweak the existing language in some way, and then write a Committee Note that strongly reaffirms the admissibility requirements in Rule 702 and criticizes the cases that treat these requirements as questions of weight rather than admissibility. If the Committee is interested in pursuing the idea of “tweaking” accompanied by a forceful Committee Note, that proposal can be prepared for the next meeting.

Rule 26, and the addition of Evidence Rule 502, as to which some courts have taken “too stingy a view of the rule’s protections.”

TAB 3

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Amendments to Rule 807, released for public comment.
Date: April 1, 2017

I. Introduction

At the Spring, 2017 meeting, the Committee approved a proposed amendment to Rule 807 for release for a period of public comment. The Standing Committee unanimously approved the Advisory Committee's proposal. The public comment period began in August and ran until February 15, 2018. Nine public comments were received. They were overwhelmingly positive. The public comments are summarized in the final section of this memo.

The Report from Judge Sessions to the Standing Committee, prepared for that Committee's June 2017 meeting, set forth the rationale for the proposed amendments to Rule 807, and the Advisory Committee's vote on the amendments. The relevant excerpt from the Report provides as follows:

The Committee has been considering possible changes to Rule 807 – the residual exception to the hearsay rule – for the last two years. The project began with exploring the possibility of expanding the residual exception to allow admissibility of more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation – including discussion with a panel of experts at a Conference held at Pepperdine Law School – the Committee determined that the risks of expanding the residual exception would outweigh the rewards. In particular, the Committee was cognizant of concerns in the practicing bar about increasing judicial discretion to admit hearsay that was not covered by existing exceptions, as well as concerns by academics that

expanding the residual exception would result in undermining the standard exceptions.

But in conducting its review of cases decided under the residual exception, and in discussions with experts at the Pepperdine Conference, the Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems that are addressed by the proposed amendment to Rule 807 are as follows:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803 and yet both sets are considered possible points of comparison for any statement offered as residual hearsay. And the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to “equivalence” review – Rule 804(b)(6) forfeiture – is not based on reliability at all. A review of the case law indicates that the “equivalence” standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one. Given the difficulty and disutility of the “equivalence” standard, the Committee has determined that a better, more user-friendly approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

- Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Committee has determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception – and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration is a typical source for assuring that a statement is reliable. Thus, trustworthiness can best be defined in the rule as requiring an evaluation of two factors: 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any good purpose. The inclusion of the language “material fact” is in conflict with the drafters’ avoidance of the term “materiality” in Rule 403 – and that avoidance was

well-reasoned, because the term “material” is used in so many different contexts. The courts have essentially held that “material” means “relevant” – and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice and the purpose of the rules because that guidance is already provided by Rule 102. Moreover, the interests of justice language could be – and has been – used as an invitation to judicial discretion to admit or exclude hearsay under Rule 807 simply because it leads to a “just” result. The Committee has determined that the rule will be improved by deleting the references to “material fact” and “interest of justice” and “purpose of the rules.”

- The current notice requirement is problematic in at least four respects:

- 1) Most importantly, there is no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court even has the power to excuse notice no matter how good the cause. Other notice provisions in the Evidence Rules (e.g., Rule 404(b)) contain good cause provisions, so adding such a provision to Rule 807 will promote uniformity.

- 2) The requirement that the proponent disclose “particulars” has led to unproductive arguments and unnecessary case law.

- 3) There is no requirement that notice be in writing, which leads to disputes about whether notice was ever provided.

- 4) The requirement that the proponent disclose the declarant’s address is nonsensical when the witness is unavailable – which is usually the situation in which residual hearsay is offered.

The proposed amendments to the notice requirements solve all these problems.

Finally, it is important to note that the Committee has retained the requirement from the original rule that the proponent must establish that the proffered hearsay is more probative than any other evidence that the proponent can reasonably obtain to prove the point. Retaining the “more probative” requirement indicates that there is no intent to expand the residual exception, only to improve it. The “more probative” requirement ensures that the rule will only be invoked when it is necessary to do so. Furthermore, the Committee has made it clear in the amendment that the proponent cannot invoke the residual exception unless the court finds that the proffered hearsay is not admissible under any of the Rule 803 or 804 exceptions. This assures, again, that parties will be able to invoke the exception only when they can establish the need to do so.

II. Proposed Amendments to Rule 807 and Proposed Committee Note

The proposed amendments to Rule 807, and the Committee Note, as released for public comment, are as follows:

Rule 807. Residual Exception

(a) **In General.** Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

- (1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804;
- (12) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~the court determines that it 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; and
- (2) ~~it is offered as evidence of a material fact;~~
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; ~~and~~
- (4) **admitting it will best serve the purposes of these rules and the interests of justice.**

(b) **Notice.** The statement is admissible only if, ~~before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of ~~the~~an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that

some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The “equivalence” standard” has not served to limit a court’s discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness.

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 is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to show that the proffered hearsay is a statement that “is not specifically covered by a hearsay exception in Rule 803 or 804.” Thus Rule 807 remains an exception to be invoked only when necessary.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules (*see*, Rules 102, 401).

The notice provision has been amended to make three changes in the operation of the rule:

- First, the rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the rule as amended. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.
- Second, the Rule now requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.
- Finally, the pretrial notice provision has been amended to provide for a good cause exception—the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

At this meeting, the question for the Committee is whether to submit the proposed amendment and Committee Note for final approval by the Standing Committee, to be sent to the Judicial Conference, then to the Supreme Court, and then to Congress.

Because the Committee voted unanimously on all the changes to the Rule, the question is not whether to take a new vote on those substantive changes. There have, however, been suggestions made for change to the text and Committee Note from three sources: 1) a minor change to the Note proposed by the Chair; 2) a few changes to the Note proposed by the Standing Committee, during the meeting that it voted to issue the proposed amendment for release for public comment; and 3) a few suggestions for change to the text made in the public comment. In addition, there is an outstanding issue about how to treat “near-misses” of the standard hearsay exceptions, and the Committee may wish to resolve that issue.

III. Suggestions for Change

This section discusses and analyzes all suggestions for change to the proposed amendment to Rule 807, obtained either in the public comment or from suggestions by members of the Standing Committee or the Advisory Committee. The suggested changes to text are discussed first, followed by suggested changes to the Note.

A. Suggested Changes to Text

1. Magistrate Judges’ Association Suggestion Regarding Equivalence:

The Federal Magistrate Judges’ Association agrees with the Committee “that Federal Rule of Evidence 807 can be challenging for courts to apply.” But the Association has problems with some of the proposed rule language. The first concern is with the deletion of the “equivalence” language. The Association says that the “equivalence” language “begs the question: equivalent to what?” Actually it does not beg the question. The current rule specifically says that the trustworthiness must be equivalent to that found in the hearsay exceptions of Rule 803 and 804. The problem with that language is not that it “begs the question.” Rather it is that it provides a standard that is so variant that it is no standard at all.

At any rate, the Association believes that the replacement provided by the amendment – “sufficient guarantees of trustworthiness” – gives “little or more guidance than the existing rule.” Because, what is “sufficient”?

A possible response to that assertion is that the problem is not as complicated as the Association makes it sound, once you think about how the admissibility requirements of the hearsay exceptions are administered. According to *Bourjaily v. United States*, 483 U.S. 171 (1987), the trial court is to determine, pursuant to Rule 104(a), whether the proponent has proven more likely than not that the admissibility requirement has been met. In *Bourjaily*, the government had the burden of proving more likely than not that the defendant and the declarant were coconspirators. An example of applying Rule 104(a) to other hearsay exceptions is that the proponent must show more likely than not that the declarant was under the influence of a startling

event, in order for the hearsay to be admissible under Rule 803(2). As applied to Rule 807 as amended, the rule requires the court to find the statement more likely than not to be trustworthy. This is what courts currently do under the existing rule, but they have had to do so by proceeding through a false and flimsy equivalence standard. The rule simply lifts that standard, and requires the court to proceed directly to whether the statement is trustworthy. The showing that is required – trustworthiness – is not different in kind from the showing that is required for expert testimony under Rule 702: that the expert’s methodology and conclusion is more likely than not reliable. The same critique could be made of that standard – reliable compared to what? But the answer is the same – the question is whether the admissibility requirement is met by a preponderance of the evidence.

The Association suggests that the Committee change the proposed amendment to provide that a court must find “circumstantial guarantees of trustworthiness equivalent to or greater than sworn testimony subject to cross-examination.” But that suggestion is problematic for several reasons. First and most important, it makes the rule *stricter* than the existing rule. Currently, the equivalence standard allows the court to pick and choose comparables, and many of them do not even come close to being as trustworthy as sworn testimony subject to cross-examination. Indeed *all* of the Rule 804 exceptions are *premised* on the assumption that statements fitting in those exceptions are not as reliable as sworn testimony subject to cross-examination. They are pale imitations, but they are allowed because the declarant is unavailable. Second, many of the exceptions are of a completely different character than sworn testimony subject to cross-examination, so the comparison is difficult if not impossible if the goal is to determine trustworthiness. Cross-examination does not really make a statement more *trustworthy*. Rather it makes the statement a better candidate for admissibility because any untrustworthiness can be rooted out by cross-examination. Comparing that guarantee to the circumstantial guarantees that might be found when a declarant makes a statement outside of court seems to be a doomed enterprise.

It should be emphasized that the Committee has already rejected the proposal that the comparable of cross-examination (and by extension the inability to cross-examine) should be added to the rule. The Minutes of the 2017 Committee meeting state that “[t]he Committee agreed to delete any express reference in the text to cross-examination, given that trial judges will understand the importance of cross in considering the admissibility of hearsay statements through Rule 807.” For all these reasons it would appear that the suggestion of the Magistrate Judge’s Association – to require equivalence to testimony cross-examined and under oath – should be rejected. Indeed if it were to be accepted the Committee would probably be better off proposing no amendment at all – because the current equivalence standard at least allows for some flexibility that the Magistrate Judges’ proposal does not.

2. Magistrate Judges’ Proposal Regarding Corroboration:

The Magistrate Judges have “concerns” regarding the phrase “and any evidence corroborating the statement.” This is a misquote. The rule requires the court to consider the totality of circumstances under which it was made and evidence, if any, corroborating the

statement. That is subtly different from “any evidence” as it implies that there may be no corroboration and if that is the case, the court should consider that deficit.

At any rate the Magistrate Judges suggest that the text be clarified to state that “evidence corroborating the statement is merely one *circumstance* that a court may consider, and that corroborating evidence is not sufficient, or necessary, for admission under the amended rule.” But corroborating evidence is not a “circumstance.” It is evidence. There are essentially two types of information that are relevant to the trustworthiness of an out-of-court statement. One is circumstantial guarantees attendant to the making of the statement – e.g., that it was made outside a litigation context, that it was made shortly after the event, that it made to a trusted person, that there was no motive to falsify, etc. The other is evidence outside the circumstances of the statement, that corroborate the declarant’s account – e.g., that the declarant said he made a call and there was evidence that a call was made, that bank records or physical evidence support the declarant’s account. These are not “circumstances.” This is evidence. And arguably one of the major benefits of the amendment is that it organizes thinking about the two different sources that support the trustworthiness of a statement as residual hearsay. That benefit is lost if the rule calls corroborating evidence a “circumstance.”¹

The Magistrate Judges’ suggest that the rule be amended to provide that a court must consider “the totality of circumstances under which [the statement] was made, including, but not limited to, and evidence, if any, corroborating the statement.” But corroborating evidence is not “included” in the totality of *circumstances* under which the statement is made. This proposal mixes apples and pineapples. Thus there is a strong argument that the Magistrate Judges’ suggestion should be rejected.

The Magistrate Judges further suggest that it be made clear that “corroborating evidence is not sufficient, or necessary, for admission under the amended rule.” That point is in fact made in the Committee Note, which provides as follows:

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 is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

At the last meeting, the Committee unanimously agreed, according to the Minutes, that it was unnecessary to add language to the text to “direct a trial court to consider both the presence or absence of corroboration, noting that courts will appreciate the importance of both, as well as of the quality of the corroboration without any express language to that effect.” There would appear to be no good reason for a change of heart. The Note is explicit in saying that corroboration is not dispositive. Micromanaging language in the text would seem unnecessary in that most courts

¹ The dictionary definition of “circumstance” that is relevant to the present discussion is “a piece of evidence that indicates the probability or improbability of an event.”

already consider corroboration properly, and all courts do so in other hearsay contexts, such as under Rules 801(d)(2)(E) and 804(b)(3).

Finally, the Magistrate Judges suggest that corroborating evidence might bootstrap weak hearsay into admissibility, and that this is particularly problematic if the corroborating evidence is “flimsy.” But it is somewhat difficult to figure how “flimsy” corroborative evidence can do much to help a hearsay statement which is supported by few guarantees of trustworthiness. (And at any rate, if it could, then that could happen in most courts today, because all circuits but two require the court to consider corroboration in the trustworthiness inquiry under Rule 807.)

To handle the “flimsiness” scenario, the Magistrate Judges suggest that the reference to “evidence, if any, corroborating the statement” should be changed to “any reliable evidence of record.” This suggestion is problematic on several counts. First, to the extent that a residual hearsay question is raised *in limine*, the corroborating evidence may not be “of record.” Second and more important, evidence is often corroborative even if, looked at independently, it is not especially reliable. The classic case is *FTC v. Figgie International Inc.*, 994 F.2d 595 (9th Cir.1993), where the FTC sought admission under Rule 807 of letters of complaint sent to the FTC by discontented consumers. The court reasoned that no single complaint was especially trustworthy, but that all the complaints together were trustworthy because they were sent independently to the FTC from unrelated members of the public, and they all reported roughly the same experience. Thus, the complaints *cross-corroborated* each other. *See also Larez v. City of Los Angeles*, 946 F.2d 630 (1991) (newspaper accounts were not sufficiently reliable on their own to prove a fact under Rule 807, but the fact that independent accounts were identical provided corroboration that satisfied the trustworthiness requirement of the residual hearsay exception). The consideration of cross-corroboration would be difficult if the Magistrate Judges’ “reliability” requirement were in the rule. Moreover, it would surely seem that judges should be trusted to figure out that if corroboration is flimsy or dubious, it should count for little or nothing in the trustworthiness inquiry. In any case, the real question of corroborating evidence is not reliability, because it is often something like physical evidence – it is about how strongly the evidence supports the hearsay statement.

Finally, the Magistrate Judges’ concern about flimsy or dubious corroboration *is* addressed in the Committee Note, which specifically provides:

Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

Addressing this rather narrow concern in the Committee Note seems preferable to adding micromanaging language in the text.

For all these reasons, a strong argument can be made that the suggestions of the Magistrate Judges regarding corroboration should not be implemented in the text of the rule.

3. *Style Suggestions from AAJ:*

The American Association for Justice (AAJ) generally supports the proposed amendment but proposes some style suggestions for Rule 807(a). They are as follows (**edits shown from a clean version of the rule as released for public comment**):

- (a) **In General.** Under the following conditions, a hearsay statement that is not otherwise specifically covered by a hearsay exception in Rule 803 or 804 is not excluded by the rule against hearsay:
- (1) ~~the statement is not specifically covered by a hearsay exception in Rule 803 or 804;~~
 - (2) (1) ~~the court determines that it~~ the statement is supported by sufficient guarantees of trustworthiness – after ~~considering~~ consideration of the totality of circumstances under which ~~it~~ the statement was made and evidence, if any, corroborating the statement; and
 - (3) (2) ~~it~~ the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Reporter's Comment:

The proposed amendment was already reviewed by the Style Subcommittee of the Standing Committee, before the rule was issued for public comment. At that time, the Style Subcommittee made changes so that the rule approved by the Advisory Committee comported with the Standing Committee's conventions on style. Thus it would not be appropriate to adopt most of the suggestions that AAJ provides. For example, changing "considering the totality of the circumstances" to "*consideration of* the totality of circumstances" is contrary to the style conventions in the restyled Evidence Rules. (By my count, more than 50 "of"s were deleted in the restyling effort. For another example, continued recitation of "the statement" is contrary to restyling conventions employed throughout the national rules.

The restyling subcommittee sent an email to the Reporter in which the members disapproved of the following suggested changes:

- (a)(2) and (a)(3), changing "it" to "the statement." We disagree. We strongly favor using pronouns when the antecedent is clear. Repeating nouns in this fashion is one thing that makes traditional drafting so stiff.
- (a)(2), changing "considering" to "consideration of." As you know, in all the restylings we pretty consistently replaced "-tion" + "of" with the "ing" form. Much preferable stylistically.

Even assuming these points are debatable on the merits, the fact that they are conventions used throughout all the national rules should be determinative.

One change that AAJ suggests could be looked at as style, but is more probably substantive. That is the suggestion to take the “not admissible under Rule 803 or 804” language that is now in Rule 807(a)(1) as amended and place it in the preface to the Rule. As it happens, that is where the language is in the current rule. The reason that the language was added as an admissibility requirement was to emphasize that the language is not just descriptive – rather it imposes a requirement that the proponent establish that the hearsay is not admissible under a Rule 803 or 804 exception. That was done to signal that the residual exception should not be used as a first resort, but rather as a last resort. It was in response to comments at the Pepperdine Conference that an amendment to Rule 807 could be seen as an invitation to bypass the (sometimes harder to demonstrate) admissibility requirements of the Rule 803 and 804 exceptions.

The Committee unanimously approved the switch of the Rule 803 and 804 language from the preface of the Rule to an admissibility requirement of Rule 807(a)(1). No demonstration has been made in the public comment that the change is somehow bad policy or makes the rule difficult to apply.

Moreover, the Style Subcommittee states that the placement of the reference to Rule 803 and 804 in the introduction is not preferred as a matter of style. The Subcommittee explains as follows:

—(a)(1), moving it into (a). There is no stylistic convention that conditions in a list should be stated all positively or all negatively. Also, moving the provision would create a gap between the subject (“statement”) and the verb phrase (“is not excluded”). Not a big flaw, but not desirable if it can be easily avoided.

But if the Committee does agree to restore the language to its current placement, then a corresponding change to the Note is required. **That change would be the following deletion:**

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. ~~Indeed Rule 807(a)(1) now requires the proponent to show that the proffered hearsay is a statement that “is not specifically covered by a hearsay exception in Rule 803 or 804.”~~ Thus Rule 807 remains an exception to be invoked only when necessary.

Finally, the Style Subcommittee *did* agree to one of the changes suggested by AAJ – deleting the phrase “the court determines that” in (a)(2). That language was included in the draft to assure that the rule would follow the theme of other Evidence Rules that refer to court action, such as Rule 407 (the court may admit) and 403 (the court may exclude). But apparently the Style Subcommittee had a change of heart; and under the Standing Committee protocols, their

determination of style is presumptively correct. **Therefore, the final proposal should be changed as follows (redlined from the clean version of the amendment):**

- (a) **In General.** Under the following conditions, a hearsay statement is not excluded by the rule against hearsay:
- (1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804;
 - (2) ~~the court determines that~~ it 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; and
 - (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.
4. ***Suggestion from AAJ and Julius King, Regarding the Notice Requirement***

AAJ supports the proposed amendments to the notice requirement, “namely, the deletion of the requirement that the declarant’s address be disclosed, the inclusion of a requirement that the notice be in writing, and the addition of a clause allowing a statement to be introduced during trial or hearing for good cause.” Another commenter, Julius King, also supports the notice requirement – indeed Mr. King has submitted a 12-page, scholarly comment, which is highly supportive of virtually all the proposed changes to Rule 807.

AAJ and Mr. King have concerns, though, about the requirement that the proponent must disclose the “substance” of the statement. They think it is not an improvement on “particulars” because it is vague. The Committee Note ties the term “substance” to its use in Rule 103 in describing what must be disclosed in an order of proof. But AAJ says that the Note is fuzzy because it says that the case law on “particulars” “may be instructive, but not dispositive.” Moreover, the citation to Rule 103 is only a cf. cite.

Reporter’s Comment:

It will be hard to define the necessary information that must be provided in the notice with much precision. There is surely a concern about overdescription. Currently the only specific provision is the straightforward (and surely fair) requirement that the proponent disclose the name of the declarant. Beyond that, is “substance” insufficiently descriptive?

If the Committee determines that the word “substance” is insufficient, one possibility is to specifically require disclosure of such things as: 1) the date on which the statement was made; 2) the circumstances under which it was made; 3) the content of the statement; 4) the intended recipient of the statement. It is hard to know where to end, though, because there are other factors

that would be pertinent to admissibility under Rule 807, such as: 1) whether the statement was made in anticipation of litigation; 2) whether it was made under oath; 3) whether it is corroborated; who is going to testify to the statement – and so on. Moreover, the more specific factors put into the notice requirement, the more likely it is that some might be difficult or impossible to comply with in specific cases. For example, a proponent is often unlikely to know the date on which a statement was made, especially if it is an oral statement. As to the recipient of the statement, what about a newspaper article? Must the proponent say “the general public” – when the risk is, if they don’t, there will be an argument before the court about the adequacy of the notice? It is to be recalled that the point of the amendment is to make Rule 807 *easier* to use – and larding it up with specific requirements for notice seems contrary to that goal.

Nonetheless, if the Committee decides that more specific requirements be added to the notice provision as examples, the following addition could be made (**redlined from the clean version of the amendment released for public comment**). The addition attempts to add more specifics to the notice requirement without going overboard.

(b) **Notice.** The statement is admissible only if the proponent gives an adverse party reasonable notice of an intent to offer the statement -- including ~~its substance~~ a description of its form and content, and the declarant’s name – so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing – or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

This change would require a corresponding change to the Committee Note:

The notice provision has been amended to make three changes in the operation of the rule:

- First, the rule requires the proponent to ~~disclose the “substance” of the statement. This term~~ provide a description of the form and content of the statement. This addition is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. ~~Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the Rule as amended.~~ The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

Again assuming that the Committee determines that more guidance is necessary regarding the specifics of information to be disclosed, it might be accomplished by retaining the word

“substance” but adding a bit more guidance to the Note. Perhaps more about the tie-in to the use of the word “substance” in the requirement for a sufficient order of proof – which requires the proponent to give enough information so that the opponent can make a reasoned argument and the court can make a reasoned decision. Perhaps cutting out the admittedly open-ended reference to the fact that prior case law on “particulars” may or may not be useful – the intent of which was to allow for judicial discretion – would avoid an invitation to some confusion.

If the Committee decides that more articulation is necessary, but is comfortable with the term “substance” (which is a term often used by courts and litigants), then perhaps some sharpening in the Note may be helpful. **Here is a possible solution:**

- First, the rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. ~~Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the Rule as amended.~~ The term “substance” is intentionally taken from the requirement for a sufficient offer of proof under Rule 103(a)(2) – that is, the proponent must provide enough information about the statement to allow the opponent to craft an argument and to allow the court to make a ruling. Any more specific description in the text of the rule risks being over- and under-inclusive. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

Finally, Mr. King objects to deletion of the requirement that the proponent’s address be disclosed. He argues that this will diminish the effect of the notice. But the Committee unanimously deleted the requirement for at least two reasons: 1. In most Rule 807 situations the declarant is unavailable, so the address is unlikely to be known; and 2. These days, it is fairly easy for the opponent to find an address of an identified declarant, and where that is not so, the Committee Note provides that the opponent can seek relief from the court. There doesn’t appear to be a good reason to revisit that unanimous decision.

B. Proposed Changes to the Committee Note

1. Change to Committee Note on Corroboration, Proposed by Judge Livingston

The Committee Note passage discussing the corroboration requirement states that: “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 is *accurate*.”

Judge Livingston suggests that the word “accurate” be replaced. She reasons that the text discusses “guarantees of trustworthiness” and does not require a court to find that the hearsay statement is, in fact, accurate or true.

One possible response to this argument is that corroborating evidence is not actually a guarantee of trustworthiness. It is a guarantee of accuracy. Assume that a lying person, with a motive to falsify, in anticipation of litigation, says “I know that the defendant stole my Degas painting and hid it under the porch at his grandmother’s house.” That statement is untrustworthy. But what if the Degas painting were found hidden under the porch of the defendant’s grandmother’s house? That would tend to show that the declarant’s statement was accurate, but does it show that the declarant is trustworthy? As discussed above, hearsay lingo distinguishes circumstantial guarantees of trustworthiness (such as that the declarant was too startled to lie) from independent corroborating evidence. An analogy is to a paid informant’s tip on probable cause, which is not credited without corroboration – the corroboration assures that the information is telling the truth, even though the informant may be an untrustworthy person.

That said, the retention of the word “accurate” is not necessary to get the point across that corroboration is relevant to the admissibility of residual hearsay. Judge Livingston has come up with language to change the note that would elide both a reference to accuracy and a reference to guarantees of trustworthiness. That change would look like this:

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 is accurate should be admissible under this exception.

2. Standing Committee Member Suggestion to Include a Reference to Rule 104(a) in the Note.

At the Standing Committee meeting, a member of that Committee suggested that a reference to Rule 104(a) should be added to the Note. The thought was that this would clarify what the trial court has to find – that the admissibility requirements are satisfied by a preponderance of the evidence.

As stated above, the Rule 104(a) standard applies to *all* admissibility requirements under the hearsay exceptions. So it can be argued that a reference to Rule 104(a) in one specific rule is unnecessary. But adding a specific reference to Rule 104(a) was thought helpful to give the court

guidance as to what it had to decide in the absence of “equivalent circumstantial guarantees of trustworthiness” – a requirement the amendment deletes from the Rule. And there is precedent for mentioning Rule 104(a) as the guideline in describing the impact of an amendment to the hearsay rule. Rule 804(b)(6), the forfeiture provision, was added in 1996 and the Committee Note clarifies that “[t]he usual Rule 104(a) preponderance of the evidence standard” was applicable to the required findings for a forfeiture by wrongdoing.²

The question is, how to phrase a reference to Rule 104(a). The proposed amendment now speaks in terms of “sufficient guarantees of trustworthiness.”³ That iteration does not fit particularly well with the preponderance standard of Rule 104(a). It is awkward to state that “the court must find by a preponderance of the evidence that the statement has sufficient guarantees of trustworthiness.” That is because “sufficient” is left undefined.

The only way that Rule 104(a) works – and the way in which Rule 807 has to work in the absence of an equivalence requirement – is that “the court must find by a preponderance of the evidence that the statement is trustworthy.” That finding is to be made after considering the circumstantial guarantees and the corroborating evidence. Note that this does not mean that the court must find the statement to be *true*. Trustworthy means worthy of trust, and therefore a proper source of information for the jury to consider and weigh. When a judge finds a statement trustworthy, it does not mean that the judge is intruding on a jury function. Rather it is just another Rule 104(a) threshold determination (akin to the coconspirator requirement in 801(d)(2)(E)), which means that the judge never tells the jury that the statement is “trustworthy.” Nor is the judge’s trustworthiness finding binding on the fact-finder – the admission through Rule 807 (a fact that the jury doesn’t know about) doesn’t prevent the opponent of the statement from arguing that the jury should not rely on the statement for its truth because it is not trustworthy. As with any hearsay statement, the judge’s threshold finding merely means that the jury is free to credit the statement but doesn’t require the jury to assume it is true.

It has been argued that trial judges should not have to determine that the statement is trustworthy, but even under the existing rule, the courts recognize that the ultimate goal for the trial court is to determine whether the statement is more likely than not trustworthy. *See, e.g., United States v. Slatten*, 865 F.3d 767, 807 (D.C.Cir. 2017) (Discussing Rule 807: “As we have recognized before, ‘in order to find [a] statement trustworthy, a court must find that the declarant of the prior statement was particularly likely to be telling the truth when the statement was made.’” Also noting that “[s]everal of the circumstances surrounding the co-defendant's declarations

² Rule 804(b)(6) could be distinguished because the Committee was dealing with conflicting case law, some of which applied a preponderance standard and some of which applied a clear and convincing evidence standard. So the need to clarify which standard applied was more important, probably, than with Rule 807. But it can be argued that deleting the “equivalence” requirement makes it necessary to clarify just what the court has to find after the amendment.

³ The Reporter’s initial draft provided that the court had to find that the statement was “trustworthy.” This was changed by a vote of the committee to “sufficient guarantees of trustworthiness.”

indicate their reliability and manifest that he was likely telling the truth at the time he made his statements.”); *United States v. Hill*, 2016 WL 4129228 (2nd Cir.) (“The district court did not abuse its discretion in precluding Abreu's statement under the residual hearsay rule because, inter alia, the statement did not meet the trustworthiness requirement. The statement is recorded in a report prepared by law enforcement as an after-the-fact summary of Abreu’s interview, and the exact circumstances by which the report was prepared are unclear. The statement itself, made late at night and two days after the crime, is a child's recollection of a traumatic event.”); *In re Vallecito Gas, LLC*, 771 F.3d 929 (5th Cir. 2014) (“We are persuaded by the district court's thorough explanation that the letter is untrustworthy, in large part because it was drafted by Morton's counsel and was prepared after Morton's counsel provided the Navajo Nation official with only one side of the story.”); *United States v. Hunt*, 521 F.3d 636 (6th Cir. 2008) (“Hunt argues that it is reasonable to conclude that the statements are truthful because they tend to incriminate the declarant, Noble, while exculpating Hunt. However, it is at least equally reasonable to conclude that the statements are not trustworthy. It would not be bizarre for an individual to lie in order to protect another individual with whom he has a business relationship. More importantly, a statement is not rendered trustworthy simply by the fact that it tends to exculpate one other than the declarant.”); *United States v. Banks*, 514 F.3d 769 (8th Cir. 2008) (“The contents of Form 4473 are, therefore, inherently trustworthy.”); *Parker v. Four Seasons Hotel*, 2014 WL 1292858 (N.D. Ill.) (“Gartin's comment to Schiavon * * * provides additional circumstantial guarantees that the statements in Sheridan's email are neither untrustworthy nor false. Under these circumstances, the Court concludes that the admission of this evidence would significantly enhance the likelihood of a correct outcome in this case. Accordingly, the statement is admitted under the Residual Exception to the hearsay rule.”); *United States v. Stern*, 2013 WL 6087744 (E.D.Wisc.) (“For all of these reasons, I find the statement sufficiently trustworthy.”); *United States v. Various Gold, Silver and Coins*, 2013 WL 5947292 (D.Ore) (finding surveys to be admissible under Rule 807 and noting that none of the factors cited by the opponent “provide a basis to find that the TurboSonic questionnaire responses are untrustworthy”); *In re September 11 Litigation*, 621 F.Supp.2d 131 (S.D.N.Y.2009) (“the prior testimony of Billings and Samit is trustworthy, to the extent that it reports their observations in carrying out the investigations.”); *Wezorek v. Allstate Ins. Co.*, 2007 WL 1816293 (E.D.Pa. 2007) (“Allstate asserts Torres' statement is trustworthy because of the following: (1) it was taped, allowing the court to assess the credibility of the statement by listening to Torres’ voice; (2) it was made two months after the application process in question; (3) Torres had personal knowledge of the events recounted in the statement; (4) it was not prepared in anticipation of litigation; (5) it is consistent with documents in Torres' file; and (6) Torres said his answers were true and correct. I agree.”); *In re Worldcom, Inc.*, 357 B.R. 223 (S.D.N.Y. 2006): In the Worldcom corporate fraud case, the court found that the Bankruptcy Court properly admitted Worldcom’s restated balance sheet; noting that “the intense public scrutiny involved in the restatement of WorldCom's financial adequately ensured that the results were trustworthy”; *Estate of Naharro v. County of Santa Clara*, 2016 WL 6248957 (N.D.Ca.) (“Defendants have not cited, and the Court has not discovered, any authority for the proposition that Gionet’s account of Naharro’s conduct is trustworthy simply because it was made in the course of a police interview.”); *United States v. Doe*, 2010 WL 2195993 (S.D. Ga. 2010) (“the Court concludes that the proffered statements are not admissible under Rule 807 because the Government

has not established that the statements are particularly trustworthy”); *AAMCO Transmissions, Inc. v. Baker*, 591 F.Supp.2d 788 (E.D.Pa. 2008) (“The statements contained on the audio-recordings and in the debriefing and shopping memoranda are not trustworthy because: (1) they were not made under oath; (2) the investigator’s statements in the shopping memoranda were not based on personal knowledge; (3) the declarants were not subject to cross-examination; (4) the shoppers’ statements were made to the investigators nearly an hour after the shoppers arrived the Center; (5) the statements were not corroborated; and (6) they were not spontaneous.”); *Taylor v. N.E. Ill. Regional Commuter RR Corp.*, 2008 WL 244303 (N.D. Ill.) (“Here, none of the statements were taken under oath and plaintiff has failed to demonstrate how the statements are trustworthy or reliable at all.”).

The question remains, where to add the reference to Rule 104(a) and trustworthiness in the note. It would appear to be best placed in the paragraph explaining the rejection of the equivalence requirement:

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The “equivalence” standard” has not served to limit a court’s discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated.

Under the amendment, the court is to proceed directly to ~~a determination of~~ whether the hearsay is supported by guarantees of trustworthiness, so that the court can determine whether the statement is more likely than not trustworthy pursuant to Rule 104(a). This does not mean that the court must find the statement to be true. “Trustworthy” means worthy of trust and therefore a proper source of information for the jury to consider and weigh. The judge’s trustworthiness finding is not binding on the jury. As with any hearsay statement, the judge’s threshold finding merely means that the jury is free to credit the statement but is not required to assume the statement is true.

3. Addition to Committee Note to Clarify that There Is No Impact on the Right to Confrontation

During discussion at the Standing Committee meeting, there was a suggestion that a passage to the Committee Note be added to emphasize that nothing in the amendment is intended to limit or affect the accused’s right to confrontation – or to put it another way, the fact that a statement is admissible under the residual exception does not answer the separate constitutional

question of the right to confrontation. It might be argued that such a reference is unnecessary because nothing that rulemakers *ever* do could limit a constitutional right of any kind. On the other hand, this is one of those areas – like Rule 412 and Rule 606(b) – where a statement might with some frequency be admissible under Rule 807 but nonetheless be testimonial under *Crawford v. Washington*. To take an example, heavily corroborated grand jury testimony would satisfy the residual exception (as about 1000 cases found before *Crawford*) but would clearly be testimonial.⁴ So perhaps it would be useful to add a proviso to the Note, as a recognition of how *Crawford* has cut back on the use of the residual exception in criminal cases.

If the Committee agrees that a Confrontation proviso should be added, it could be a freestanding paragraph, right before the paragraph that mentions that the “more probative” requirement is being retained. Adding the proviso right before that paragraph would be continuing the discussion of trustworthiness and also it would begin a two paragraph discussion on the limits of the amendment. ***The proviso might look something like this.***

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

4. Standing Committee Suggestion Regarding Inadmissibility Under Other Exceptions:

At the Standing Committee meeting, Judge Furman suggested that it would be useful to clarify a point about the requirement in the Rule that the proffered hearsay not be admissible under Rule 803 or 804. That is now an admissibility requirement in the Rule, where before it was merely a description of the hearsay that would be admissible under the Rule. It was raised to the level of an admissibility requirement in response to the concern that a change in the Rule would encourage litigants to try to offer a statement admissible under the (presumably easier) Rule 807 without bothering to check whether the statement would be admissible under a standard exception. Put another way, raising the inapplicability of Rules 803 and 804 to an admissibility requirement assures that the Committee is not trying to unduly expand the residual exception.

⁴ It should be said though that it is quite unlikely that a court would actually decide that a statement is admissible under Rule 807 but that admission violates the right to confrontation because the statement is testimonial. In reality, if the statement is testimonial, the court will just exclude it and find it unnecessary to decide whether it is admissible under Rule 807.

Judge Furman’s concern was that a judge might think that she actually has to rule that a hearsay statement is not admissible under Rule 803 or 804 as part of a ruling on the hearsay offered under Rule 807. That was never the intent, and Judge Furman makes a good argument that something should be added to the note to clarify that a ruling from the court is not required.

Language to address the “court ruling” problem could be added to the part of the Note that discusses the fact that inadmissibility under Rule 803 and 804 is now an admissibility requirement of Rule 807. *That addition could look like this:*

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to show that the proffered hearsay is a statement that “is not specifically covered by a hearsay exception in Rule 803 or 804.” This does not mean that a court is required to make a finding that no other exception is applicable. But it does mean that the proponent cannot seek admission of hearsay under Rule 807 if it is apparent that the hearsay could be admitted under another exception. Thus Rule 807 remains an exception to be invoked only when necessary.

5. *Standing Committee Member’s Suggestion to Emphasize that Good Cause Should Be Difficult to Show.*

At the Standing Committee meeting, Judge St. Eve suggested that language be added to the Note to state that the good cause exception to the pretrial notice requirement is hard to meet. There is a good policy reason for a limit to the good cause exception. If the decision is made that pretrial notice is important, then it is problematic to apply a good cause exception in such a way as to undermine the rule. And there *is* a good reason for the pretrial notice requirement in Rule 807. A statement offered as residual hearsay could be made under an infinite possibility of circumstances. It is the essence of an unstructured analysis – the opponent cannot, for example, look just to whether there is a startling event, or a doctor involved. Thus, it stands to reason that pretrial notice is essential to allow the opponent to consider all the possible circumstantial guarantees that might be attendant to any particular statement. Accordingly, there is a good argument for providing cautionary language about the good cause exception in the Committee Note.

If the Committee agrees that cautionary language would be useful, it would surely best be placed in the section of the Committee Note that discusses the good cause exception. **Added language might look like this:**

- Finally, the pretrial notice provision has been amended to provide for a good cause exception – the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause

exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. But given the opponent's need for time to prepare for evidence that fits no standard exception, the good cause exception should be limited to clear cases in which the proponent employed all reasonable efforts to provide timely pretrial notice.

Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

6. NACDL Suggested Additions to the Committee Note on Notice

NACDL – which generally supports the amendment – recommends that language be added to the Committee Note on notice that would recognize the “structural asymmetry” for discovery requirements in criminal cases. Two specific additions to the Committee Note are suggested. First, “the note should make clear that disclosures by a criminal defendant under the amended rule need not be detailed, need not include an explanation of the evidence’s relevance if such information would reveal defense strategy that is otherwise not subject to pretrial disclosure, and may, in most instances, omit the proposed witness’s name.” Second, allowance for late disclosure for good cause should be “routinely granted” and it “should not be required that the defense establish that it did not know of the need for, or the existence of, the residual hearsay until the trial is underway.” Obviously, the NACDL’s suggestion regarding the good cause exception runs contrary to Judge St. Eve’s suggestion that good cause excusal should be rarely granted.

Should there be a strict notice rule for the government and a loose one for the defendant? That does not appear justified. Nothing in the constitution prevents the imposition of reasonable pretrial notice requirements on a defendant in a criminal case. *See Michigan v. Lucas*, 500 U.S. 145 (1991) (notice requirement is constitutional unless “arbitrary or disproportionate”). The defendant in a criminal case *already* has a notice obligation under Rule 807, as well as under Rule 412 and other rules. *See, e.g., United States v. Coney*, 51 F.3d 164 (8th Cir. 1995) (no abuse of discretion in refusing to admit hearsay proffered by the defendant under the residual exception, where the defendant offered the report during the trial, only 45 minutes before she wanted to introduce it).

Nothing in the amendment dramatically changes the notice obligation currently applied by the courts. The only change to the notice obligation is that the address of the declarant need no longer be provided (no complaint about that) and the proponent must disclose the “substance” of the statement, or its content and the identity of the declarant, if the Committee decides to use terms other than “substance.” The particular concerns of NACDL – that the defendant would have to disclose an explanation of the evidence’s relevance, or the name of the in-court witness, are not required by the amended Rule 807. Thus, there appears to be no good reason to reach out and address the notice requirement as applied to a defendant in a criminal case.

Something in the note regarding criminal defendants and the good cause requirement seems a bit more justified, because that is a new requirement in the rule. Not totally new, however, because almost all courts have read a good cause exception into the existing Rule 807. The question for the Committee is whether Judge St. Eve's position – that the good cause exception must be strictly construed – should be applied full bore to criminal defendants. One could argue that there might be a reason for a bit more lenience for criminal defendants, given the fact that they are often less well-funded and so may need some slack in certain cases. On the other hand, it seems hard to argue that good cause should be automatic for a criminal defendant but a rare event for everyone else.

One possibility is to tweak the good cause language discussed above in response to Judge St. Eve's proposal. **It might look like this:**

- Finally, the pretrial notice provision has been amended to provide for a good cause exception – the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. But given the opponent's need to have time to prepare for evidence that fits no standard exception, the good cause exception should be limited to clear cases in which the proponent employed all reasonable efforts to provide timely pretrial notice. In assessing good cause, the court should of course take into account the proponent's resources and the importance of the evidence, especially to a defendant in a criminal case.

Reporter's comment: Combining Judge St. Eve's position with the NACDL position results in a Note that might be interpreted to provide conflicting signals. The Committee might think it better to leave well enough alone and not add anything extra in the Note regarding the good cause exception. It is not a new requirement in most courts, so query how much guidance is needed.

IV. Near-Misses

As discussed in previous memos, there is some dispute in the courts about whether Rule 807 can be used to qualify hearsay that “nearly misses” a standard exception. For example, a declarant makes a statement about a startling event, and has had some opportunity to think about the statement, but not much, so it is not an excited utterance, but it is close. Or, a declarant makes a statement that is against her *family's* interest, but not her own – like, “my son murdered somebody last night.” That statement is not admissible as a declaration against penal or pecuniary interest, but it is close.

The proposed amendment does not discuss the “near miss” question. That matter *was* discussed, however, at the last meeting. The Minutes of that meeting recount the discussion:

The Reporter conceded that under the current Rule, there is some dispute concerning what to do about “near-misses” – hearsay that fails to meet all the admissibility requirements for a particular exception, but is nonetheless reliable enough to qualify as residual hearsay. He stated that a minority of courts have opted to exclude “near-misses” that approach too closely to an established exception, but that most courts are loath to exclude such a statement if it is actually found to be trustworthy. He further explained that the “near-miss” issue would be difficult to resolve through rulemaking and that the working draft of the proposed amendment to Rule 807 did not intend to address that issue. He noted that the public comment process might provide valuable insights into how best to tackle the “near-miss” issue. One Committee member suggested that good rulemaking should aim to resolve ambiguities in the case law and proposed that the language in the draft rule could be changed from hearsay “not specifically covered” by a Rule 803 or 804 exception to hearsay “not specifically admissible under a Rule 803 or 804 exception” – in order to avoid any suggestion of a “near-miss” prohibition and to codify the approach of the majority of courts. Although Committee members agreed that this language could work, the consensus was to retain the “covered” language through the comment period to see what input might be forthcoming from the public on the issue. The Committee did resolve to delete a sentence in the Committee note accompanying the proposed Rule that read: “It [the amendment] is not intended to be a device to erode or evade the standard exceptions” to avoid any suggestion that the amendment intends to disqualify “near-miss” hearsay from being admitted pursuant to Rule 807.

The Reporter’s hope that public comment might elucidate the “near miss” issue has not come to pass. None of the public comments addressed the question. At this point, it would seem a good idea to leave the “near miss” issue where the Committee has found it, as opposed to trying to mandate a uniform approach in the courts. The suggestion made at the prior meeting for a minor change in the text would appear sufficient to allow the majority of courts to continue to employ a “near miss” analysis, while not absolutely preventing stricter courts from avoiding it. That suggestion would change the rule as follows (**as viewed against a clean version of the amended rule**):

- (a) **In General.** Under the following conditions, a hearsay statement is not excluded by the rule against hearsay:
 - (1) the statement is not specifically ~~covered by~~ admissible under a hearsay exception in Rule 803 or 804;

- (2) ~~the court determines that~~ it 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; and
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

The term “admissible” is subtly different from “covered.” A hearsay exception could “cover” a certain statement and yet the statement might not be admissible under it. For example, a prior inconsistent statement *not* made under oath is not admissible under Rule 801(d)(1)(A), but that Rule could be read to “cover” all inconsistent statements. Indeed, the critique of the “near miss” theory is that the near-miss courts have read “not specifically covered” to be “not admissible under.”

It could be argued that the change could be read to *require* courts to apply a near-miss analysis. In fact, almost all the courts have already gone down the “near-miss” road. Here is a sampling of the near-miss cases:

United States v. Valdez-Soto, 31 F.3d 1467, 1471 (9th Cir. 1994) (unsworn prior inconsistent statement admitted as a near-miss of Rule 801(d)(1)(A); noting that “the existence of a catch-all hearsay exception is a clear indication that Congress did not want courts to admit hearsay only if it fits within one of the enumerated exceptions”).

United States v. Furst, 886 F.2d 558 (3d Cir. 1989) (residual exception can be used when the proponent nearly misses the requirements of another exception).

Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) (testimony not admissible under Rule 804(b)(1) – because offered against an opponent who was not a party to the prior matter – was admissible under the residual exception as a “near-miss”).

United States v. Laster, 258 F.3d 525 (6th Cir. 2001) (records not admissible under Rule 803(6) for lack of a qualified witness, but sufficiently trustworthy to be admissible under Rule 807; “the phrase ‘specifically covered’ means only that if a statement is admissible under one of the exceptions, such subsection should be relied upon instead of the residual exception”).

United States v. Banks, 514 F.3d 769 (8th Cir. 2008) (record not admissible under Rule 803(6) for lack of a foundation witness was admissible as residual hearsay because of its similarity to business records).

United States v. Guerrero, 2010 WL 1645109 (S.D.N.Y.): Two defendants were tried separately for their part in a murder. At the first trial, an eyewitness testified in a way that

identified the defendant at trial but tended to exculpate Guerrero. The eyewitness was extensively cross-examined by defense counsel. Guerrero, at his trial, proffered that eyewitness testimony from the first trial, the witness having become unavailable. The court held that the statement was admissible under Rule 807. The court found that the testimony was a near-miss of prior testimony under Rule 804(b)(1): the miss being that the first case was in state court and the second in federal, and the federal government did not have an opportunity to develop the testimony at the prior trial. It stated that Rule 807 “suggests that almost fitting within one of these exceptions cuts in favor of admission, not against.”

Fossyl v. Watson, 2007 WL 6960324 (S.D. Ohio): A person dying of cancer made a statement to her husband that implicated herself in a previous murder. The court found that the statement was not admissible as a dying declaration because it did not concern the causes and circumstances of the declarant’s death, but it was admissible under Rule 807 as a near-miss.

Here are some of the few cases that take the minority view, rejecting the near-miss analysis:

Glowczenski v. Taser Intern., Inc., 928 F.Supp.2d 564 (E.D.N.Y. 2013): In a product liability action brought against Taser, the defendants sought to strike exhibits that were published articles in scientific journals. The plaintiffs had not qualified the articles under Rule 803(18) because they had not established a foundation that the articles were authoritative. The plaintiffs argued that the articles could be considered under Rule 807, but the court disagreed. The court reasoned that the residual exception applies only to hearsay that is “not specifically covered” by another exception. In this case, the articles were “specifically covered by another hearsay exception, Rule 803(18), and Rule 807 is inapplicable.”

U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc., 2007 WL 842079 (D.D.C. 2007): This was a civil case involving conspiracy, brought against a corporation and an individual after a corporate official (Anderson) was tried criminally for conspiracy. The plaintiffs sought to admit testimony from the Anderson trial. The court found that the testimony was not admissible under Rule 804(b)(1) because Anderson was not a “predecessor in interest” of the corporation and individual in this case. Anderson’s motive was to show that he was not a member of the conspiracy; that differed from the current parties, whose motive was to show that there was not conspiracy at all. The plaintiffs argued that the testimony was admissible under Rule 807 as a “near miss” of Rule 804(b)(1), but the court disagreed. It reasoned as follows:

Plaintiffs argue that this evidence is such a near-miss that it should fall under Rule 807. But this testimony fails on almost every prong of that Rule. First, Rule 807 can only apply to a “statement not specifically covered by Rule 803 or 804.” This Circuit has made clear that this provision is more residual than catchall, meaning that it is meant to pick up the residue of

reliable and probative hearsay evidence not otherwise admissible, and is not meant to catch all of the arguably admissible evidence that rightly does not fit within the existing categories. This evidence is clearly meant to be channeled through Rule 804(b)(1), and clearly fails. This is a strong indication that it is not meant to be admitted via Rule 807.

Reporter’s comment: The language of the court is a good statement against the near-miss analysis, but this is not a great example of rejection of a near-miss. That is because the miss wasn’t near at all. The party who cross-examined did not have a similar motive to do so as the party against whom the evidence was offered. The similar motive requirement is *the* requirement supporting admissibility of prior testimony. It would be like saying that the statement of any dead person is a near miss of a dying declaration, because the declarant is dead.

It is unclear whether the change in language would persuade minority courts to adopt a near-miss analysis. And it is unclear whether that would be a good result on the merits. The validity of the near-miss analysis is dependent on: 1) how near the miss is; and 2) how important the miss is. It might well be appropriate to allow the courts to continue to have discretion to construe the rule as allowing or not allowing near misses, without trying to be definitive. A change from “not covered by” to “not admissible under” would not inevitably require a court to adopt a near-miss analysis, but over time it would be likely to do so, because in fact a hearsay statement that nearly misses is “not admissible under” the standard exception.

“Near-Miss” Committee Note

Certainly if the change to “not admissible under” is made, there will have to be an explanatory Committee Note. **Here is one possibility:**

The original rule applied to hearsay “not specifically covered” by a Rule 803 or 804 exception. The amendment makes the rule applicable to hearsay “not admissible under” those exceptions. This change allows a court to find that a trustworthy statement may be admissible under this exception when it is a “near-miss” of one of the Rule 803 or 804 exceptions. If the court employs a “near-miss” analysis it should take into account 1) how far the hearsay misses the admissibility requirements of the standard exception; and 2) the importance of the admissibility requirement that the statement fails.

This passage can be read to allow near miss analysis without requiring it. It of course can be changed to mandatory language if the Committee so decides.

Finally, it might be appropriate to treat the near-miss question *without* any amendment to the relevant text. This would be a way to address the near-miss question without attempting to change the case law in the courts. **Here is a possible passage:**

The rule continues to apply to hearsay “not specifically covered” by a Rule 803 or 804 exception. It continues to allow (but not to require) a court to find that a trustworthy statement may be admissible under this exception when it is a “near-miss” of one of the Rule 803 or 804 exceptions. If the court employs a “near-miss” analysis it should take into account 1) how far the hearsay misses the admissibility requirements of the standard exception; and 2) the importance of the admissibility requirement that the statement fails.

V. Summing Up the Possible Changes

What follows is the proposed amendment and Committee Note, altered by the suggested changes that appear most viable from the discussion above. This indication of changes is illustrative only. It is not intended to forestall discussion of all of the suggestions above.

The changes are added to a clean copy of the rule as issued for public comment. In this way the Committee can hopefully better see the impact of the new suggestions for change.

The changes implemented to the text are:

1. Changing “not specifically covered” to “not admissible under.”
2. Deleting “the court determines that” from the rule as issued for public comment.

The changes implemented to the Note are:

1. A discussion of “near miss” to accompany the text change to “not admissible under.”
2. Adding a proviso that the court need not make a finding that the hearsay is inadmissible under Rule 803 and 804.
3. Changing the term “accurate” in the note material on corroboration.
4. Adding a discussion of Rule 104(a).
5. Adding a proviso on the right to confrontation.
6. Providing more commentary on the use of the word “substance” and deleting the comparison to “particulars.”

7. Adding to the good cause language to state that the exception is hard to meet, but that the court should take account of resources, especially for criminal defendants.

Text – changes from the clean copy of the proposal released for public comment.

- (a) **In General.** Under the following conditions, a hearsay statement is not excluded by the rule against hearsay:
 - (1) the statement is not ~~specifically covered by~~ admissible under a hearsay exception in Rule 803 or 804;
 - (2) ~~the court determines that~~ it 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; and
 - (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.
- (b) **Notice.** The statement is admissible only if the proponent gives an adverse party reasonable notice of an intent to offer the statement – including its substance and the declarant’s name – so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing – or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note with changes from the Note issued for public comment

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The “equivalence” standard” has not served to limit a court’s discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. Under the amendment, the court is to proceed directly to ~~a determination of~~ a determination of whether the hearsay is supported by guarantees of trustworthiness, so that the court can

determine whether the statement is more likely than not trustworthy pursuant to Rule 104(a). This does not mean that the court must find the statement to be true. “Trustworthy” means worthy of trust and therefore a proper source of information for the jury to consider and weigh. The judge’s trustworthiness finding is not binding on the jury. As with any hearsay statement, the judge’s threshold finding merely means that the jury is free to credit the statement but is not required to assume the statement is true.

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 is accurate should be admissible under this exception. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to show that the proffered hearsay is a statement that “is not ~~specifically covered by~~ admissible under a hearsay exception in Rule 803 or 804.” This does not mean that a court is required to make a finding that no other exception is applicable. But it does mean that the proponent cannot seek admission of hearsay under Rule 807 if it is apparent that the hearsay could be admitted under another exception. Thus Rule 807 remains an exception to be invoked only when necessary.

The original rule applied to hearsay “not specifically covered” by a Rule 803 or 804 exception. The amendment makes the rule applicable to hearsay “not admissible under” those exceptions. This change allows a court to find that a trustworthy statement may be admissible under this exception when it is a “near-miss” of one of the Rule 803 or 804 exceptions. If the court employs a “near-miss” analysis it should take into account 1) how far the hearsay misses the admissibility requirements of the standard exception; and 2) the importance of the admissibility requirement that the statement fails.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the

statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules (*see*, Rules 102, 401).

The notice provision has been amended to make ~~three~~ four changes in the operation of the rule:

- First, the rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. ~~Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the Rule as amended.~~ The term “substance” is intentionally taken from the requirement for a sufficient offer of proof under Rule 103(a)(2) – that is, the proponent must provide enough information about the statement to allow the opponent to craft an argument and to allow the court to make a ruling. Any more specific description in the text of the rule risks being over- and under-inclusive.
- Second, the prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.
- ~~Second~~ Third, the Rule now requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Finally, the pretrial notice provision has been amended to provide for a good cause exception – the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. But given the opponent’s need to have time to prepare for evidence that fits no standard exception, the good cause exception should be limited to clear cases in which the proponent employed all reasonable efforts to provide timely pretrial notice. In assessing good cause, the court should of course take into account the proponent’s resources and the importance of the evidence, especially to a defendant in a criminal case.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

Reporter’s Note: I changed three factors to four factors. After the discussion on substance is beefed up, the deletion of the address requirement really looks like a separate change. It doesn’t fit great in that paragraph.

V. Summary of Public Comment

Daniel Church of Morris, Wilnauer Church (EV-2017-003), supports the amendment because it “would reduce the surprise element to an adversary and gives the court the discretion needed to make an informed ruling.”

Brian Roth (EV-2017-004), supports the amendment as being “more clearly worded” than the original.

Karl Romberger (EV-2017-005), supports the Committee's proposed changes, and “endorse[s] the observations about how best to assess the trustworthiness of residual hearsay.” He concludes that “[t]he Committee's efforts should improve legal practices in all fora where evidence is received.”

Aniello Ceretto, (EV-2017-006), opposes the amendment insofar as it adds a good cause exception to the pretrial notice requirement. He states that it is “going to lead to many more adjournment requests OR if not, then bad court decisions undermining public confidence in the reliability of court decisions based on hearsay.”

Sara Lessard (EV-2017-007), believes that the proposed amendment “is an amazing opportunity for ordinary people to understand the rule better.”

Julius King (EV-2017-009), states that “the current FRE 807 is problematic for several reasons and the new proposed FRE 807 properly address most of those issues.” He states that “the proposed change to the trustworthiness requirement of FRE 807 is satisfactory because it would clarify the rule by removing the ‘comparative trustworthiness’ standard and foster consistency among trial courts by requiring judges to consider, if any, corroborating evidence strengthens the requirement. Additionally, the proposed change is acceptable because it clarifies the threshold requirements of the rule by directly stating FRE 807 hearsay exceptions are only admissible if the statement does not fit in FRE 803 and FRE 804.” Mr. King approves most of the changes to the notice requirement, but opposes the deletion of the declarant’s address from the notice requirement.

The American Association for Justice (EV-2017-011), “generally supports the proposed amendments to Federal Rule of Evidence 807” and suggests some stylistic changes to “help clarify the purpose and intent of the amendments. The Association generally supports the changes to the notice requirement, but states that the term “substance” is vague and that the Committee Note should provide more guidance on the meaning of the term.

The Federal Magistrate Judges’ Association (EV-2017-012), suggests that the trustworthiness requirement should be evaluated in comparison with testimony given under oath and subject to cross-examination. The Association also suggests that corroboration should not be singled out as a factor in the trustworthiness analysis, and if it is, the court should limit consideration to corroborating evidence that is reliable.

The National Association of Criminal Defense Lawyers (EV-2017-013), agrees that “the existing requirement the residual hearsay have ‘circumstantial guarantees of trustworthiness’ equivalent to those required for Rule 803 or 804 exceptions has not been a workable standard, given the differences in trustworthiness among the recognized hearsay exceptions themselves. The Association also states that the changes to the notice requirement “are generally well-taken” but it recommends that language be added to the not to make clear that disclosures by the defendant in a criminal case need not be detailed, and that the good cause exception should be liberally applied to protect a defendant in a criminal case who fails to give pre-trial notice.

TAB 4

TAB 4A

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Daniel J. Capra
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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Fed. R. Evid. 801(d)(A)
Date: April 1, 2018

For the past three years (!) the Committee has been considering the possibility of expanding substantive admissibility for certain prior inconsistent statements of testifying witnesses under Rule 801(d)(1)(A). The existing rule provides for substantive admissibility in only a very narrow circumstance – where the witness made the inconsistent statement under oath at a formal proceeding. The current proposal is to expand substantive admissibility to statements that were recorded by “audiovisual means.” The rationales for the proposal are: 1. the witness who made the statement is subject to cross-examination; 2. it is clear that the statement was actually made, so cross-examination won’t be stifled by a witness who simply denies ever making the statement; and 3. the jury will be able to see the statement and so it will be especially useful to assess the witness’s credibility. There is also a non-evidentiary supporting rationale – a change might encourage government officials to record more statements. Finally, there is a subsidiary proposal to allow for substantive admissibility where the witness acknowledges having made the prior statement – though Committee members have expressed concern about the practical problems inherent in determining whether a witness has actually acknowledged the accuracy of the prior statement.

At the Spring 2017 meeting, the Committee decided to conduct more research before submitting the proposal for public comment. The most important data received are the results of surveys of judges and practitioners prepared by Dr. Timothy Lau of the FJC. The FJC report on the results of the surveys is included in this agenda book behind this memo.

This memo is divided into four parts. Part One sets forth the working draft of the amendment and describes the history of the Committee’s lengthy consideration of the proposed amendment to Rule 801(d)(1)(A). Part Two discusses the FJC survey as well as other input received on the proposal, and also discusses possible changes to the draft as a result of public comment and other inputs. Part Three provides a short discussion of the DOJ proposal to provide for substantive admissibility of prior inconsistent statements that the witness acknowledges having made. Part Four sets forth a draft proposed amendment and Committee Note with the suggested changes added.

At this meeting, the Committee should vote on whether to approve the rule for release for public comment. The rule has been on the agenda for a number of years, and there is very little extra input, short of public comment, that can be obtained. It's time to determine whether to send it out for public comment or take it off the agenda.

I. Working Draft and Committee Discussions

A. *The Working Draft*

What follows is the working draft of the text and Committee Note for the proposed amendment. The acknowledgment alternative, and draft note about it, are placed in brackets.

(d) Statements That Are Not Hearsay. 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:
 - (i)** was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
 - (ii)** was recorded by audiovisual means, and the recording is available for presentation at trial; or
 - [(iii)** is acknowledged by the declarant, while testifying at the trial or hearing, as the declarant's own statement; or]
- (B)** is consistent with the declarant's testimony and is offered:
 - (i)** 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
 - (ii)** to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
- (C)** identifies a person as someone the declarant perceived earlier.

Memorandum to Advisory Committee on Evidence Rules
Re: Possible Amendment to Fed. R. Evid. 801(d)(A)
April 1, 2018

A working draft of the Committee Note provides as follows:

The amendment provides for broader substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily restrictive. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate—because it may be difficult to cross-examine a declarant about a prior statement that the declarant plausibly denies making. But as shown in the practice of some states, there is a less onerous alternative—not widely available at the time the rule was drafted—to assure that what is introduced is what the witness actually said. The best proof of what the witness said, and that the witness said it, is when the statement is made in an audiovisual record. That is the safeguard provided by the amendment. Moreover, audiovisual recording allows the fact-finder to view and weigh more effectively the circumstances surrounding the prior statement. Given the important safeguard provide by audiovisual recordings, there is good reason to dispense with the confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The amendment expands substantive admissibility for prior inconsistent statements only if there is no dispute that the witness actually made the statement. Subdivision (A)(ii) requires a statement to be recorded by “audiovisual” means. So, to be substantively admissible, it must be clear that the witness made the statement on both audio and video. “Off-camera” statements are not substantively admissible under the amendment.

It may arise that a prior inconsistent statement, even though made in an audiovisual record, is challenged for being unreliable—for example that the witness was subject to undue influence, or impaired by alcohol at the time the statement was made. These reliability questions are generally for the trier of fact, and they will be relatively easy to assess given the existence of an audiovisual recording and testimony at trial by the person who made the statement.

Questions may arise when the recording is partial, or subject to technical glitches. Courts in deciding the analogous question of authenticity under Rule 901 have held that deficiencies in the recording process do not bar admissibility unless they “render the recording as a whole untrustworthy.” *United States v. Adams*, 722 F.3d 788, 822 (6th Cir. 2013). *See also United States v. Cejas*, 761 F.3d 717 (7th Cir. 2014) (intermittent skips in video recording did not render recordings untrustworthy). Courts can usefully apply that standard in assessing the

genuineness of the witness's prior statement for purposes of substantive admissibility.

There is overlap between subdivisions (A)(i) and (A)(ii). For example, audiovisual recording of a deposition is potentially admissible under both provisions. But the Committee decided to retain the longstanding original provision, as it has been the subject of extensive case law that should not be discarded. Rather than replace the original ground of substantive admissibility, the decision has been made to add a new, if somewhat overlapping, ground.

[New Subdivision (A)(iii) provides for an additional, limited ground of substantive admissibility: where the declarant acknowledges having made the prior statement while testifying at the trial or hearing. Acknowledgment by the witness eliminates the concern that the statement was never made, so the acknowledging witness can be fairly cross-examined about the statement. It is for the court in its discretion to determine under the circumstances whether the witness has, in testifying, sufficiently acknowledged making the statement that is offered as inconsistent. There is no requirement that the court undertake a line-by-line assessment of the prior statement.]

While the amendment allows for somewhat broader substantive admissibility of prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement to show not that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) is inapplicable if the proponent is not offering the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

B. Background on the Amendment

Since beginning its review of all prior witness statements under Rule 801(d)(1), the Committee has narrowed its focus. Here is a synopsis of the Committee's determinations:

- While there is a good argument that prior witness statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements would be difficult and awkward. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).
- The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements – Rule 801(d)(1)(B) – was only recently amended, and that amendment properly captures the

statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification – Rule 801(d)(1)(C) – has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

- Currently Rule 801(d)(1)(A) provides for substantive admissibility only in unusual cases, i.e., where the declarant made the prior statement under oath at a formal proceeding. Two possibilities for expansion are: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof – other than a witness’s statement – that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states. The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute about whether it was ever made. Cross-examination is the touchstone of the exception, and it could be difficult to cross-examine the witness about a statement he denies making; and it could be costly and distracting to have to prove whether a prior inconsistent statement was made, if there is no reliable record of it.

- If the concern is whether the statement was ever made, a majority of Committee members have concluded that this concern could be answered by a requirement that the statement be audiovisually recorded. Some members emphasized that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively– which is a good result even beyond its evidentiary consequences.

- A number of members noted that one of the major costs of the current rule is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was ever made, but it is unjustified when the prior statement is audiovisually recorded – as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

- An additional ground for substantive admissibility was proposed by the Justice Department: that the inconsistent statement is substantively admissible if the witness acknowledges having made it. The reason for this addition was that acknowledgment by the witness would eliminate any concern that the prior statement was never made. The Committee was made aware, however, of research that Professor Richter conducted on the Illinois evidence rule that allows acknowledged prior inconsistent statements to be admitted for their truth. This research suggests that providing for substantive admissibility for acknowledged statements can raise difficult questions of whether the statement is truly acknowledged by the witness – the

witness might waffle, or acknowledge reluctantly, or provide only a partial acknowledgment, etc. The Committee determined that it would be best to forward any proposed amendment with an acknowledgement provision in brackets that could be considered a subject of separate comment.

At the Spring meeting, the Committee engaged in a substantial and detailed discussion of the proposed amendment to Rule 801(d)(1)(A). The Committee recognized the potential benefits and costs of the proposal, which could be summarized as follows:

Potential Benefits

- Admissibility of audiovisually recorded statements could incentivize law enforcement officers and others to record more interrogations and interviews, which would be an improvement on current practices and a net positive in the creation of additional available evidence to ascertain the truth.
- Prosecutors and plaintiffs could get to a jury in additional cases with the help of audiovisual statements by waffling and turncoat witnesses – as is the case in California.
- Incomprehensible limiting instructions cautioning the jury against substantive use of audiovisually recorded statements would be eliminated.
- Summary judgment practice on the civil side could be impacted by the availability of audiovisually recorded statements, which could be a net positive to the extent that there is additional evidence for the court to consider.

Potential Costs

- The substantive admissibility of audiovisually recorded statements could lead to manipulation and gamesmanship in producing videos for tactical use – both by law enforcement officers and by other parties who could now make audiovisual recordings of witnesses likely to turn against them at trial. In addition, corporations could be motivated to make audiovisual recordings in anticipation of litigation for fear of witnesses giving unfavorable testimony at trial. Many of these statements may be made without reflection, or subject to persuasion, and so may not be reliable. (Though the contrary argument is that the difference between substantive and impeachment use is quite unlikely to generate strategic conduct, as there is already an incentive to record these statements under current law).
- An amendment that permits substantive admissibility of audiovisual recordings that are inconsistent with a witness's trial testimony could serve to advantage the powerful, such as prosecutors and corporations with incentives to record and a systemized approach to the creation of evidence.
- The proliferation of video recording outside an interrogation or interview setting, such as by police body or dash cameras, could raise questions about the admissibility of off-camera statements or of on-camera statements completed and contextualized by statements made off-camera in a chaotic and rapidly evolving situation.

- Audiovisual recordings on Facebook or YouTube could present issues of reliability. (Though the principle supporting the amendment is that reliability concerns are answered by the ability to cross-examine the person who made the statement.)
- Admitting “acknowledged” witness statements could require a laborious and inefficient process of determining the existence and scope of the acknowledgment.
- Summary judgment practice could be negatively affected if possibly unreliable recorded statements are generated after an event and then the declarant testifies inconsistently (but accurately) at a deposition. If the recorded statement can be used substantively, then summary judgment may be denied in some case where perhaps it should be, and would otherwise be, granted. (Though the circumstances under which this might occur are extremely narrow).

Finally, at the Spring 2017 meeting the Committee discussed whether audiovisually recorded statements are as reliable as prior statements under oath at a formal proceeding, where the involvement of lawyers and potential perjury consequences may make witnesses think twice about lying. The possible answer to this concern is that Rule 801(d)(1)(A) is not primarily about the reliability of a statement at the time it is made, but is rather about the fact that the witness who made the statement is on the stand, subject to cross-examination – and that audiovisual recording will allow the fact-finder to view and weigh more effectively the circumstances surrounding the statement, in addition to having the benefit of observing in-court cross-examination.

II. Outreach Efforts

A. FJC Survey

The FJC survey provides some findings on the possible impact of the proposed amendment regarding audiovisual statements, and about whether the amendment might be favorably received if it is proposed. Separate surveys were sent to judges and attorneys. The return rate for some of the answers by attorneys is too low to mean much, but some attorneys provided oral comments which might be treated in the nature of public comments.

Each Committee member can draw their own conclusions from the FJC report. But here are some takeaways from the Reporter, for what it is worth:

- The conclusion that a “significant minority” of respondents had misinterpreted the term “audiovisual statements” is a little strong. The question from which that conclusion is drawn is seen on page 9 of the report. Some respondents are labeled confused when they included statements that were recorded on two separate devices, one audio and one video. But there is nothing in the rule that requires the statement to have been recorded by a single instrument. The Committee has not explicitly considered whether “audiovisual” could mean audio with one machine and visual with another – to the extent that would ever happen in reality. But if it were, there is no good reason to find that a statement recorded by one audio instrument and one video instrument simultaneously would not be substantively admissible.

To the extent that the respondents thought that it was sufficient that *either* audio or visual be recorded, that is incorrect under the proposed rule. But that point is emphasized in the Note; and moreover it is difficult to believe that so many respondents could reasonably construe “audiovisual” to mean “audio or visual.” What might be more probable is that the respondents looked at the options without the focus needed to see the “either” in the three options – all of which look similar to the eye.

- If the confusion figure is in fact reliable, perhaps the solution is to return to the original phrasing: “audio *and* visual.”
- The responses are generally favorable toward the amendment, which might provide comfort to the Committee that the proposal makes some improvement in the rule without going too far.
- The judicial respondents do not appear to fear an explosion of audiovisual statements in response to the amendment.
- While judges and lawyers hew to the line between substantive and impeachment evidence during a trial, there was a general feeling that jurors do not, because the instruction is almost impossible to follow.
- Based on the responses, it does not seem that much needs to be said in the amendment or the Committee Note about the context in which a recording is made, or about technical quality – beyond the reference that is currently in the Note.
- The survey showed concern from the respondents that audiovisual recordings can be altered. Of course, this is true not only for recordings offered under this rule but for any time an electronic recording is admitted. The question is whether more must be said about the authenticity issues, either in the Note or maybe even in the text. Because the recording will be admitted as substantive evidence, it by definition is subject to the authentication rules that exist for all evidence.

A few years ago the Committee reviewed the question of authenticity of electronic data and decided unanimously that it would not be advisable to change the text of the rules to provide more guidance. Instead, a Manual was prepared and was sent to all judges. That manual covers the authentication questions that would arise under this proposed amendment.

In the last section of the memo, draft language is included to provide some more guidance on the authenticity questions presented by audiovisual recordings.

B. Comment from the American Association for Justice

AAJ focuses on the ubiquity of cellphone recordings and social media postings that would become substantively admissible if inconsistent with a witness’s testimony. But AAJ does not

believe that the prevalence of such audiovisual evidence will be inherently problematic. It states that “[w]hile the implications of this rule may grow as cell-phone recordings and social media recordings become more prevalent, changes in technology would not inherently affect the reliability of a recording that captures both the audio and visual aspects of a statement.” It notes that an audiovisual recording “provides context, is reliable and subject to proper cross-examination. As such, AAJ does not foresee this draft amendment impacting many civil cases.”

AAJ suggests that the Advisory Committee “be mindful of the types of evidence that this rule change may implicate as technology evolves.” It recommends that the Committee expand the Note “to acknowledge that it is the intent of the Committee that ‘audiovisual recording’ be deemed to apply to changes in technology, not just traditional videotaped recordings.” It states that “perhaps it would be useful to give examples of technology that are included in the proposed amendment, including the use of cellphone recordings and social media with an audio component.”

Reporter’s Comment: It would seem useful to add to the Note that the rule is intended to cover technological advancements. It might be thought less useful to provide examples, because those examples can themselves be outstripped by technology. Moreover, to the extent the Committee is concerned about proliferation, laying out examples on the kind of media that the rule may cover could be seen as encouraging that proliferation.

One possibility is to add the following line to the Committee Note:

The amendment expands substantive admissibility for prior inconsistent statements only if there is no dispute that the witness actually made the statement. Subdivision (A)(ii) requires a statement to be recorded by “audiovisual” means. So to be substantively admissible, it must be clear that the witness made the statement on both audio and video. “Off-camera” statements are not substantively admissible under the amendment.

The term “audiovisual recording” is intended to cover developments in technology, and is not limited to traditional videotaped recording.

It may arise that a prior inconsistent statement, even though made in an audiovisual record, is challenged for being unreliable—for example that the witness was subject to undue influence, or impaired by alcohol at the time the statement was made. These reliability questions are generally for the trier of fact, and they will be relatively easy to assess given the existence of an audiovisual recording and testimony at trial by the person who made the statement.

C. *The Innocence Project*

The Innocence Project opposes the proposed amendment, contending that it will threaten the fair administration of plea bargaining. The Project states that before the rule is issued for public

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comment, the Committee should do research on the effect that the rule will have on plea bargaining at the state level. Specifically, “the Committee should commission a pilot study” in the jurisdictions allowing broader substantive use of prior inconsistent statements “to determine, inter alia, the prevalence of recorded witness statements, the types of cases in which such recordings are made or introduced, and how these recordings have impacted plea bargaining and trial practices. Such a study should analyze the effect of the introduction of the proposed Rule in a single jurisdiction and also compare two similar jurisdictions, one with and one without the proposed rule, which would give the Committee some empirical evidence from which to make a judgment.”

Pause for Reporter’s Comment: If the kind of study described is what is required for a rule change, then it is fair to state that none of the Evidence amendments, nor indeed none of the original Federal Rules, are properly grounded. Indeed it seems fair to say that no National Rule of any kind has been supported by that kind of research before it is even sent out for public comment.

The Innocence Project recognizes that the rule change has some positive effects for criminal defendants. For example, police will have an extra incentive to record witness statements during the course of investigation. But the Project complains that “the proposed Rule includes neither standards for when law enforcement agents would be required to record witness statements, nor a reliability inquiry for determining the admissibility of such statements.” The Project suggests that the Rule require that all witness statements be recorded. [That is a rule proposal that is clearly substantive, because it would cover evidence that is not offered; though perhaps there could be a rule that conditions admissibility of one recorded statement on recording others]. But because not all statements will be recorded, the Innocence Project “is concerned that the proposed Rule would be invoked selectively, and particularly in cases primarily reliant on an inculpatory witness statement, where the risk of wrongful conviction is heightened.” The Project worries that where the initial statement is false, it could be used to induce pleas in weak cases, because it is substantive evidence. And the Project also worries that “a successful prosecution could be mounted” solely on the basis of a false statement that is inconsistent with a witness’s later testimony.

The Innocence Project also contends that the proposed amendment “has the potential to delay and/or prevent justice even after a wrongful conviction has occurred. That is because a single, unsworn statement could provide the basis for upholding a conviction on appeal when a sufficiency of the evidence challenge is raised, or denying a defendant a new trial on post-conviction review, even where the complaining witness has recanted.” The Project cites an example of a case where post-conviction relief was denied because the complaining witness had identified the defendant – and even though the witness recanted, the identification would be substantively admissible under the proposed amendment.

Comments:

1. The rule amendment would have no effect on the example cited by the Innocence Project. The case involved an *identification* by a witness who testified at trial, and later recanted. That identification is admissible substantively today under Rule 801(d)(1)(C).

2. The rule is about admissibility, not sufficiency. Indeed, *none* of the Evidence Rules have anything to say about sufficiency. So to the extent one might think that there should be something in the rule or note saying that a prior inconsistent statement is not sufficient evidence, that would be unprecedented.

3. It is notable that Rule 801(d)(1)(C) was not enacted as part of the original Rules, because Senator Ervin objected on the ground that a hearsay identification might be found sufficient to support a guilty verdict – i.e., a conviction could be based solely on unsworn hearsay. After Senator Ervin retired, Congress added the originally proposed Rule 801(d)(1)(C). The Report from the Judiciary Committee found that Senator Ervin’s concerns were “misdirected.” That Report made these points: 1) the rule is addressed to admissibility, not sufficiency; 2) a statement admissible under any hearsay exception might be found sufficient to support a verdict, and the vast majority of statements fitting under hearsay exceptions are not under oath; 3) the person who made the statement must be testifying subject to cross-examination, assuring that “if any discrepancy occurs between the witness’s in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for the discrepancy so that the trier of fact might determine which statement is to be believed.”¹

Each of the points made by the Senate Judiciary Committee regarding Rule 801(d)(1)(C) are equally applicable to the statements that would be admitted substantively under the proposed amendment. And in once sense the proposed amendment is on even stronger ground – because the prior statement is audiovisually recorded, the trier of fact may more easily “determine which statement is to be believed.”

If Congress, after such extensive deliberation, determined that a hearsay exception for a prior witness statement should not be rejected just because a statement under the rule might be found sufficient to support a verdict, one might argue (as many have done in other contexts) that the Congressional determination is subject to deference.

D. The National Association of Criminal Defense Lawyers

NACDL is opposed to the proposed amendment to Rule 801(d)(1)(A). It states that the amendment would “mark a sharp break with other exceptions to the hearsay rule, which generally require circumstantial guarantees of reliability.” [Not including party-opponent statements,

¹ Report of the Committee on the Judiciary, Senate, 94th Cong. 1st Sess. No. 94-199 (1975). The report made an additional point: prior identifications are subject to due process requirements that prevent unreliable identifications from being admitted when they are caused by unnecessary police suggestiveness.

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coconspirator statements, learned treatises, etc.]. NACDL states that the oath requirement in the current Rule 801(d)(1)(A) “provides some assurance that the statement is reliable.”

NACDL argues that the opportunity to cross-examine the declarant at trial is insufficient to justify substantive admissibility when the witness “purports to have forgotten the event about which he is questioned” – though it notes that it *supports* admissibility of prior testimony for impeachment purposes when the witness feigns lack of memory. NACDL opines that when a witness professes lack of memory, “meaningful cross-examination would be impossible.”

Reporter butting in for a minute: The Supreme Court in *United States v. Owens*, 484 U.S. 554 (1988), found that a witness was subject to adequate cross-examination as to his prior statement of identification even though he lacked all memory of the underlying event. NACDL doesn’t explain how cross-examination can be sufficiently effective where the witness feigns memory as to an identification but not where he feigns memory as to an inconsistent statement. NACDL does not ask for reconsideration of *Owens*. Indeed it cites *Owens* in its letter.

Back to NACDL: NACDL contends that the substantive use of unsworn prior inconsistent statements “would invite manipulation” especially with cooperating witnesses. The concern is that such witnesses require many sessions with prosecutors and it might be only the last one that is audiovisually recorded. It argues that the risk of manipulation might be forestalled if there was a requirement that all of a cooperating witness’s interviews be recorded audiovisually.

Back to the Reporter: As stated above, the Federal Rules cannot mandate the recording of statements that are not being offered as evidence. But perhaps a rule could condition admissibility of one statement on the proponent recording and making available the other statements to the opponent. At any rate, as to the idea of shaping a cooperating witness’s testimony, this occurs now, and the witness’s best statement is then made and locked in at the grand jury. The prosecutor at the hearsay symposium in Chicago described this practice. Perhaps the consequence of the amendment would be not that “shaping” will occur (because it is already occurring), but rather that shaping would occur without having to go to the grand jury to lock the last statement in. That might be considered a negative consequence of the proposed rule – fewer statements will be rendered before a grand jury.

Back to NACDL: NACDL argues that the proposed amendment would overrule the line of cases that prohibit the government from calling a witness solely to impeach a witness with a prior inconsistent statement that is not substantively admissible. *See United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975) (unfair for the prosecution to call a witness solely to impeach the witness with an inconsistent statement that would otherwise be hearsay, as this is a pretextual evasion of the hearsay rule). It argues that these cases will be read out of the law if more prior inconsistent statements are substantively admissible – because then there would be no abuse in calling the witness solely to introduce the prior inconsistent statement.

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Reporter's response: These cases are not overruled by the amendment. It will still be inappropriate to call a witness solely to impeach them with otherwise inadmissible evidence. It's just that now the universe of substantively admissible evidence is broadened. It means that the risk of abuse is more limited than it was before the amendment. Isn't that a good thing?

E. Professor Edward Imwinkelried

I contacted Professor Ed Imwinkelried, the famous evidence scholar, for his insight into how the California Rule (allowing substantive admissibility of all prior inconsistent statements) has been working. Here is his email response:

I follow section 1235 fairly carefully, since I coauthor the annotated California Evidence Code for Thomson Reuters. In those annotations, the first case listed was rendered in 1994. For a period of almost a quarter of a century, there are relatively few decisions. That small number is an indication that the section has not proven problematic. Moreover, you'll see that the recurring issue is whether a claim of forgetfulness is a sufficiently inconsistent statement – an issue that relates more to impeachment under section 791 than it does to any hearsay issue.

Professor Imwinkelreid's California Evidence treatise sets forth an argument in favor of the California rule:

Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the event and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the "turn-coat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

F. Possible Changes to Working Draft Based on Input Received

Assuming that the Committee wishes to go forward and submit the proposed amendment to the Standing Committee for release for public comment, there are several suggestions for change in the above material that it might consider. They are:

1. Changing “audiovisual” to “audio and visual.” This change would be in response to the FJC survey results that purportedly indicate that the respondents might have thought the proposed amendment covered statements that were either audio or visually recorded. The term “audio and visual” was originally used, and the restylists thought it was balky. But if it is necessary for clarity, then that trumps style.

2. Addressing the concern about altered audiovisual presentations: The question of alteration is one of authenticity that is no different from any other situation in which a party wants to admit electronic information to prove a fact. That question is governed by Rules 901 and 902.

If the Committee thinks the point that alteration is a basic authenticity question needs to be made, there could be an addition to the text and to the Committee Note.

The textual change could be slight. It might look like this:

- (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:
 - (i)** was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
 - (ii)** was recorded by audiovisual means, and the recording is **authenticated and** available for presentation at trial; or
 - [(iii)** is acknowledged by the declarant, while testifying at the trial or hearing, as the declarant’s own statement;
 - or]

The addition to the Committee Note could look like this:

The amendment expands substantive admissibility for prior inconsistent statements only if there is no dispute that the witness actually made the statement. Subdivision (A)(ii) requires a statement to be recorded by “audiovisual” means. So to be substantively admissible, it must be clear that the witness made the statement on both audio and video. “Off-camera” statements are not substantively admissible under the amendment.

The term “audiovisual recording” is intended to cover developments in technology, and is not limited to traditional videotaped recording.

It may arise that a prior inconsistent statement, even though made in an audiovisual record, is challenged for being unreliable—for example that the witness was subject to undue influence, or impaired by alcohol at the time the statement was made. These reliability questions are generally for the trier of fact, and they will be relatively easy to assess given the existence of an audiovisual recording and testimony at trial by the person who made the statement.

It is also of course possible that the audiovisual presentation might have been manipulated or altered. These dangers raise questions of authenticity, and they are handled under the same rules and principles that apply to any form of electronic evidence offered as proof of a fact. See generally P. Grimm et. al, *Authenticating Digital Evidence*, 69 *Baylor Law Review* 1 (2017).²

Questions may arise when the recording is partial, or subject to technical glitches. Courts in deciding the analogous question of authenticity under Rule 901 have held that deficiencies in the recording process do not bar admissibility unless they “render the recording as a whole untrustworthy.” *United States v. Adams*, 722 F.3d 788, 822 (6th Cir. 2013). See also *United States v. Cejas*, 761 F.3d 717 (7th Cir. 2014) (intermittent skips in video recording did not render recordings untrustworthy). Courts can usefully apply that standard in assessing the genuineness of the witness’s prior statement for purposes of substantive admissibility.

3. Adding language to the note to anticipate technological developments: This change was suggested by AAJ and is set forth above.

4. Conditioning admissibility of the audiovisual recording on having recorded all other prior statements: This possibility was suggested by NACDL and the Innocence Project. It is hard to figure out how to implement such a requirement. The rule cannot state “The proponent must record all other statements of the witness.” That would be an absurd, substantive, rule. Perhaps something like, “for the statement to be admissible, all prior statements on the same subject must be audiovisually recorded and made available for examination by the adverse party.” But is the proponent supposed to run around with the witness to be there whenever he makes a statement? That doesn’t seem to work.

² Or the cite could be to the Pamphlet, *Best Practices for Authenticating Digital Evidence* (WestAcademic 2016).

Usually cites are not allowed, for some reason, but this cite seems especially appropriate because it is the end result of the Committee’s agenda item on authenticating electronic evidence.

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The concern of the NACDL and the Innocence Project is with statements shaped by law enforcement. So maybe the way to write it is:

“If the statement was obtained by law-enforcement personnel and offered by the government in a criminal case, it is not admissible unless all statements made by the witness to law-enforcement personnel on the same subject were audiovisually recorded and made available to all adverse parties.”

This would probably have to be a hanging paragraph somewhere. If the Committee is interested in adding such a provision, we can seek help from the stylists.

5. *Addressing the problem of sufficiency:*

If the Committee believes that something should be added to the note on the question of the sufficiency of a prior inconsistent statement offered as substantive proof, then that entry should *not* seek to provide an opinion on whether the inconsistent statement is sufficient evidence. That is for a judge to determine on a case by case basis, and it is not a question of admissibility. It’s a question of substantive law, like a corpus delicti rule. It may be useful, however, to make the point that the rule is not about sufficiency. An addition to the note might look like this:

The rule provides that certain prior inconsistent statements are admissible as substantive evidence. It does not and cannot determine whether a prior inconsistent statement may itself be sufficient evidence to support a jury verdict. *See* Report of the Committee on the Judiciary, Senate, 94th Cong. 1st Sess. No. 94-199 (1975) (Rule 801(d)(1) concerns the substantive admissibility, and not the sufficiency, of a witness’s prior statement).

III. Acknowledgment

As discussed above, the DOJ has proposed that a prior inconsistent statement should be substantively admissible if the witness acknowledges making it. The rationale is straightforward – if the problem for substantive admissibility is that it is impossible to cross-examine a witness who denies making the prior statement, that danger is eradicated if the witness acknowledges that he in fact made it. But in response to the proposal, some members of the Committee were of the opinion that the exception would be hard to administer and would create work for the courts.

Nothing has changed since these arguments were made last year. The acknowledgment provision was placed in brackets, but none of the commenters on the rule mentioned it. The acknowledgment provision was not part of the FJC survey.

Under these circumstances – and assuming that the Committee wants to submit the proposed amendment for public comment – it would make a lot of sense to include the acknowledgment provision in the proposal. It would also make sense to continue to include it in

brackets. This bracketing procedure has been used by all the Committees for provisions it had not yet fully agreed upon, where the thought was that public comment would be helpful in making an ultimate decision. The literature that goes out with the rule for public comment could specifically invite comment on the bracketed provision, and it could request input on how it might be administered by the courts.³ Consequently, the amended working draft below contains the acknowledgment provision in bracketed form.

IV. Amended Working Draft

What follows is the working draft of the proposed amendment to Rule 801(d)(1)(A), with all the suggested additions discussed above, but for one: the suggestion that admission of statements to law enforcement should be conditioned on recording all prior statements. That can be added, with some difficulty, if the Committee wishes.

(d) Statements That Are Not Hearsay. 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~~:
- (i)** was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
 - (ii)** was recorded by audiovisual [audio and visual] means, and the recording is **authenticated and** available for presentation at trial; or
 - [(iii)** is acknowledged by the declarant, while testifying at the trial or hearing, as the declarant's own statement;
or]

(B) is consistent with the declarant's testimony and is offered:

³ This bracketing procedure was used for a provision in Rule 502 that would have codified the doctrine of selective waiver. It received many, many helpful comments. It was ultimately withdrawn.

- (i) 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
 - (ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground; or
- (C) identifies a person as someone the declarant perceived earlier.

Committee Note

The amendment provides for broader substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily restrictive. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate—because it may be difficult to cross-examine a declarant about a prior statement that the declarant plausibly denies making. But as shown in the practice of some states, there is a less onerous alternative—not widely available at the time the rule was drafted—to assure that what is introduced is what the witness actually said. The best proof of what the witness said, and that the witness said it, is when the statement is made in an audiovisual record. That is the safeguard provided by the amendment. Moreover, audiovisual recording allows the fact-finder to view and weigh more effectively the circumstances surrounding the prior statement. Given the important safeguard provide by audiovisual recordings, there is good reason to dispense with the confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The amendment expands substantive admissibility for prior inconsistent statements only if there is no dispute that the witness actually made the statement. Subdivision (A)(ii) requires a statement to be recorded by “audiovisual” means. So to be substantively admissible, it must be clear that the witness made the statement on both audio and video. “Off-camera” statements are not substantively admissible under the amendment.

The term “audiovisual recording” is intended to cover developments in technology, and is not limited to traditional videotaped recording.

It may arise that a prior inconsistent statement, even though made in an audiovisual record, is challenged for being unreliable—for example that the witness was subject to undue influence, or impaired by alcohol at the time the statement was made. These reliability questions are generally for the trier of fact, and they will be relatively easy to assess given the existence of an audiovisual recording and testimony at trial by the person who made the statement.

It is also possible that the audiovisual presentation might have been manipulated or altered. These dangers raise questions of authenticity, and they are handled under the same rules and principles that apply to any form of electronic evidence offered as proof of a fact. See generally P. Grimm et. al, *Authenticating Digital Evidence*, 69 Baylor Law Review 1 (2017).

There is overlap between subdivisions (A)(i) and (A)(ii). For example, audiovisual recording of a deposition is potentially admissible under both provisions. But the Committee decided to retain the longstanding original provision, as it has been the subject of extensive case law that should not be discarded. Rather than replace the original ground of substantive admissibility, the decision has been made to add a new, if somewhat overlapping, ground.

Questions may arise when the recording is partial, or subject to technical glitches. Courts in deciding the analogous question of authenticity under Rule 901 have held that deficiencies in the recording process do not bar admissibility unless they “render the recording as a whole untrustworthy.” *United States v. Adams*, 722 F.3d 788, 822 (6th Cir. 2013). *See also United States v. Cejas*, 761 F.3d 717 (7th Cir. 2014) (intermittent skips in video recording did not render recordings untrustworthy). Courts can usefully apply that standard in assessing the genuineness of the witness’s prior statement for purposes of substantive admissibility.

[New Subdivision (A)(iii) provides for an additional, limited ground of substantive admissibility: where the declarant acknowledges having made the prior statement while testifying at the trial or hearing. Acknowledgment by the witness eliminates the concern that the statement was never made, so the acknowledging witness can be fairly cross-examined about the statement. It is for the court in its discretion to determine under the circumstances whether the witness has, in testifying, sufficiently acknowledged making the statement that is offered as inconsistent. There is no requirement that the court undertake a line-by-line assessment of the prior statement.]

Memorandum to Advisory Committee on Evidence Rules
Re: Possible Amendment to Fed. R. Evid. 801(d)(A)
April 1, 2018

The rule provides that certain prior inconsistent statements are admissible as substantive evidence. It does not and cannot determine whether a prior inconsistent statement may itself be sufficient evidence to support a jury verdict. See Report of the Committee on the Judiciary, Senate, 94th Cong. 1st Sess. No. 94-199 (1975) (Rule 801(d)(1) concerns the substantive admissibility, and not the sufficiency, of a witness's prior statement.

While the amendment allows for somewhat broader substantive admissibility of prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement to show not that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) is inapplicable if the proponent is not offering the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

TAB 4B

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MEMORANDUM

TO: Advisory Committee on Rules of Evidence

FROM: Timothy Lau, Federal Judicial Center¹

CC: Michael Shepard, American College of Trial Lawyers²

DATE: February 27, 2018

RE: FRE 801(d)(1)(A) Survey Results

Executive Summary

Under Rule 801(d)(1)(A) of the Federal Rules of Evidence (“FRE”), a prior inconsistent statement (“PICS”) is admissible as substantive evidence only if the statement was “given under penalty of perjury” (“GUPP”). The Advisory Committee on Rules of Evidence (the “Committee”) is considering a proposal (the “Proposed Amendment”) to expand the rule to substantively admit PICS not “given under penalty of perjury” (“non-GUPP”) that “w[ere] recorded by audiovisual means” (“AVR”³) and “[are] available for presentation at trial.”

At its Spring 2017 meeting, the Committee asked the Federal Judicial Center (the “Center”) to conduct a survey study of matters pertinent to the Proposed Amendment and report results by the Spring of 2018. This memorandum presents the survey results.⁴

¹ I would like to thank Jessica Snowden, Melissa Whitney, and Jim Eaglin for their comments and suggestions and Dean Miletich, Valerie Nannery, and Jessica Snowden for creating the photographs included in the questionnaires. Additional feedback on the draft survey questionnaires from the past and present Chairs of this Committee, the Reporter, Michael Cicchini, a criminal defense attorney in Wisconsin, and Crystal Seiler, Deputy District Attorney of Santa Clara County in California, was helpful and appreciated. Finally, Jessica Snowden provided valuable help in the administration of the survey.

² Michael Shepard served as the interface of the American College of Trial Lawyers with the Center in the course of this survey study.

³ “AVR” in this memorandum will be variously used as a noun for “audiovisual recordings” and as an adjective for “audiovisually recorded.”

⁴ The topics explored in the survey were determined based on the following sources:

(1) the advice and feedback of the past and present Chairs of the Committee and the Reporter;

This study surveyed experience with and opinions about PICS among two populations, federal judges and fellows of the American College of Trial Lawyers (the “College”), using two related yet separate online interactive questionnaires.⁵ The survey of judges emphasized the nature of the non-GUPP AVR PICS currently used for impeachment in the federal courts and the goals of the Proposed Amendment. The aim of the litigators’ survey was to discern how the experience of states where non-GUPP PICS were substantively admissible differed from that of jurisdictions where such evidence was admissible only for impeachment.⁶ The two surveys were conducted concurrently from mid-October to mid-November of 2017.⁷

The overall survey trends reported here should be informative and useful to the Committee’s deliberation. However, because of the complexity of the subject matter, the survey questionnaires included questions and instructions that were very challenging for the respondents. Also, the litigators’ survey attained a low rate of participation; specifically, only 154 responses were received from 1,074 persons invited. When divided into subgroups by practice area and jurisdiction, the responses were insufficient for drawing statistically significant conclusions about each subgroup. Strong caution is advisable in that the results of the surveys, particularly the litigators’, should not be read as definitive.⁸

The key survey results are as follows:

- A significant minority of judges and litigators would interpret the term, “statement . . . recorded by audiovisual means,” in ways not contemplated by the Committee. As such, the Proposed Amendment as drafted might depend on the Committee Note for its proper construction.

-
- (2) the series of memoranda prepared by the Reporter for this Committee, Memorandum from Daniel J. Capra, Reporter, on Possible Amendment to Fed. R. Evid. 801(d)(A) (Oct. 1, 2016) [hereinafter the “Capra Fall 2016 Memorandum”], and Memorandum from Daniel J. Capra, Reporter, on Possible Amendment to Fed. R. Evid. 801(d)(A) (Apr. 1, 2017) [hereinafter “Capra Spring 2017 Memorandum”];
 - (3) the memoranda prepared by the Academic Consultants, Memorandum from Ken Broun, Academic Consultant, on Effect of a Broader Rule Admitting Prior Inconsistent Statements on Rulings on Summary Judgment (Jan. 4, 2016) [hereinafter “Broun Memorandum”], and Memorandum from Liesa L. Richter, Academic Consultant, on State Evidence Rules permitting Substantive Admissibility of Recorded Prior inconsistent Statements (Feb. 16, 2017) [hereinafter “Richter Memorandum”];
 - (4) the transcript of the symposium this Committee held in October 2016 at Pepperdine University School of Law, *The Phillip D. Reed Lecture Series: Conference on Possible Amendments to Federal Rules of Evidence 404(b), 807, and 801(D)(1)(a)*, 85 *FORDHAM L. REV.* 1517 (2017) [hereinafter “Pepperdine Symposium Transcript”].
 - (5) the minutes of the April 2016 and April 2017 meetings (respectively, “Spring 2016 Minutes” and “Spring 2017 Minutes”); and
 - (6) my own notes and impressions from the discussions at the meetings of the Committee.

⁵ Appendix B includes links to the online survey questionnaires.

⁶ In general, the judges were given more opportunities to provide open-ended explanations and to answer questions specifically about the Proposed Amendment, while the litigators’ survey focused on the characteristics of PICS encountered in litigation.

⁷ Reminder emails were sent to all invited judges and litigators shortly prior to the close of the survey.

⁸ Appendix C provides a detailed discussion about these limitations.

- On the whole, survey respondents were in favor of expansion of FRE 801(d)(1)(A) to allow non-GUPP AVR PICS to be substantively admissible. Based on the responses of the federal judges, the Proposed Amendment can be seen as a preferred compromise between full liberalization and no change to the rule.
- Federal judges responding to the survey were generally supportive of a policy that encourages the creation of AVR by making non-GUPP AVR PICS admissible as substantive evidence. The responses of the litigators suggest that this incentive would primarily impact the action of criminal prosecutors.
- The majority of survey respondents believed that jury instructions distinguishing between substantive and impeachment uses of PICS are difficult for jurors to understand. However, judges and litigators generally did appear to distinguish between the two uses of PICS themselves. In jurisdictions where non-GUPP PICS were substantively admissible, attempts to substantively use the evidence were given more scrutiny. There were also differences in how such evidence was presented and argued between these jurisdictions and other jurisdictions where non-GUPP PICS were only admissible for impeachment.
- The survey results suggest some other “use cases” of non-GUPP AVR PICS in addition to those considered by the Committee, including recordings of statements made by expert witnesses at conferences, recordings within jails and prisons, and wiretap intercepts.
- In jurisdictions where non-GUPP PICS were admissible as substantive evidence, not all non-GUPP PICS introduced for impeachment were also used as substantive evidence. In addition, the non-GUPP PICS substantively admitted seemed more often to be AVR than those admitted for impeachment. Accordingly, the Proposed Amendment may cover a good portion of the non-GUPP PICS that litigators would be willing to introduce or judges would be willing to admit should all non-GUPP PICS be made substantively admissible.
- Survey responses from litigators in jurisdictions where non-GUPP PICS were substantively admissible indicate that the admissibility of PICS as substantive evidence required more adjudication than the admissibility of PICS for impeachment. This finding suggests that the adoption of the Proposed Amendment may result in more adjudicative work for the federal courts.
- Survey responses of litigators in jurisdictions where non-GUPP PICS were substantively admissible suggest that the substantive and impeachment uses of the evidence have similar effects on litigation outcomes. It therefore appears that the Proposed Amendment, if adopted, may not often affect litigation outcomes.
- Non-GUPP AVR PICS have rarely been relied upon to forestall the grant of summary judgment in jurisdictions where such evidence was substantively admissible. It therefore seems unlikely that substantive admissibility of non-GUPP AVR PICS will greatly affect the summary judgment practice in the federal courts.
- Survey responses suggest that the context behind the AVR was not often apparent in non-GUPP AVR PICS used in litigation. Any requirement within the Proposed

Amendment that the context be apparent may substantially reduce the amount of substantively admissible non-GUPP AVR PICS, especially in civil litigation.

- In terms of technical quality, the video and audio clarity of non-GUPP AVR PICS used in litigation generally seemed to be adequate. However, continuity problems, while not frequently an issue, may occur more often than the Committee might have expected.
- Until now, non-GUPP AVR PICS have typically arisen in interrogation settings. However, AVR made with new technologies such as body cameras, vehicular cameras, and smart phone cameras are beginning to gain prominence. To that end, requirements on contents and technical quality included in the Proposed Amendment may have a strong effect on the substantive admissibility of these emerging forms of non-GUPP AVR PICS.

I. Population Samples

There were two population samples in this study. The first was a random sample of experienced federal district judges, and the second a random sample of fellows of the College who were by nature experienced litigators.

A. Federal Judges

In all, the Center surveyed 166 judges. The survey targeted the active district judges who had served for 5 years at the time the sample was generated.⁹ The total number of district judges surveyed in each circuit was chosen to roughly approximate the proportion of the U.S. population within each circuit.

From the 166 judges, the Center received 76 responses, a response rate of 46%. The following table summarizes by circuit the number of judges who were surveyed and the number of judges who ultimately responded:

Circuit	Surveyed Judges		Responding Judges		Response Rate
	<i>n</i>	%	<i>n</i>	%	%
1st Cir.	9	5%	4	5%	44%
2d Cir.	9	5%	3	4%	33%
3rd Cir.	10	6%	8	11%	80%
4th Cir.	18	11%	9	12%	50%
5th Cir.	17	10%	6	8%	35%
6th Cir.	16	10%	5	7%	31%
7th Cir.	13	8%	4	5%	31%
8th Cir.	18	11%	7	9%	39%
9th Cir.	24	14%	17	22%	71%
10th Cir.	15	9%	7	9%	47%
11th Cir.	15	9%	6	8%	40%
D.C. Cir.	2	1%	0	0%	0%
TOTAL	166		76		46%

Table I-A: Demographics of surveyed and responding judges

B. Litigators

The Center also surveyed 1,074 litigators. To form the survey sample, twenty litigators¹⁰ of “active” status within the College were randomly drawn from each chapter¹¹ of the College. Where a chapter had less than twenty members, all members of the chapter were invited to participate in the survey. If the initial email survey invitation to an invited

⁹ The selection process was conducted shortly prior to the launch of the survey.

¹⁰ Some of the fellows of the College were judges. Federal judges were treated in accordance to the protocol for federal judges described in Section I.A. State judges were not invited to participate in the survey because there were too few state judges within the College for a meaningful survey of their experience given the wide variation in the state rules on PICS.

¹¹ The College had a chapter for every state, with the exception of California, Illinois and New York, each of which had two chapters. The College also had chapters for the provinces of Canada. Naturally, members of these chapters naturally were not surveyed.

litigator was returned as undeliverable, another litigator was drawn from the litigator’s chapter and invited in his or her place.

Department of Justice (“DOJ”) policy precludes surveying its employees without prior approval of the Executive Office for United States Attorneys (“EOUSA”). The Chair of this Committee sought permission from the EOUSA on behalf of the Committee and the Center without results. Accordingly, the three litigators within the survey sample whose email addresses identified them as DOJ employees were not invited to participate.

Out of these 1,074 litigators invited, the Center received 154 responses, a response rate of 14%.¹²

The remainder of this memorandum primarily examines and compares the response patterns of the litigators based on their responses to questions¹³ about: (1) whether their practice was primarily in state or federal courts; and (2) whether their practice was primarily criminal or civil. The following table summarizes these demographic details of the 154 responding litigators:

Response	Criminal		About Evenly Split		Civil		TOTAL	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
State Courts	8	36% ¹⁴	3	21%	57	48%	68	44%
About Evenly Split	9	41%	9	64%	47	40%	65	42%
Federal Courts	5	23%	2	14%	14	12%	21	14%
TOTAL	22 (14%) ¹⁴		14 (9%)		118 (77%)		154	

Table I-B: Demographics of responding litigators

Litigators whose practice was primarily in “state courts” or “about evenly split between state and federal courts” were routed similarly within the interactive survey and were aggregated into a single category (collectively, the “state litigators”).¹⁵ They were asked to indicate a state in which they primarily practiced¹³ and were also asked about their knowledge of the rule of PICS of that state:

¹² This response rate is low. Appendix C provides a detailed discussion about this limitation.

¹³ The questions can be accessed through the links provided in Appendix B.

¹⁴ Unless otherwise indicated within this memorandum, all percentages reported within a “%” column reflect the percentages for a given entry out of the total for that column. The percentages, if any, reported within parentheses in the last row of a table reflect the percentage of the sum total of respondents in a given column out of the total numbers of responses reported in that table.

¹⁵ Litigators whose practice was “about evenly split” were, like the litigators whose practice was primarily in state courts, asked only about their state litigation experience. Given the length of the questionnaire and the fact that the federal experience was also captured through the responses of the federal judges and of the litigators who primarily practiced in the federal courts, these “about evenly split” litigators were not asked about their federal litigation experience to avoid burdening them with too many questions.

Do the evidentiary rules or practices in the courts of [STATE] allow for the admission of a prior inconsistent statement as substantive evidence even if the statement was not given under penalty of perjury?

Yes, because all prior inconsistent statements, whether given under penalty of perjury or not, may be admitted as substantive evidence

Yes, but only some prior inconsistent statements not given under penalty of perjury may be admitted as substantive evidence

No

Not sure

In general, the states¹⁶ can be classified into three groups:¹⁷ (A) those where all non-GUPP PICS were substantively admissible; (B) those where only some non-GUPP PICS were substantively admissible; and (C) those where non-GUPP PICS were not substantively admissible.

The interactive survey presented additional questions concerning substantive uses of PICS for the first two groups of states (collectively, the “substantive states”) while limiting questions to only impeachment uses of PICS for the third group of states (the “impeachment states”). However, these questions were presented to the litigators based on each litigator’s belief about the rule on PICS of his or her state rather than the actual rule of the state. For example, a litigator who believed that his or her state was a substantive state was presented with questions concerning the substantive uses of non-GUPP PICS, even if such use of the evidence was not actually permitted within the state.¹⁸

Instead, the responses to the question concerning the state rule on PICS were used in data analysis, after the survey was closed, to identify the litigators whose responses to the other survey questions could be categorized as informed and reliable. Unless otherwise stated, this memorandum only reports results from the litigators in the substantive states and in the impeachment states who answered correctly about their state rules (respectively, the “substantive state litigators” and the “impeachment state litigators”). Responses from the state litigators who answered incorrectly were only reported and analyzed in discussions about topics of the broadest applicability.

¹⁶ For purposes of this memorandum, Puerto Rico and the District of Columbia are regarded as “states.”

¹⁷ See Capra Fall 2016 Memorandum, at 7-11. The rules of each state are summarized in Appendix C.

¹⁸ This survey design avoided the need to correct litigators when they provided incorrect responses. There were multiple reasons for this design decision. First, it seemed inappropriate to inform state litigators they were “wrong” based on the Center’s pre-survey assessment of the state rules on PICS. The litigators had superior, on-the-ground knowledge, and the survey had to make room for the possibility that the litigators were actually “right.” Indeed, given the wide variation and numerous caveats surrounding the state rules on PICS, reasonable minds may disagree on the “correct” classification of the rules. Second, it did not make sense to ask litigators in substantive states about the substantive admissibility of PICS when they genuinely did not believe that such use of the evidence was permitted. Third, correcting litigators about the rules of their states might result in unpredictable and detrimental effects on the remainder of their survey responses. This survey design did have the unfortunate drawback of allowing the questions asked of each litigator to diverge from the reality of his or her actual practice. It therefore became necessary to discard responses.

The following table summarizes the accuracy of the state litigators about the state rules on PICS:

Response	Criminal		About Evenly Split		Civil		Substantive States		Impeachment States		TOTAL	
	n	%	n	%	n	%	n	%	n	%	n	%
Correct	13	76% ¹⁹	6	50%	46	44%	36	49%	29	48%	65	49%
Incorrect	4	24%	6	50%	58	56% ¹⁹	37	51%	31	52%	68	51%
TOTAL	17 (13%)		12 (9%)		104 (78%)		73 (55%)		60 (45%)		133	

Table I-C: Accuracy of the responses of state litigators about the rule on PICS of their states²⁰

Accordingly, the bulk of the survey results detailed in this memorandum are from a subset of 86 of the litigators, whose demographics are summarized in the following table:

Response	Criminal		About Evenly Split		Civil		TOTAL	
	n	%	n	%	n	%	n	%
Substantive States	11	61%	4	50%	21	35%	36	42%
Impeachment States	2	11%	2	25%	25	42%	29	34%
Federal	5	28%	2	25%	14	23%	21	24%
TOTAL	18 (21%)		8 (9%)		60 (70%)		86	

Table I-D: Demographics of litigators whose survey responses are primarily relied upon

The survey questionnaire contained other demographic questions.²¹ The litigators who indicated that their practice had a criminal component²² were asked additional questions about who they primarily represented, whether the government or defendant, and about what types of criminal cases they litigated. Similarly, the litigators who indicated that their practice had a civil component²³ were given additional questions about whether they primarily represented plaintiffs or defendants and also about what type of civil cases they litigated. These details are generally not used within this memorandum except in limited circumstances where they provide helpful context.

¹⁹ Because a higher proportion of the criminal litigators correctly answered about the state rules on PICS, the impact of the exclusion falls primarily on the civil litigators. This discrepancy may also be taken as a reflection of the relative importance of PICS in criminal as compared to civil litigation.

²⁰ The detailed breakdown is provided in Appendix D.2.

²¹ The questions can be accessed through the links provided in Appendix B.

²² That is, their practices were primarily criminal or about evenly split between criminal and civil.

²³ That is, their practices were primarily civil or about evenly split between criminal and civil.

II. Interpretations of “Statement . . . Recorded by Audiovisual Means”

As drafted, the Proposed Amendment excepts from the hearsay rule:

prior statement[s] . . . recorded by audiovisual means . . . and . . .
available for presentation at trial.

This language is the result of much discussion within the Committee. What would constitute “statement . . . recorded by audiovisual means” has not been made explicit within the Proposed Amendment. Instead, the following requirement is set forth within the draft Committee Note:

[The Proposed Amendment] requires a statement to be recorded by “audiovisual” means. So to be substantively admissible, it must be clear that the witness made the statement on both audio and video. “Off-camera” statements are not substantively admissible under the amendment.

The survey sought to understand how the definition within the Proposed Amendment would be interpreted by asking all judges and litigators the following question:

Which of the following would you interpret as being covered by the phrase “a prior statement . . . recorded by audiovisual means”?

(Please select as many as may apply.)

A recording generated by a single recording system that captures both audio and video of the prior statement

A recording generated by a single recording system that captures either audio or video of the prior statement

A recording generated by combining separate audio and video feeds from different systems

None of the above *(Please explain.)*

The responses are summarized in the following table:

Response	Federal Judges		Litigators	
	<i>n</i>	%	<i>n</i>	%
A recording generated by a single recording system that captures both audio and video . . .	69	91%	120	78%
A recording generated by a single recording system that captures either audio or video . . .	23	30%	57	37%
A recording generated by combining separate audio and video feeds from different systems	30	39%	38	25%
None of the above	1	1%	5 ²⁴	3%

Table II-A: Responses about what recordings fall within “statement . . . recorded by audiovisual means”

²⁴ Two of these respondents used “none of the above” to state their belief that the Proposed Amendment should permit the substantive admission of purely audio recordings of PICS rather than give a truly alternative interpretation.

The results suggest that the vast majority would interpret “statement . . . recorded by audiovisual means” to encompass an AVR of the statement “generated by a single system that captures both audio and video.” However, a substantial minority would also interpret the term to encompass a recording that captures only the audio of the statement or a recording “generated by combining audio and video feeds from different systems.”

It appears then that there is ample ambiguity in the meaning of the term “statement . . . recorded by audiovisual means” and that, without a clearer definition of what constitutes excepted non-GUPP AVR PICS, the Proposed Amendment as drafted may be heavily dependent on the Committee Note for its proper construction.

In order to study the Proposed Amendment, the term “statement . . . recorded by audiovisual means” had to be used throughout the survey questionnaires. However, the responses would have suffered if respondents interpreted the term differently. The interactive questionnaires were therefore programmed to prompt all respondents with this common instruction:

In answering the remaining questions, please interpret the term “a prior statement . . . recorded by audiovisual means” to mean a recording generated by a single recording system that captures both audio and video of the prior statement, not a recording that was generated by combining separate audio and video feeds or that only has audio or video of the prior statement.

The goal was to ensure that respondents completed the other survey questions with a uniform understanding of “statement . . . recorded by audiovisual means.” Naturally, all responses reported and observations drawn within this memorandum follow this definition of AVR.

III. Frequency of Admission of non-GUPP AVR PICS

This section of the memorandum discusses how much the Proposed Amendment might expand on the current scope of FRE 801(d)(1)(A). It first considers the frequency of occurrences of PICS, then the portion of PICS that were non-GUPP, and then the portion of PICS that were non-GUPP and also AVR.

A. Frequency of Attempts to Have PICS Admitted into Evidence

The survey asks the substantive state litigators, in their litigation experience, how often “any party”²⁵ has attempted to have a PICS *admitted as substantive evidence or for impeachment*.²⁶ The impeachment state and federal litigators were asked a question which focused *only on impeachment*.

²⁵ The question was directed to ask a responding litigator about the attempts of “any party” rather than those of the respondent’s own to ensure that the responses would not reflect the litigation style of that particular respondent. Also, this wording allows the question to the litigators to match the question asked of the federal judges.

²⁶ The questions can be accessed through the links provided in Appendix B.

The federal judges were given an equivalent question about how often “any party” before their courts has attempted to have PICS *admitted for impeachment*.

1. Litigators

The following table summarizes the responses of the litigators:

Response	Substantive Evidence						Impeachment Evidence					
	Criminal		About Evenly Split		Civil		Criminal		About Evenly Split		Civil	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Substantive State Litigators												
Never	0	0%	0	0%	1	5%	0	0%	0	0%	0	0%
Rarely	1	9%	0	0%	6	29%	0	0%	0	0%	0	0%
Sometimes	3	27%	3	75%	6	29%	1	9%	1	25%	3	14%
Frequently	6	55%	0	0%	7	33%	8	73%	0	0%	16	76%
Always	1	9%	1	25%	1	5%	2	18%	3	75%	2	10%
TOTAL	11		4		21		11		4		21	
Impeachment State Litigators												
Never	N/A						0	0%	0	0%	0	0%
Rarely							0	0%	0	0%	3	12%
Sometimes							0	0%	0	0%	6	24%
Frequently							0	0%	1	50%	13	52%
Always							2	100%	1	50%	3	12%
TOTAL	2		2		25							
Federal Litigators												
Never	N/A						0	0%	0	0%	1	7%
Rarely							1	20%	0	0%	1	7%
Sometimes							3	60%	1	50%	3	21%
Frequently							1	20%	1	50%	9	64%
Always							0	0%	0	0%	0	0%
TOTAL	5		2		14							

Table III-A: Responses of litigators about how often attempts were made to have PICS admitted for substantive evidence or for impeachment

From the limited number of responses, three observations can be drawn. First, within the substantive states, PICS were more often used for impeachment than as substantive evidence in both criminal and civil litigation. This implies that litigators do not always attempt to have PICS substantively admitted even when permitted to do so.

Second, the responses for the impeachment use of PICS appear similar across all jurisdictions. This suggests that litigators may behave similarly across jurisdictions, and, as such, the responses of substantive state litigators about substantive uses of non-GUPP PICS may be indicative of how litigators in federal courts would use such evidence should it be made substantively admissible.

Third, in all jurisdictions, although PICS were more often employed in the criminal context, they were not entirely absent from the civil practice.

2. Federal Judges

The responses of the federal judges, along with those of the federal litigators already presented in Table III-A, were as follows:

Response	Federal Judges		Federal Litigators					
			Criminal		About Evenly Split		Civil	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Never	0	0%	0	0%	0	0%	1	7%
Rarely	8	11%	1	20%	0	0%	1	7%
Sometimes	18	24%	3	60%	1	50%	3	21%
Frequently	46	61%	1	20%	1	50%	9	64%
Always	4	5%	0	0%	0	0%	0	0%
TOTAL	76		5		2		14	

Table III-B: Responses of federal judges and federal litigators about how often attempts were made to have PICS admitted for impeachment

The perception of the federal judges was generally consistent with that of the federal litigators.

B. Proportion of Admitted PICS that Were Non-GUPP and also AVR

The substantive state litigators were given a set of four questions.²⁷ They were asked how often, in their litigation experience, PICS that were *admitted as substantive evidence* were also non-GUPP. They were then asked how often these PICS were also AVR. They were then given two similar questions concerning PICS that were *admitted for impeachment*. The impeachment state and federal litigators were only given the last two questions *concerning impeachment*.

The federal judges were given equivalent questions which asked how often PICS *admitted for impeachment* in their courts were non-GUPP, and then how often these non-GUPP PICS *admitted for impeachment* were AVR.

²⁷ The questions can be accessed through the links provided in Appendix B.

1. Litigators

The substantive state criminal litigators responded as follows:²⁸

Response		Also AVR					TOTAL
		Never	Rarely	Sometimes	Frequently	Always	
Substantive Evidence							
Non-GUPP	Never	0 ²⁹	N/A				0
	Rarely	0	0	1	0	0	1
	Sometimes	0	0	1	1	0	2
	Frequently	0	1	2	3	0	6
	Always	0	2	0	0	0	2
	TOTAL	0	3	4	4	0	11
Impeachment Evidence							
Non-GUPP	Never	0	N/A				0
	Rarely	0	0	0	0	0	0
	Sometimes	0	0	0	0	0	0
	Frequently	1	2	5	1	0	9
	Always	1	0	1	0	0	2
	TOTAL	2	2	6	1	0	11

Table III-C: Responses of substantive state criminal litigators about the characteristics of admitted PICS

These responses suggest some differences in the PICS admitted as substantive evidence and those admitted for impeachment. Compared to those admitted as substantive evidence, PICS admitted for impeachment were more frequently non-GUPP. At the same time, the non-GUPP PICS that were substantively admitted were more frequently AVR.

While there are insufficient responses to draw firm conclusions, the trends suggest that litigators and courts may be more stringent on the substantive uses of PICS. There is a possibility that criminal litigators within substantive states, knowingly or not, acted as if non-GUPP PICS that were non-AVR were less convincing. Therefore, when they did introduce PICS for substantive purposes, they were comparatively more likely to rely on GUPP PICS. And when they did introduce non-GUPP PICS, they were more likely to rely on non-GUPP PICS that were AVR.

It may also be that these trends resulted from the actions of the state courts and not those of the criminal litigators themselves. That is, it may be that state courts were less

²⁸ The easiest way to understand these types of tables is to first consider the last column. The last column of the table shows that six out of eleven of the substantive state criminal litigators thought that PICS admitted as substantive evidence were “frequently” non-GUPP. The last row of the table reveals that, in terms of how often the non-GUPP PICS admitted as substantive evidence were also AVR, the responses were evenly split between “rarely,” “sometimes,” and “frequently.” The rows and the columns in the center of the table provide the breakdown. This particular table states, for example, that of the six respondents who thought that PICS admitted as substantive evidence were “frequently” non-GUPP, three thought that the non-GUPP PICS were “frequently” also AVR.

²⁹ If a respondent stated that he or she “never” encountered non-GUPP evidence, the respondent was not asked whether he or she encountered non-GUPP evidence that was also AVR. Instead, the inference is drawn that he or she “never” encountered such evidence.

willing to admit non-GUPP PICS for substantive use unless they were AVR and were more tolerant of the use of non-GUPP PICS that were not AVR for impeachment. The data here does not allow for exploring these competing explanations.

The substantive state civil litigators responded as follows:

Response		Also AVR					TOTAL
		Never	Rarely	Sometimes	Frequently	Always	
Substantive Evidence							
Non-GUPP	Never	0	N/A				0
	Rarely	0	2	0	0	0	2
	Sometimes	2	5	2	0	0	9
	Frequently	3	3	3	0	0	9
	Always	0	0	0	0	0	0
	TOTAL	5	10	5	0	0	20
Impeachment Evidence							
Non-GUPP	Never	0	N/A				0
	Rarely	0	0	0	0	0	0
	Sometimes	2	4	1	0	0	7
	Frequently	3	8	2	0	0	13
	Always	0	0	1	0	0	1
	TOTAL	5	12	4	0	0	21

Table III-D: Responses of substantive state civil litigators about the characteristics of admitted PICS

As in the criminal context, non-GUPP PICS were more frequently admitted for impeachment than for substantive use. However, compared to the criminal context, non-GUPP PICS appear to generally be admitted with less frequency, whether for substantive or impeachment use. In other words, to the extent that PICS were admitted in civil cases, more of this evidence was GUPP. This difference can potentially be explained by the heavier reliance on statements made in the context of depositions in civil cases.³⁰

Nonetheless, to the extent that non-GUPP PICS were admitted in civil cases, they were comparatively less frequently AVR than the non-GUPP PICS admitted in criminal litigation. It is possible that civil litigators feel that jurors, under a lower standard of proof, were likelier to credit non-AVR PICS. Alternatively, it may be that substantive state courts were more tolerant of non-GUPP PICS that were not AVR in civil than in criminal cases.

As for the impeachment states, the two responses from the criminal litigators were too few to form a chart. However, both respondents agreed with the most common response of their substantive state counterparts, namely, that the PICS admitted for impeachment were “frequently” non-GUPP, which, in turn, were “sometimes” AVR.

The impeachment state civil litigators gave the following responses:

³⁰ This explanation is consistent with the observation of footnote 19 that the state criminal litigators were more capable than the state civil litigators in correctly answering about the state rules on PICS. Unlike their criminal counterparts, the state civil litigators may have less need to know whether non-GUPP PICS were substantively admissible.

		Also AVR					TOTAL
		Never	Rarely	Sometimes	Frequently	Always	
Non-GUPP	Never	4	N/A				4
	Rarely	1	2	0	0	0	3
	Sometimes	1	3	2	0	0	6
	Frequently	1	8	3	0	0	12
	Always	0	0	0	0	0	0
	TOTAL	7	13	5	0	0	25

Table III-E: Responses of impeachment state civil litigators about the characteristics of admitted PICS

These responses are largely similar to those of their substantive state counterparts.

The federal criminal litigators responded as follows:

		Also AVR					TOTAL
		Never	Rarely	Sometimes	Frequently	Always	
Non-GUPP	Never	0	N/A				0
	Rarely	0	0	0	0	0	0
	Sometimes	0	1	0	0	0	1
	Frequently	2	0	2	0	0	4
	Always	0	0	0	0	0	0
	TOTAL	2	1	2	0	0	5

Table III-F: Responses of federal criminal litigators about the characteristics of admitted PICS

The similarity of these few responses to those presented in Table III-C suggest that the non-GUPP PICS admitted for impeachment in federal criminal cases may have similar characteristics to those admitted for impeachment in state cases.

The responses from the federal civil litigators were as follows:

		Also AVR					TOTAL
		Never	Rarely	Sometimes	Frequently	Always	
Non-GUPP	Never	0	N/A				0
	Rarely	0	2	0	0	0	2
	Sometimes	2	3	2	0	0	7
	Frequently	0	3	1	0	0	4
	Always	0	0	0	0	0	0
	TOTAL	2	8	3	0	0	13

Table III-G: Responses of federal civil litigators about the characteristics of admitted PICS

The responses from the federal civil litigators suggest that, compared to their substantive state counterparts, PICS admitted for impeachment were less often non-GUPP. This may suggest a heavier reliance on deposition evidence in federal civil cases for impeachment purposes.

2. Federal Judges

The responses of the federal judges were as follows:

Response		Also AVR					TOTAL
		Never	Rarely	Sometimes	Frequently	Always	
Non-GUPP	Never	10	N/A			0	10
	Rarely	2	3	0	0	0	5
	Sometimes	4	15	3	1	0	23
	Frequently	10	17	8	2	0	37
	Always	1	0	0	0	0	1
TOTAL		27	35	11	3	0	76

Table III-H: Responses of federal judges about the characteristics of admitted PICS

With the exception of the 10 judges who responded that the PICS admitted for impeachment were “never” non-GUPP, or, in other words, the PICS admitted for impeachment were *always* GUPP, the responses were intermediate between those of the federal criminal and of the federal civil litigators.

C. Implications

As discussed in Section III.A.1, it appears from the responses of the substantive state litigators that there were fewer attempts to introduce non-GUPP PICS as substantive evidence than there were attempts to introduce such evidence for impeachment. It follows then that, even when permitted to do so, litigators may not use every non-GUPP PICS they use for impeachment as substantive evidence as well.

Given this tendency, it is possible that adoption of the Proposed Amendment may not result in every non-GUPP AVR PICS used for impeachment being also used as substantive evidence and that non-GUPP AVR PICS will still primarily be used in federal courts for impeachment.

At the same time, the responses of Section III.B provided by substantive state criminal litigators indicate that non-GUPP PICS admitted for substantive use were more often AVR than non-GUPP PICS admitted for impeachment. The possibility exists that litigators and judges in substantive states may be more discriminating on non-GUPP PICS admitted for substantive use than on non-GUPP PICS admitted for impeachment and were using AVR as a marker of the quality of the PICS itself.³¹

In conjunction, these trends suggest that the Proposed Amendment, by substantively admitting all non-GUPP PICS that are AVR, may actually cover a large portion

³¹ The Committee itself came to the conclusion that:

If the statement is recorded by both audio and visual means there can be no dispute about whether the witness actually made it. Moreover, the jury can see the statement itself and better assess its credibility.

Memorandum from Judge Debra A. Livingston, Chair, Advisory Comm. on the Rules of Evidence, to Judge David G. Campbell, Chair, Comm. on Rules of Practice and Procedure 3 (Nov. 15, 2017).

of the non-GUPP PICS that litigators would be willing to introduce or judges would be willing to admit should all non-GUPP PICS be made substantively admissible.

More broadly, while the survey responses discussed in Section IX suggest doubt about the validity of the distinction between the substantive and impeachment uses of PICS, the responses discussed in this section suggest that litigators and judges generally do understand that distinction. They would not be more stringent with the use of PICS as substantive evidence and more relaxed towards the use of PICS for impeachment had they not, in some way, internalized the distinction.

IV. Rulings over Admission of PICS

Concern has been expressed about a possible increase in the amount of adjudicative work around the admissibility of PICS under the Proposed Amendment. This section of the memorandum discusses the number of rulings that may be needed to resolve questions concerning PICS.

Substantive state litigators were asked how often attempts to have PICS *admitted as substantive evidence* required oral or written rulings.³² They were then asked how often attempts to have PICS *admitted for impeachment* required oral or written rulings. The impeachment state and federal litigators were only asked about *impeachment*.

The federal judges were given an equivalent question that asked how often attempts in their courts to have PICS *admitted for impeachment* required oral or written rulings.

A. Litigators

The responses of the litigators were as follows:

³² The questions can be accessed through the links provided in Appendix B.

Response	Criminal				About Evenly Split				Civil			
	Oral Ruling		Written Ruling		Oral Ruling		Written Ruling		Oral Ruling		Written Ruling	
	n	%	n	%	n	%	n	%	n	%	n	%
Substantive State Litigators												
Substantive Evidence												
Never	0	0%	4	36%	0	0%	1	25%	0	0%	1	5%
Rarely	4	36%	4	36%	2	50%	2	50%	2	10%	15	75%
Sometimes	4	36%	3	27%	0	0%	1	25%	7	35%	2	10%
Frequently	0	0%	0	0%	1	25%	0	0%	10	50%	2	10%
Always	3	27%	0	0%	1	25%	0	0%	1	5%	0	0%
TOTAL	11		11		4		4		20		20	
Substantive State Litigators												
Impeachment Evidence												
Never	1	10%	7	64%	0	0%	0	0%	2	10%	6	32%
Rarely	2	20%	2	18%	1	25%	2	67%	8	40%	12	63%
Sometimes	5	50%	1	9%	1	25%	1	33%	7	35%	1	5%
Frequently	2	20%	1	9%	2	50%	0	0%	3	15%	0	0%
Always	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
TOTAL	10		11		4		3		20		19	
Impeachment State Litigators												
Never	0	0%	1	50%	0	0%	2	100%	0	0%	8	35%
Rarely	1	50%	1	50%	2	100%	0	0%	3	16%	13	57%
Sometimes	0	0%	0	0%	0	0%	0	0%	11	58%	1	4%
Frequently	0	0%	0	0%	0	0%	0	0%	4	21%	1	4%
Always	1	50%	0	0%	0	0%	0	0%	1	5%	0	0%
TOTAL	2		2		2		2		19		23	
Federal Litigators												
Never	0	0%	1	25%	0	0%	1	50%	0	0%	4	31%
Rarely	0	0%	1	25%	0	0%	1	50%	1	8%	7	54%
Sometimes	2	50%	2	50%	1	50%	0	0%	4	31%	2	15%
Frequently	1	25%	0	0%	1	50%	0	0%	7	54%	0	0%
Always	1	25%	0	0%	0	0%	0	0%	1	8%	0	0%
TOTAL	4		4		2		2		13		13	

Table IV-A: Responses of litigators about how often attempts to have PICS admitted required oral or written rulings

The responses suggest that, within each practice area, the frequency of rulings for impeachment generally was similar across jurisdictions. In addition, courts across all jurisdictions more often orally resolved questions about the admissibility of PICS, whether for substantive or impeachment use.

However, comparison of the responses of the substantive state litigators suggests that substantive admissibility of PICS required more court rulings, both oral and written, than admissibility of PICS for impeachment. This finding implies that admission of PICS as substantive evidence generally may be more contentious than admission of PICS for impeachment, and meshes with the observations discussed in Section III that litigators and judges may place greater scrutiny on attempts to introduce PICS for substantive use.

B. Federal Judges

The responses of the federal judges were as follows:

Response	Oral Ruling		Written Ruling	
	<i>n</i>	%	<i>n</i>	%
Never	1	1%	26	35%
Rarely	6	8%	42	56%
Sometimes	22	29%	7	9%
Frequently	35	47%	0	0%
Always	11	15%	0	0%
TOTAL	75		75	

Table IV-B: Responses of judges about how often attempts to have PICS admitted required oral or written rulings

These responses were consistent with those of the federal litigators.

C. Implications

The federal courts currently only adjudicate the admission of non-GUPP PICS for impeachment, in accordance with the strictures of the hearsay rule and of FRE 801(d)(1)(A). The survey responses in combination suggest that substantive uses of PICS would generally require more oral and written rulings than impeachment uses of PICS. Accordingly, adoption of the Proposed Amendment might result in some increase in adjudication on PICS proportionate to the amount of non-GUPP AVR PICS that will be used not only for impeachment but also as substantive evidence.³³

V. Impact of non-GUPP AVR PICS on Litigation

The survey explored the impact of non-GUPP AVR PICS on litigation, specifically, on litigation outcomes, litigation strategy, and the summary judgment practice in particular.

A. Litigation Outcome

The substantive state litigators were asked how often non-GUPP AVR PICS *admitted as substantive evidence* or *admitted for impeachment* affected the outcome of litigation. Impeachment state and federal litigators were only asked about non-GUPP AVR PICS *admitted for impeachment*.

Their responses³⁴ were as follows:

³³ Observations about the possible increase are set out in Section III.

³⁴ In principle, the responses depended on the survey responses reported in Section III.B.1, and, as such, should be reported in a three-dimensional 5 by 5 by 5 matrix. To simplify the presentation and also the analysis, the responses are condensed together and the answers to the previous questions ignored.

Response	Substantive Evidence						Impeachment Evidence					
	Criminal		About Evenly Split		Civil		Criminal		About Evenly Split		Civil	
	n	%	n	%	n	%	n	%	n	%	n	%
Substantive State Litigators												
Never	0	0%	0	0%	1	7%	0	0%	0	0%	1	6%
Rarely	0	0%	1	50%	6	40%	1	11%	1	50%	6	38%
Sometimes	7	64%	0	0%	7	47%	6	67%	0	0%	9	56%
Frequently	3	27%	1	50%	1	7%	1	11%	1	50%	0	0%
Always	1	9%	0	0%	0	0%	1	11%	0	0%	0	0%
TOTAL	11		2		15		9		2		16	
Impeachment State Litigators												
Never	N/A						0	0%	1	100%	2	12%
Rarely							0	0%	0	0%	6	35%
Sometimes							1	50%	0	0%	8	47%
Frequently							1	50%	0	0%	1	6%
Always							0	0%	0	0%	0	0%
TOTAL	2		1		17							
Federal Litigators												
Never	N/A						0	0%	0	0%	0	0%
Rarely							0	0%	1	50%	3	30%
Sometimes							3	100%	1	50%	4	40%
Frequently							0	0%	0	0%	3	30%
Always							0	0%	0	0%	0	0%
TOTAL	3		2		10							

Table V-A: Responses of litigators about how often non-GUPP AVR PICS affected the outcome of litigation

There is a clear divergence in the responses from the state criminal and civil litigators. Compared to their civil counterparts, the state criminal litigators felt that non-GUPP AVR PICS more often affected the outcome of litigation. There were insufficient responses from the federal criminal litigators to observe if a similar split existed among federal litigators.

The similarities in the responses of the substantive state litigators concerning the impact of substantive and impeachment use of non-GUPP AVR PICS on litigation outcome suggest that substantive uses of non-GUPP AVR PICS may only make a marginal difference. This is consistent with the discussion in Section IX about the inability of jurors to understand the differences between the substantive and impeachment uses of PICS.

On the whole, these responses suggest that the Proposed Amendment may make only a small difference in litigation outcomes.

B. Litigation Strategy

A statement does not become a PICS until the declarant has testified to the contrary. However, the possibility that a prior statement might become a PICS should the declarant testify as a witness might affect litigation strategy, such as whether to put the declarant on the stand, to settle, or to accept a plea agreement.

1. Substantive State Litigators

A number of questions were presented to the substantive state litigators. The first question asked:

In your __[STATE]__ litigation experience, how often has the possibility of a prior statement becoming a prior inconsistent statement (should the declarant testify) affected litigation strategy?

Their responses were as follows:

Response	Criminal		About Evenly Split		Civil	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Never	0	0%	0	0%	3	14%
Rarely	1	9%	0	0%	10	48%
Sometimes	3	27%	0	0%	7	33%
Frequently	5	45%	4	100%	1	5%
Always	2	18%	0	0%	0	0%
TOTAL	11		4		21	

Table V-B: Responses of substantive state litigators about how often the possibility of a statement becoming a PICS affected litigation strategy

These survey results show that a rule on PICS allowing substantive use of all non-GUPP PICS may play a greater role in the criminal than in the civil practice.

Respondents were provided the opportunity to explain their answers. The comments from the criminal lawyers were consistent with expectations, namely, that witnesses would have problems explaining away the inconsistency of their statements. The following response was typical:³⁵

- *As a (former) prosecutor, upon learning that a victim or witness in a criminal case intended to recant his or her prior inculpatory statement (often because of direct or indirect witness intimidation) my decision to nonetheless proceed with the prosecution would often be influenced by the knowledge that I would be able to admit the inculpatory prior statement as substantive evidence. Many prosecutions that would have otherwise been impossible, or at least substantially more difficult, could therefore proceed.*

The responses from the civil litigators generally aligned with those of their criminal counterparts; for example, they stated that the existence of PICS influenced considerations about calling witnesses or settling cases. The following responses were typical:

³⁵ The comments were largely cumulative to each other and therefore not presented in full.

- *If a lawyer for a party knows of the inconsistent statement in advance and believes it will be used, he or she would probably explore it on direct examination, thereby defusing its effect*
- *Electing not to call a witness given a prior recorded or written statement.*
- *This often arises in context of admission of fault and apportionment of liability especially in the context of a car crash and there is an early statement taken by an insurance adjuster. Then, if there is an inconsistent statement at deposition I will often develop my strategy based upon which statement is more favorable for my case.*
- *Affects witness preparation for how to explain the inconsistency*

These responses suggest that litigation may be affected in roughly the same way in both civil and criminal litigation.

The litigators were further asked how often the PICS that affected litigation strategy were non-GUPP.³⁶ Their responses were as follows:

Response	Criminal		About Evenly Split		Civil	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Never	0	0%	0	0%	0	0%
Rarely	0	0%	0	0%	3	17%
Sometimes	1	9%	2	50%	8	44%
Frequently	9	82%	2	50%	7	39%
Always	1	9%	0	0%	0	0%
TOTAL	11		4		18	

Table V-C: Responses of substantive state litigators about how often potential PICS that affected litigation strategy were non-GUPP

In turn, these respondents were further asked how often these non-GUPP statements were also AVR.³⁷ Their responses were as follows:

Response	Criminal		About Evenly Split		Civil	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Never	0	0%	2	50%	5	28%
Rarely	2	18%	1	25%	10	56%
Sometimes	5	45%	1	25%	3	17%
Frequently	2	18%	0	0%	0	0%
Always	2	18%	0	0%	0	0%
TOTAL	11		4		18	

Table V-D: Responses of substantive state litigators about how often potential non-GUPP PICS that affected litigation strategy were AVR

The dominant response for the civil litigators was that the potential PICS that “rarely” affected litigation strategy were only “sometimes” non-GUPP and then only “rarely” AVR. In contrast, the dominant response for the criminal litigators was that the potential PICS that “frequently” affected litigation strategy were “frequently” non-GUPP

³⁶ The question can be accessed through the links provided in Appendix B. The question was only presented to those who did not answer “never” to the preceding question.

³⁷ The question can be accessed through the links provided in Appendix B. The question was only presented to those who did not answer “never” to the preceding question.

and then “sometimes” AVR. It appears then that non-GUPP AVR PICS had a larger impact on litigation strategy in the criminal than in the civil practice. This is consistent with the observation presented in Section V.A that non-GUPP AVR PICS more often affected the outcome of litigation in substantive state criminal cases.

2. Implications

The survey responses suggest that adoption of the Proposed Amendment will likely affect litigation strategy in criminal and civil cases in similar ways. It may act to discourage calling declarants as witnesses and may affect settlement or plea agreements in some cases.

However, adoption of the Proposed Amendment may not affect criminal and civil cases to the same extent. The survey responses show that, in the substantive states, potential PICS that affected litigation strategy in the criminal practice were more likely to be non-GUPP and, in turn, those which were non-GUPP were also more likely to be AVR. In contrast, potential PICS that were non-GUPP did not play as large a role in civil as in criminal litigation. Furthermore, those PICS which were non-GUPP and which did affect litigation strategy were often not AVR. As a result, the Proposed Amendment may not affect litigation strategy in civil cases to as large an extent as it may affect strategy in criminal cases.

C. Summary Judgment

The Committee had expressed concern about the potential impact of the substantive admissibility of non-GUPP AVR PICS on the summary judgment practice.³⁸

Substantive state civil litigators were asked a batch of questions concerning the use of PICS in summary judgment. The first concerned the reliance on potential PICS to forestall the grant of summary judgment:

In your __[STATE]__ civil litigation experience, how often was the possibility of a prior statement becoming a prior inconsistent statement relied upon to forestall the grant of summary judgment?

The results are presented below:

Response	<i>n</i>	%
Never	7	33%
Rarely	12	57%
Sometimes	1	5%
Frequently	1	5%
Always	0	0%
TOTAL	21	

Table V-E: Responses of substantive state civil litigators about how often potential PICS were relied upon to forestall the grant of summary judgment

The respondents were further asked whether these potential PICS were non-GUPP.³⁹ Their responses were as follows:

³⁸ As reflected in the minutes of the Spring 2017 meeting, the Committee thought that there might be both positive and negative aspects to the adoption of the Proposed Amendment:

Summary judgment practice on the civil side could be impacted by the availability of audio-visually recorded statements, which could be a net positive to the extent that there is additional evidence for the court to consider

Summary judgment practice could be negatively affected if possibly unreliable recorded statements are generated after an event and then the declarant testifies inconsistently (but accurately) at a deposition. If the recorded statement can be used substantively, then summary judgment may be denied in some case where perhaps it should be, and would otherwise be, granted.

Spring 2017 Minutes, *supra* note 4, at 25-26.

³⁹ The question can be accessed through the links provided in Appendix B. The question was only presented to those who did not answer “never” to the preceding question.

Response	<i>n</i>	%
Never	2	14%
Rarely	4	29%
Sometimes	7	50%
Frequently	1	7%
Always	0	0%
TOTAL	14	

Table V-F: Responses of substantive state civil litigators about how often potential PICS relied upon to forestall the grant of summary judgment were non-GUPP

Finally, the respondents were asked whether the potential non-GUPP PICS relied upon to forestall the grant of summary judgment were AVR.⁴⁰ Their responses were as follows:

Response	<i>n</i>	%
Never	2	17%
Rarely	6	50%
Sometimes	3	25%
Frequently	1 ⁴¹	8%
Always	0	0%
TOTAL	12	

Table V-G: Responses of substantive state civil litigators about how often potential non-GUPP PICS relied upon to forestall the grant of summary judgment were AVR

These survey responses suggest that the Proposed Amendment is unlikely to have a significant effect on the existing summary judgment practice in the federal courts. After all, substantive state litigators reported that the possibility that a prior statement might become a PICS was rarely relied upon to forestall the grant of summary judgment.⁴² Moreover, the potential PICS that were relied upon to forestall the grant of summary judgment were infrequently non-GUPP, and, even then, “rarely” AVR. Accordingly, the Proposed Amendment is unlikely to impact even the rare instances when a PICS might be relied upon to forestall the grant of summary judgment.

⁴⁰ The question can be accessed through the links provided in Appendix B. The question was only presented to those who did not answer “never” to the preceding question.

⁴¹ This practitioner from Colorado practiced in the areas of “personal injury,” “professional malpractice,” and “torts (generally).” The survey results does not allow an exploration as to why this practitioner answered “frequently,” although it should be noted that the practitioner answered “rarely” to both preceding questions.

⁴² This survey result is consistent with the findings of the former Academic Consultant to the Committee. Broun Memorandum, *supra* note 4, at 2.

VI. Quality of non-GUPP AVR PICS Currently Used in Litigation

This memorandum examines two aspects of quality of non-GUPP AVR PICS.

The first is the *contents* captured within non-GUPP AVR PICS. The Committee appears to have arrived at the consensus that non-GUPP AVR PICS must capture the PICS as spoken by the declarant to be admissible as substantive evidence. In other words, the declarant's demeanor must be visible, and off-camera PICS would not be substantively admissible even if audio were captured.

Beyond that baseline, the Committee does not appear to have settled on what else ought to be captured within substantively admissible non-GUPP AVR PICS. There was interest in whether the AVR should also capture the demeanor of questioners whose questions triggered the PICS. Some Committee members were of the view that it should be clear within the AVR that the subject PICS was not made under coercion. All of these questions, fundamentally, are related and concerned with the amount of context that must be captured within non-GUPP AVR PICS.

Another aspect of quality is the *technical nature* of the AVR. The Committee has, for example, discussed whether and how the presence of "glitches" in the AVR should affect admissibility.

This section of the memorandum addresses these and other concerns regarding the quality of non-GUPP AVR PICS.

It should be noted that, prior to being asked about their impressions of the quality of non-GUPP AVR PICS they have encountered, all respondents were given instructions to direct their attention to non-GUPP AVR PICS. Litigators were specifically told the following:

[P]lease interpret the term "Audiovisually Recorded Prior Inconsistent Statements" to include all prior statements that:

- (1) were entered, were offered, or may potentially have been admitted as prior inconsistent statements;
- (2) were not "given under penalty of perjury"; and
- (3) were "recorded by audiovisual means."

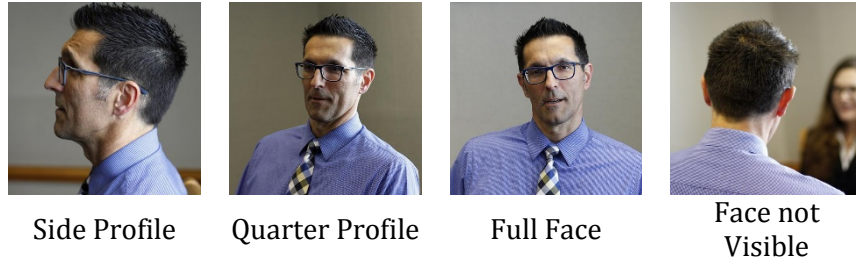
Judges were given equivalent survey instructions.⁴³ All responses reported within this section of the memorandum should be read in light of these instructions.

⁴³ The instructions for judges were identical except for (1), which instead recited "were entered by or offered in your court as prior inconsistent statements."

A. Contents of non-GUPP AVR PICS

All respondents who reported having encountered non-GUPP AVR PICS⁴⁴ were asked two questions about what was visible within those non-GUPP AVR PICS.

They were first asked, in terms of the general appearance of the declarants in non-GUPP AVR PICS, how often the AVR fell within each of the following four categories:⁴⁵



They were then asked, in terms of the amount of context of the making of the recordings visible within non-GUPP AVR PICS, how often the AVR fell within each of the following six categories:⁴⁵

<p>Focused on the declarant. Little background visible.</p>	<p>Significant amount of background visible. Audience or questioner not visible.</p>	<p>Significant amount of background and either audience or questioner visible. Demeanor of audience or questioner not visible.</p>
		<p>Other <i>(Please specify.)</i></p>
<p>Significant amount of background and demeanor of either audience or questioner visible. Full context not visible.</p>	<p>Full context visible without specific focus on declarant, audience, or questioner.</p>	

⁴⁴ This was determined based on their responses to the questions discussed in Sections III, IV, and V.

⁴⁵ The questions can be accessed through the links provided in Appendix B.

1. Litigators

The litigators⁴⁶ responded as follows concerning the appearance of the declarants:

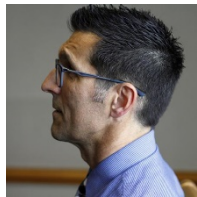
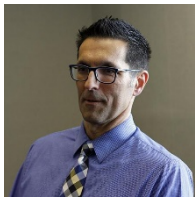
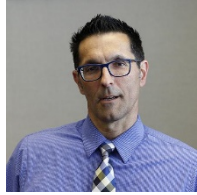
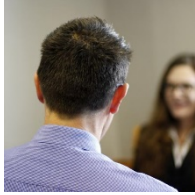
Response	 Side Profile					 Quarter Profile						
	Criminal		About Evenly Split		Civil		Criminal		About Evenly Split		Civil	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Never	5	33%	2	40%	32	76%	1	7%	1	20%	5	12%
Rarely	6	40%	1	20%	7	17%	2	13%	1	20%	19	46%
Sometimes	4	27%	2	40%	2	5%	7	47%	3	60%	14	34%
Frequently	0	0%	0	0%	0	0%	5	33%	0	0%	3	7%
Always	0	0%	0	0%	1	2%	0	0%	0	0%	0	0%
TOTAL	15		5		42		15		5		41	
Response	 Full Face					 Face not Visible						
	Criminal		About Evenly Split		Civil		Criminal		About Evenly Split		Civil	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Never	0	0%	0	0%	2	5%	8	57%	5	83%	39	95%
Rarely	1	6%	0	0%	5	12%	5	36%	1	17%	2	5%
Sometimes	7	44%	3	60%	8	19%	1	7%	0	0%	0	0%
Frequently	7	44%	2	40%	23	53%	0	0%	0	0%	0	0%
Always	1	6%	0	0%	5	12%	0	0%	0	0%	0	0%
TOTAL	16		5		43		14		6		41	

Table VI-A: Response of litigators about the appearance of declarants in non-GUPP AVR PICS

The litigators⁴⁶ responded as follows concerning the context apparent in the non-GUPP AVR PICS they encountered:

⁴⁶ The responses of the substantive state, impeachment state, and federal litigators are reported together here because there does not appear to be a need to differentiate between their responses.






Response	 Focused on the declarant. Little background visible.			 Significant amount of background visible. Audience or questioner not Visible.			 Significant amount of background and either audience or questioner visible. Demeanor of audience or questioner not visible.											
	Criminal		About Evenly Split		Civil	Criminal		About Evenly Split		Civil	Criminal		About Evenly Split		Civil			
	n	%	n	%	n	n	%	n	%	n	n	%	n	%	n			
Never	2	14%	1	17%	5	12%	1	7%	0	0%	4	9%	0	0%	1	17%	23	55%
Rarely	5	36%	1	17%	4	9%	3	20%	2	33%	13	30%	4	27%	3	50%	13	31%
Sometimes	2	14%	1	17%	11	26%	7	47%	3	50%	16	36%	7	47%	2	33%	4	10%
Frequently	5	36%	3	50%	20	47%	4	27%	1	17%	11	25%	3	20%	0	0%	2	5%
Always	0	0%	0	0%	3	7%	0	0%	0	0%	0	0%	1	7%	0	0%	0	0%
TOTAL	14		6		43	15	6		44	15	6		42					
Response	 Significant amount of background and demeanor of either audience or questioner visible. Full context not visible.			 Full context visible without specific focus on declarant, audience, or questioner.			Other ⁴⁷											
	Criminal		About Evenly Split		Civil	Criminal		About Evenly Split		Civil	Criminal		About Evenly Split		Civil			
	n	%	n	%	n	n	%	n	%	n	n	%	n	%	n			
Never	1	7%	1	17%	28	67%	2	13%	2	33%	27	66%	0	0	2			
Rarely	4	27%	3	50%	14	33%	6	40%	2	33%	14	34%	0	0	0			
Sometimes	8	53%	1	17%	0	0%	5	33%	2	33%	0	0%	0	0	0			
Frequently	1	7%	1	17%	0	0%	1	7%	0	0%	0	0%	1	0	0			
Always	1	7%	0	0%	0	0%	1	7%	0	0%	0	0%	0	0	0			
TOTAL	15		6		42	15	6		41	1	0		2					

Table VI-B: Response of litigators about the context apparent in non-GUPP AVR PICS

⁴⁷ Because many respondents left the entry blank instead of entering “never,” percentages are not reported for lack of a meaningful total.

The sole answer for “other” provided the following explanation:

- *None of these [options] occur in audio visual recordings with police body cams which have difficulty keeping the declarant on camera at all times or in focus. Nor do these options take into consideration interviews of child witnesses by social workers or police in special rooms in which the full context is visible with specific focus on the declarant and the questioner.*

The responses from litigators were similar across jurisdictions.

There is, however, a difference in the contents of non-GUPP AVR PICS encountered in criminal cases and in civil cases. In terms of the appearance of declarants, both criminal and civil litigators responded that the full face was the typical way in which declarants appeared. However, there was generally more diversity in the appearance of the declarants within the non-GUPP AVR PICS used in criminal cases. As seen in Table VI-A, while the civil litigators mainly answered “rarely” to the quarter profile and “never” to all other profiles, the criminal litigators generally had higher response rates for the other profiles. Indeed, half of the criminal litigators gave answers that were not “never” to the “face not visible” category, while almost all their civil counterparts answered “never.”

A difference can also be observed in the amount of context apparent in the AVR. As seen in Table VI-B, the civil litigators mostly responded that the non-GUPP AVR PICS were focused on the respondent with little background visible. All of their responses to the categories of “significant amount of background and demeanor of either audience or questioner visible . . .” or “full context visible without specific focus on declarant, audience, or questioner” were “rarely” or “never.” In contrast, a significant proportion of the criminal litigators provided responses of “sometimes,” “frequently,” and “always” to these two categories. It follows then that a greater amount of context was more often apparent in the non-GUPP AVR PICS encountered by the criminal litigators compared to those encountered by the civil litigators.

2. Federal Judges

The responses from the federal judges were as follows:




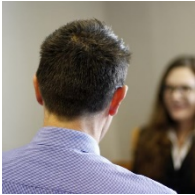
Response	 Side Profile		 Quarter Profile		 Full Face		 Face not Visible	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Never	34	79%	13	30%	6	14%	40	93%
Rarely	7	16%	13	30%	3	7%	2	5%
Sometimes	1	2%	12	28%	17	39%	1	2%
Frequently	1	2%	5	12%	15	34%	0	0%
Always	0	0%	0	0%	3	7%	0	0%
TOTAL	43		43		44		43	

Table VI-C: Response of federal judges about the appearance of declarants in non-GUPP AVR PICS

The judges were given an opportunity to explain their answers. The applicable comments were as follows:

- *I would not admit if can't clearly see face and gestures*
- *I really do not recall*
- *I have never had a prior inconsistent statement admitted that was an audiovisual recording.*

The federal judges also provided the following responses concerning the context visible within non-GUPP AVR PICS:

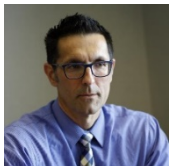



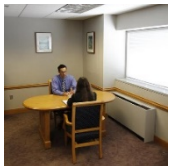
Response	 Focused on the declarant. Little background visible.		 Significant amount of background visible. Audience or questioner not Visible.		 Significant amount of background and either audience or questioner visible. Demeanor of audience or questioner not visible.		 Significant amount of background and demeanor of either audience or questioner visible. Full context not visible.		 Full context visible without specific focus on declarant, audience, or questioner.		Other ⁴⁸
	n	%	n	%	n	%	n	%	n	%	
Never	5	11%	5	11%	18	41%	27	63%	30	70%	2
Rarely	12	27%	16	36%	15	34%	11	26%	6	14%	1
Sometimes	12	27%	21	48%	8	18%	4	9%	7	16%	2
Frequently	13	30%	2	5%	3	7%	1	2%	0	0%	0
Always	2	5%	0	0%	0	0%	0	0%	0	0%	0
TOTAL	44		44		44		43		43		5

Table VI-D: Response of federal judges about the context apparent in non-GUPP AVR PICS

The judges were again given an opportunity to explain their answers, and provided the following comments:

- *Again, I really do not recall*
- *These questions are very difficult. AV prior inconsistent statements are not that common outside the deposition context. Commonly, they arise in criminal cases where there is AV of a witness interview Most commonly, unsworn prior inconsistent statements tend to be in the form of emails, text messages or Facebook postings where there is no recording.*

On the whole, the responses of the judges were consistent with those of the litigators.

⁴⁸ Because many respondents left the entry blank instead of entering “never,” percentages are not reported for lack of a meaningful total.

B. Technical Quality of non-GUPP AVR PICS

Materials previously presented to the Committee noted that some AVR used as evidence in state and federal courts had gaps.⁴⁹ Furthermore, a number of Committee members were concerned about the substantive admissibility of AVR taken by body or concealed cameras, which generally would be less clear than footage taken under better-controlled conditions.

To address these concerns, the survey examined three aspects of technical quality of non-GUPP AVR PICS: (1) video clarity; (2) audio clarity; and (3) continuity problems.

1. Video Clarity

All respondents who reported having encountered non-GUPP AVR PICS⁵⁰ were asked the following question:⁵¹

In your . . . experience,⁵² how generally was the video clarity of Audiovisually Recorded Prior Inconsistent Statements?



Poor quality



Adequate quality



Good quality

The responses were as follows:

⁴⁹ Capra Spring 2017 Memorandum, *supra* note 4, at 19; Richter Memorandum, *supra* note 4, at 15-16.

⁵⁰ This was determined based on their responses to the questions discussed in Sections III, IV, and V.

⁵¹ A comprehensive exploration of video clarity is not feasible through an online questionnaire. After all, there are numerous technical causes for the lack of clarity, which results in different types of clarity deficiencies, and it would be too demanding to ask respondents to distinguish between these different types of deficiencies. Accordingly, this study aimed to generally survey the clarity of video the respondents observed in non-GUPP AVR PICS.

⁵² For federal judges, the preamble read, "In your experience . . ." For state litigators, the preamble read, "In your [STATE] litigation experience . . ." For federal litigators, the preamble read, "In your federal litigation experience . . ."

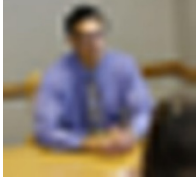


Response	State ⁵³						Federal							
	Criminal		About Evenly Split		Civil		Criminal		About Evenly Split		Civil		Judges	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
 Poor Quality	0	0%	0	0%	3	9%	0	0%	1	50%	0	0%	4	9%
 Adequate Quality	6	50%	2	50%	15	44%	3	100%	0	0%	3	27%	27	63%
 Good Quality	6	50%	2	50%	16	47%	0	0%	1	50%	8	73%	12	28%
Total	12		4		34		3		2		11		43	

Table VI-E: Responses about the video clarity of non-GUPP AVR PICS

The survey responses suggest that non-GUPP AVR PICS encountered across all jurisdictions generally provide at least adequate visual clarity. However, the data also suggests that the evidence used in civil litigation may be higher in quality in this aspect.

⁵³ The responses of the substantive and impeachment state litigators are reported together here because there does not appear to be a need to differentiate between their responses.

2. Audio Clarity

The respondents who reported having encountered non-GUPP AVR PICS⁵⁴ were also asked the following question:⁵⁵

In your . . . experience,⁵⁶ how generally was the audio clarity of
Audiovisually Recorded Prior Inconsistent Statements?

Poor quality | Adequate quality | Good quality

The responses were as follows:

Response	State ⁵⁷						Federal							
	Criminal		About Evenly Split		Civil		Criminal		About Evenly Split		Civil		Judges	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Poor Quality	2	15%	1	25%	4	12%	0	0%	1	50%	0	0%	9	21%
Adequate Quality	6	46%	3	75%	21	62%	3	100%	1	50%	6	55%	27	64%
Good Quality	5	38%	0	0%	9	26%	0	0%	0	0%	5	45%	6	14%
TOTAL	13		4		34		3		2		11		42	

Table VI-F: Responses about the audio clarity of non-GUPP AVR PICS

The judges provided the following comments:

- *But I have had Poor Quality several times.*
- *It has varied. Sometimes it is poor quality.*
- *If the audio is not clear, I would likely not admit it.*

The responses suggest that non-GUPP AVR PICS encountered across all jurisdictions in general were adequate or better in terms of audio clarity. Also, the evidence used in civil litigation appear to be higher in audio clarity than that used in criminal litigation, as was the case for video clarity.

Nonetheless, based on the responses of Table VI-E and Table VI-F, it appears that the video component of non-GUPP AVR PICS was generally clearer than the audio component across all jurisdictions and across practice areas. There was comparatively a greater proportion of responses that the video clarity was of “good quality” than responses that the audio clarity was of “good quality.”

⁵⁴ This was determined based on their responses to the questions discussed in Sections III, IV, and V.

⁵⁵ The Capra Spring 2017 Memorandum, for example, points to the possibility of “garbled statements.” It would be very difficult to explore the different types of lack of audio clarity, such as muffling, garbling, and echoing, in online questionnaires. This study therefore aimed to generally understand the feeling of the respondents about the audio clarity of non-GUPP AVR PICS by allowing them to only choose between three quality levels.

⁵⁶ For federal judges, the preamble read, “In your experience . . .” For state litigators, the preamble read, “In your ___[STATE]___ litigation experience . . .” For federal litigators, the preamble read, “In your federal litigation experience . . .”

⁵⁷ The responses of the substantive and impeachment state litigators are reported together here because there does not appear to be a need to differentiate between their responses.

3. Continuity Problems

A potential problem with AVR is the continuity of the video and/or the audio component.⁵⁸ The survey generally asks how often respondents who reported having encountered non-GUPP AVR PICS⁵⁹ have seen such problems with continuity issues:

Audiovisual recordings may have gaps or glitches, i.e., continuity problems, such that the recording of events may not be complete.

In your . . . experience,⁶⁰ how often were there continuity problems in Audiovisually Recorded Prior Inconsistent Statements?

The responses were as follows:

Response	State ⁶¹						Federal							
	Criminal		About Evenly Split		Civil		Criminal		About Evenly Split		Civil		Judges	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Never	0	0%	0	0%	7	21%	0	0%	0	0%	1	10%	4	9%
Rarely	6	46%	2	50%	18	53%	1	33%	1	50%	7	70%	17	39%
Sometimes	5	38%	1	25%	8	24%	2	67%	1	50%	2	20%	20	45%
Frequently	2	15%	1	25%	1	3%	0	0%	0	0%	0	0%	3	7%
Always	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
TOTAL	13		4		34		3		2		10		44	

Table VI-G: Responses about how often continuity problems were present in non-GUPP AVR PICS

One of the judges provided the following comment:

- *If there were significant gaps or glitches, I probably would not admit [the AVR PICS].*

As was the case with video and audio clarity, the responses suggest that continuity problems appeared more often to be an issue with the non-GUPP AVR PICS used in criminal cases than those used in civil cases.

The survey responses showing that continuity problems, even if not frequent, do occur with some regularity are surprising. They differ from the results of previous research conducted by the Reporter based on reported cases, where he concluded that continuity problems were rare.⁶² A potential explanation for this discrepancy is that courts address continuity problems with oral rather than written rulings, which would make it difficult to ascertain the frequency of continuity problems through written opinions.

⁵⁸ An example of an AVR PICS with this deficiency is the subject of *People v. Vannote*, “where approximately 31 to 35 seconds of the interview were not recorded.” 970 N.E. 2d 72, 79 (Ill. App. Fourth District 2012)

⁵⁹ This was determined based on their responses to the questions discussed in Sections III, IV, and V.

⁶⁰ For federal judges, the preamble read, “In your experience . . .” For state litigators, the preamble read, “In your ___[STATE]___ litigation experience . . .” For federal litigators, the preamble read, “In your federal litigation experience . . .”

⁶¹ The responses of the substantive and impeachment state litigators are reported together here because there does not appear to be a need to differentiate between their responses.

⁶² Capra Spring 2017 Memorandum, *supra* note 4, at 20.

C. Other Concerns Regarding the Reliability of non-GUPP AVR PICS

To understand other concerns litigators and judges have with the reliability of non-GUPP AVR PICS more generally, litigators and judges who reported having encountered non-GUPP AVR PICS⁶³ were asked the following question:

Please describe any other concerns with the reliability of Audiovisually Recorded Prior Inconsistent Statements you may have observed.

Only the comments applicable to the Proposed Amendment are listed below.

1. State Litigators

The state criminal litigators provided the following responses:

- *The worst situation is where you can see the declarant but not the questioner, such as a police officer who is doing the questioning. Any rules adopted should require a clear video showing the context of the questioning and a clear and accurate audio that tracks the questioner's questions and the declarant's statements without fail. It is of prime importance that such sessions show both the questioner and the declarant at the time the questions are asked and answered. Reliability and authenticity are key.*
- *Most of my experience with audio visual recordings involved police interviews. More often than not, the witness . . . is extremely nervous and in a lengthy interview often gives the police some inaccurate answers. While technology of the audiovisual recording is generally excellent, the underlying human factor of fear and confusion of memory cause me to have concern for their substantive reliability.*
- *Poorly edited on- and off-record breaks by videographer*
- *The point at which the recording is activated is crucial. On audiovisual recordings involving police contacts in the field, the recording often fails to capture the event which caused the officer to begin the recording.*
- *These statements are significantly more reliable than the time-honored method of transcripts produced by a court reporter.*

Their civil counterparts provided the following responses:

- *. . . . Videos from prisons or jails are more obscured [than deposition AVR].*
- *Court should rule on any problems before trial*
- *I have much more concerns if the recording is not performed by a professional in audio/visual recordings.*

A state litigator with a mixed criminal and civil practice provided the following response:

- *I cannot remember other examples [outside of depositions] except perhaps police interrogations or police roadside videos. Those roadside videos are often of poor quality. As technology improves I am concerned about the ability to doctor videos and to edit in ways that make them unreliable.*

⁶³ This was determined based on their responses to the questions discussed in Sections III, IV, and V.

2. Federal Litigators

The following responses were given by federal civil litigators:

- *Audiovisually recorded depositions and statements are reliable. However, what I am now seeing for the first time in court is police officer body camera recordings, highway patrol vehicle-mounted camera recordings, and similar types of recordings that are less formal and organized than audiovisual depositions. A recent case was dominated by body and vehicle camera recordings. They were fascinating to the jury, and extremely persuasive as opposed to the old way of an officer or a witness describing what happened; the jury really felt like they were on the scene. But the audio quality is sometimes poor and fragmented, and what is shown visually is limited by what the camera can show. And sometimes you can hear things being said off to the side of what is being visually recorded. I am convinced that more and more of this type of evidence is the wave of the future. I tend to think it should be admitted, unless it is obviously manipulated to show one viewpoint and exclude another, but it will be important for juries to be properly instructed about how to evaluate such evidence and weigh it.*
- *Must ensure that the statement reliably and accurately states what was said and conveys the context in which the statement was made*
- *None. The time for this change is overdue.*
- *None.*
- *None that I recall.*

The following response was given by a litigator whose practice was evenly split between criminal and civil:

- *Frequently, the Declarant is the subject of a surreptitious recording by an informant who has been given a script or at least an outline of questions to ask or a discussion to lead by Federal Agents. This scenario frequently fails to accurately present what the Declarant meant or intended.*

3. Federal Judges

The federal judges provided the following comments:

- *Authenticity is always a big concern given the plethora of editing tools available today.*
- *I think elevating these statements above others is problematic and will require careful wording, guidance and training.*
- *None that I can think of.*
- *These sorts of statements are not given under oath. Unless it is an FBI agent or other law enforcement or investigative officer involved, the person being recorded sometimes does not know of the recording. The state in which I sit as a district judge, for instance, allows recording of phone conversations as long as one party (often the party doing the recording) consents. I really think that such statements should not be put on the same plane as sworn deposition or grand jury or other trial testimony. I oppose the proposed revision to the rule. Simply because someone happens to have a cell phone out to record someone talking, even perhaps doing so secretly, does not transform someone spouting off not under oath into a statement that should be admissible for the truths of the matters asserted. Rather, such information should remain as hearsay, admissible, if at all, for impeachment only with a limiting instruction.*

- *consider it to be very reliable*
- *The use or abuse of leading questions.*
- *I have no concerns. I think this is an excellent amendment to the rules. It should be left to the trial judge to decide whether the audiovisual recording is clear enough by a preponderance of the evidence that it should come in as substantive evidence and not just as impeachment evidence.*
- *The quality of the recording and the context of the statement.*
- *There is always an authenticity concern when AV manipulation and/or undetected or unperceived editing is a possibility.*
- *Few problems with modern equipment.*
- *Audio not always of good quality, complete event not often recorded leading to admissibility issues, lack of sufficient prior notice of intended use of the statement*
- *I wonder about the reliability of certain recordings such as those done by cell phone.*

D. Implications

The responses, in combination, yield some indications about how quality standards either explicitly or implicitly built into the Proposed Amendment may affect the admissibility of non-GUPP AVR PICS. In particular, they suggest that quality standards may have different effects on the use of such evidence in civil and criminal litigation.

With regard to the contents, the non-GUPP AVR PICS used either for impeachment or as substantive evidence in the various jurisdictions often captured the demeanor of declarants either in quarter profile or more often in full face. There appear to be some rare instances in criminal cases where declarants were off-camera, but, in general, survey responses indicate that the typical non-GUPP AVR PICS would not trigger concern about whether the demeanor of the declarant was visible.

There are more questions, however, about the context visible in non-GUPP AVR PICS. The Committee appears to be of the mind that some amount of the context of the making of the PICS should be visible on camera to reduce disputes about whether, for example, the statement was made under duress:

The Committee next turned its discussion to allowing substantive admissibility of prior inconsistent statements where there is in fact proof that it was made—such as a statement that was recorded or was signed by the witness. Several members noted that where a statement is made at a police station, even if it is signed or audio recorded, the witness might have an argument that it was made under pressure—and that many people who confess at the station do in fact repudiate their statements once they get a lawyer. Others responded that while audio recordings and signed statements are subject to argument as to how and perhaps even whether they were made, the same is not true for video recordings. A statement that is recorded on video might be explained away by the witness at trial—which is perfectly suited to the trial context—but it is all but impossible to deny that a statement was made when it has been

video recorded. Moreover, any indication of police pressure or overreaching is likely to be presented in the video itself.⁶⁴

The responses suggest that existing non-GUPP AVR PICS used in court were mostly focused on declarants with little background visible. This suggests that “indication of . . . pressure or overreaching” was unlikely to be visible in many of the non-GUPP AVR PICS,⁶⁵ not to mention the questioners’ demeanor.

Accordingly, a requirement within the Proposed Amendment that the context of the making of the non-GUPP AVR PICS be visible within the AVR itself is likely to substantially reduce the amount of substantively admissible non-GUPP AVR PICS. This effect will likely be more heavily felt in the civil realm, given that the survey respondents pointed to non-GUPP AVR PICS used in civil cases as mostly focused on declarants and containing little context.

With regard to the technical quality, the video and audio clarity of non-GUPP AVR PICS were generally acceptable, even though some respondents noted the presence of poor quality audio. Continuity problems, although not frequently an issue, did appear to occur more often than the Committee may have come to expect. In all three aspects, the non-GUPP AVR PICS used in civil cases appeared to be superior to those in criminal cases.

VII. Origin of non-GUPP AVR PICS

Related to the issue of the quality of non-GUPP AVR PICS is the issue of how and when they are created. This survey sought to understand the origin of non-GUPP AVR PICS and to identify use cases that the Committee has not yet considered.

A. Control over Recording Conditions

The litigators and judges who reported having encountered non-GUPP AVR PICS⁶⁶ were asked the following question:

In your . . . experience,⁶⁷ how often were Audiovisually Recorded Prior Inconsistent Statements⁶⁸ recorded during an event specially organized to record the declarant’s statement (as opposed to recorded by chance)?

The responses were as follows:

⁶⁴ Spring 2016 Minutes, *supra* note 4, at 38.

⁶⁵ Of course, the “pressure or overreaching” can still be indirectly reflected in the demeanor of the declarant. However, the determination of whether a declarant is under “pressure or overreaching” based on the declarant’s demeanor may not be a simple exercise.

⁶⁶ This was determined based on their responses to the questions discussed in Sections III, IV, and V.

⁶⁷ For federal judges, the preamble read, “In your experience . . .” For state litigators, the preamble read, “In your [STATE] litigation experience . . .” For federal litigators, the preamble read, “In your federal litigation experience . . .”

⁶⁸ The questionnaire instructions defining the term are set forth in Section VI.

Response	States ⁶⁹						Federal							
	Criminal		About Evenly Split		Civil		Criminal		About Evenly Split		Civil		Judges	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Never	0	0%	0	0%	2	6%	0	0%	0	0%	0	0%	5	11%
Rarely	0	0%	0	0%	4	12%	0	0%	1	50%	1	9%	3	7%
Sometimes	2	15%	0	0%	7	21%	0	0%	0	0%	1	9%	11	24%
Frequently	8	62%	3	75%	16	47%	2	66%	1	50%	6	55%	20	43%
Always	3	23%	1	25%	5	15%	1	33%	0	0%	3	27%	7	15%
TOTAL	13		4		34		3		2		11		46	

Table VII-A: Responses about how often non-GUPP AVR PICS were created in specially organized events

Three judges chose to elaborate upon their answers:

- *Usually law enforcement interviews.*
- *Typically custodial interrogations. I have had some police bodycams, but they weren't used to impeach.*
- *We just don't see the planned recording of an individual's statement. The more typical situation is a police officer's bodycam.*

The responses suggest that, for criminal and civil matters across all jurisdictions, non-GUPP AVR PICS were frequently the product of deliberate recording. While comparatively less often encountered, chance recordings were not unheard of.

B. Recording Devices

Respondents who reported having encountered non-GUPP AVR PICS⁷⁰ were asked the following question about how often the following devices were used to record the evidence: (1) “fixture devices (e.g., surveillance cameras, interrogation room cameras, fixed pole cameras)”; (2) “cameras integral to smart phones (e.g., iPhones, Android phones)”; (3) “body cameras”; (4) “other portable devices (e.g., ‘camcorders’, digital cameras with video recording capabilities, ‘spycams’)”; (5) “vehicular cameras”; and (6) “other category (*Please specify.*)”⁷¹

The responses were as follows:

⁶⁹ The responses of the substantive and impeachment state litigators are reported together here because there does not appear to be a need to differentiate between their responses.

⁷⁰ This was determined based on their responses to the questions discussed in Sections III, IV, and V.

⁷¹ The questions can be accessed through the links provided in Appendix B.

Response	States ⁷²						Federal							
	Criminal		About Evenly Split		Civil		Criminal		About Evenly Split		Civil		Judges	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Fixture Devices (e.g., Surveillance Cameras, Interrogation Room Cameras, Fixed Pole Cameras)														
Never	0	0%	0	0%	10	31%	1	33%	0	0%	2	18%	5	12%
Rarely	0	0%	1	25%	8	25%	0	0%	2	100%	2	18%	7	16%
Sometimes	4	31%	0	0%	11	34%	1	33%	0	0%	4	36%	13	30%
Frequently	8	62%	3	75%	3	9%	0	0%	0	0%	3	27%	17	40%
Always	1	8%	0	0%	0	0%	1	33%	0	0%	0	0%	1	2%
TOTAL	13		4		32		3		2		11		43	
Cameras Integral to Smart Phones (e.g., iPhones, Android Phones)														
Never	0	0%	1	25%	14	44%	1	33%	1	50%	5	45%	13	31%
Rarely	9	75%	2	50%	11	34%	2	67%	1	50%	2	18%	15	36%
Sometimes	3	25%	1	25%	6	19%	0	0%	0	0%	3	27%	12	29%
Frequently	0	0%	0	0%	1	3%	0	0%	0	0%	1	9%	2	5%
Always	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
TOTAL	12		4		32		3		2		11		42	
Cameras Integral or Attached to Computing Devices (e.g., Laptops, Desktops, Tablets, Computer Monitors)														
Never	2	17%	1	33%	15	47%	1	33%	2	100%	6	55%	9	22%
Rarely	7	58%	0	0%	11	34%	1	33%	0	0%	3	27%	22	54%
Sometimes	3	25%	2	67%	5	16%	1	33%	0	0%	2	18%	9	22%
Frequently	0	0%	0	0%	1	3%	0	0%	0	0%	0	0%	1	2%
Always	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
TOTAL	12		3		32		3		2		11		41	
Body Cameras														
Never	2	18%	0	0%	21	66%	2	67%	1	50%	5	45%	12	29%
Rarely	3	27%	2	66%	9	28%	0	0%	0	0%	4	36%	9	22%
Sometimes	3	27%	1	33%	1	3%	1	33%	0	0%	2	18%	16	39%
Frequently	3	27%	0	0%	1	3%	0	0%	1	50%	0	0%	4	10%
Always	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
TOTAL	11		3		32		3		2		11		41	
Other Portable Devices (e.g., "Camcorders", Digital Cameras with Video Recording Capabilities, "Spycams")														
Never	2	18%	1	33%	7	22%	1	33%	1	50%	2	18%	17	43%
Rarely	4	36%	1	33%	9	28%	0	0%	0	0%	5	45%	16	40%
Sometimes	2	18%	1	33%	10	31%	2	67%	0	0%	3	27%	6	15%
Frequently	3	27%	0	0%	4	13%	0	0%	1	50%	1	9%	1	3%
Always	0	0%	0	0%	2	6%	0	0%	0	0%	0	0%	0	0%
TOTAL	11		3		32		3		2		11		40	
Vehicular Cameras (e.g., "Dashcams")														
Never	2	15%	0	0%	20	61%	2	67%	1	50%	5	45%	6	14%
Rarely	2	15%	1	25%	8	24%	0	0%	1	50%	5	45%	12	29%
Sometimes	7	54%	1	25%	4	12%	1	33%	0	0%	1	9%	18	43%
Frequently	2	15%	2	50%	1	3%	0	0%	0	0%	0	0%	6	14%
Always	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
TOTAL	13		4		33		3		2		11		42	

⁷² The responses of the substantive and impeachment state litigators are reported together here because there does not appear to be a need to differentiate between their responses.

Response	States ⁷³			Federal			
	Criminal	About Evenly Split	Civil	Criminal	About Evenly Split	Civil	Judges
	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>
Other Category (<i>Please Specify.</i>) ⁷⁴							
Never	0	0	1	1	0	2	7
Rarely	1	0	1	0	0	0	1
Sometimes	0	0	1	0	0	0	0
Frequently	0	0	0	0	0	0	1
Always	0	0	0	0	0	0	0
TOTAL	1	0	3	1	0	2	9

Table VII-B: Responses about how often different types of recording devices were used to generate non-GUPP AVR PICS

There were not many respondents who specified an “other category.” One response from a civil litigator referred to “statements recorded by an investigator” while two responses, one each from a federal judge and from a civil litigator, referred to professional AVR.

The respondents were permitted an opportunity to expand on their answers. The applicable comments were as follows:

- *I have never been a fan of these types of devices—they have a potentially nasty overlay which can be a problem in the courtroom. I have used them, but they have lots of baggage.*
- *This area is exploding and I am sure that my answers will change as these recordings become even more available by all the means stated above.*

C. Situations where non-GUPP AVR PICS Arise

Respondents who reported having encountered non-GUPP AVR PICS⁷⁵ were asked to describe situations in which the evidence arose:

Please describe some of the cases in which you have encountered Audiovisually Recorded Prior Inconsistent Statements⁷⁶ . . . ⁷⁷ and the circumstances that gave rise to such statements.

Only the comments applicable to the Proposed Amendment are listed below.

⁷³ The responses of the substantive and impeachment state litigators are reported together here because there does not appear to be a need to differentiate between their responses.

⁷⁴ Because many respondents left the entry blank instead of entering “never,” percentages are not reported for lack of a meaningful total.

⁷⁵ This was determined based on their responses to the questions discussed in Sections III, IV, and V.

⁷⁶ The questionnaire instructions defining the term are set forth in Section VI.

⁷⁷ For federal judges, the question read, “. . . Statements and the circumstances . . .” For state litigators, the question read, “Statements in your [STATE] litigation experience and the circumstances . . .” For federal litigators, the question read, “Statements in your federal litigation experience and the circumstances . . .”

1. State Litigators

One state criminal litigator provided the following response:

- *I often used police-recorded interrogations to impeach government witnesses.*

The state civil litigators provided the following comments:

- *Presentations by experts at medical-legal conferences with statements inconsistent with deposition testimony.*
- *... the use of recorded witness statements developed during investigation.*
- *Police interviews*
- *Body cam is increasing in frequency Also, people are taking a lot more videos at the scene of accidents.*
- *Criminal case involving witness interviews; sometimes defendant interviews, though not sure that qualifies under this survey, as those are automatically admissible by the prosecution.*
- *Complex business and med[ical] mal[practice]*
- *1. Birth injury case with news media footage; interview of parents*
2. Smart phone recording of zipline accident
- *I have used audiovisual recorded statements of a witness . . . which were obtained during an investigation to impeach the person's testimony at trial.*
- *Previously when I was doing prosecution there were surveillance audio visual.*

A litigator with mixed criminal and civil practices stated:

- *... where a witness was recorded, sometimes without their knowledge.*

2. Federal Litigators

The federal criminal litigators offered the following comments:

- *Statements my witnesses . . . (including confessions) in criminal investigations*
- *Prosecutions following investigations by federal law enforcement agencies.*

Their civil counterparts stated:

- *Other than at video depositions, I've been involved in several large tort disputes where someone chose to record the events for personal use and happened to capture the accident occurring. In the construction context, I've had access to recordings made on the job site for purposes of memorializing disputed work shortcomings.*
- *... Rarely do I see statements recorded in [contexts outside of AVR depositions] . . . I think the trend is that we are going to see more and more statements recorded on cell phones, body cams, and vehicle cams.*
- *Eyewitness who changes description of events when testifying at trial.*
- *Post accident investigation where the witness interview was recorded by the investigator and where a plaintiff or other witness used a cell phone to record a statement either openly or surreptitiously.*

- . . . *video statements made in investigation of a dispute . . .*

A litigator whose practice was evenly split between criminal and civil provided the following comment:

- *As described earlier, the usual circumstance involves a planned encounter with the Declarant by a scripted informant or cooperating government witness.*

3. Federal Judges

The federal judges provided the following comments:

- *Police interrogations or statements. Traffic stops caught on camera. Interviews by private investigators/government investigators.*
- *Interrogation testimony is the most frequent use. Quality ranges widely.*
- *These frequently arise from recorded telephone conversations involving persons being detained in local prisons.*
- *Another type that we frequently see is prior witness statements taken after an event, but which are not under oath.*
- *Most of the times that I have encountered these are FBI interviews of a suspect, dashboard cameras, police body cameras, private investigator or someone using a cell phone.*
- *happens fairly often in criminal cases—drug cases, sex offenses*
- *Body cameras, dash cams are frequently offered in Fourth Amendment cases to suppress evidence . . . Often it is not clear that the offered testimony is in fact inconsistent with or merely out of context with statement offered in evidence. I don't see a reason to change the rule and believe it would create as many problems as it would solve.*
- *generally police involved cases, either at the police station or at roadside*
- *statements made during police questioning, statements made on smart phones*
- *I have encountered such statements in criminal cases where the defendant voluntarily consents to be interviewed or where the defendant's vehicle was stopped pursuant to a traffic stop.*
- *Recorded jail calls, wiretap intercepts, witness interviews recorded by law enforcement, surveillance videos in the civil context used to impeach.*
- *Cannot recall specific cases.*
- *Dash cam audio/video recordings*
- *Custodial interrogations of criminal defendants.*
- *Traffic stops. Interviews of criminal suspects at a police station. Surveillance cameras.*
- *The most frequent situations occur in motions to suppress or in accident investigations involving video/audio from police vehicle and body microphone recording devices. Obviously, some of the statements depending on the circumstances might qualify as admissions, but many times they are not made by a party.*
- *Police interviews in criminal cases (infrequent)*
- *most often in drug case prosecutions*

- *The most common are from interviews in interview rooms in law enforcement facilities where the audio visual equipment is permanently installed and the subject is facing the camera. These interviews frequently arise after an event when the subject before or after receiving Miranda warnings agrees to talk to law enforcement.*
- *Automobile stops and suspect being questioned by police, undercover drug buys, some commercial litigation disputes, prior expert or statements by witnesses at a filmed seminar or corporate meeting*
- *In the main, these are part of witness interrogations. Dash cameras are becoming more common, but the sound quality is usually poor. Police body cameras are still rare, but seem to be increasing as well. Phone videos are also becoming more common.*
- *I have not had these kinds of statements admitted at trial.*
- *CA wearing body camera or watch. Camera supplied by LEO.*

D. Implications

1. Emerging AVR Technologies

The responses suggest that, at present, non-GUPP AVR PICS are dominated by statements made under controlled recording conditions. Within the criminal realm, the AVR typically were taken by fixture cameras in interview rooms, while in the civil realm the AVR typically were taken by portable cameras. These types of non-GUPP AVR PICS appear to fall squarely within the contemplation of the Committee.

Nonetheless, the comments clearly indicate that there is an ongoing shift in the origin of non-GUPP AVR PICS used in the courts. This comment by a federal judge succinctly captures the general sentiment of the survey respondents:

- *In the main, these are part of witness interrogations. Dash cameras are becoming more common, but the sound quality is usually poor. Police body cameras are still rare, but seem to be increasing as well. Phone videos are also becoming more common.*

The emerging types of AVR will generally not be taken under controlled conditions.⁷⁸ They are also unlikely to meet any quality definition, particularly with respect to the contents, the Committee may include within the Proposed Amendment. At present, the draft Committee Note to the Proposed Amendment states:

So to be substantively admissible, it must be clear that the witness made the statement on both audio and video. “Off-camera” statements are not substantively admissible under the amendment.

It seems difficult to imagine how, for example, vehicular or body cameras will consistently meet this content requirement. After all, neither type is used by aiming the camera at a particular speaker. They are not even installed in ways conducive to aiming the camera. Indeed, the very purpose of operating these cameras is to have them passively record every event that takes place in front of them. It is therefore likely that the demeanor of the declarant will not be clear or even visible in these AVR.⁷⁹ And while smart phone cameras can be aimed, they require “steady” hands to properly capture a potential PICS at the standard contemplated by the Committee. This level of operator control may not be present or possible in the exigent or surreptitious circumstances cited within the comments where non-GUPP AVR PICS may be created.

In some sense, the responses of the federal judges and litigators suggest the possibility that the quality requirements that the Committee may include within the Proposed Amendment would have the effect of excluding these emerging types of non-

⁷⁸ AVR generated in controlled conditions generally would be of a higher quality than those made under uncontrolled conditions. For example, under controlled conditions, the maker of an AVR can take care to control for lighting and take time to focus the camera on the declarant.

⁷⁹ As seen in these comments by the litigators:

- *A recent case was dominated by body and vehicle camera recordings . . . , But the audio quality is sometimes poor and fragmented, and what is shown visually is limited by what the camera can show. And sometimes you can hear things being said off to the side of what is being visually recorded.*
- *. . . police body cams which have difficulty keeping the declarant on camera at all times or in focus.*

GUPP AVR PICS from substantive use. And it is likely that the higher the standard of quality, the heavier the effect of exclusion will be.

2. Additional Use Cases

The following comments made by a substantive state civil litigator and a federal judge concerning the use of non-GUPP PICS against expert witnesses suggest a use case that, to the best of this author's knowledge, this Committee may not yet have considered:

- *Presentations by experts at medical-legal conferences with statements inconsistent with deposition testimony.*
- *... prior expert or statements by witnesses at a filmed seminar or corporate meeting*

These comments suggest the possibility that the Proposed Amendment may generate new ways for expert statements to become substantively admissible.

This survey has not been designed to explore the increase in the substantive admissibility of statements made by experts. At this time, statements made by experts at conferences is probably not a large concern. However, with the popularization of AVR technologies to "stream" conferences and seminars, it is difficult to predict how many expert statements will over time be substantively admissible as non-GUPP AVR PICS. In turn, it is unclear how the substantive admissibility of AVR of statements made by experts at conferences and seminars would affect the practice surrounding expert witnesses.

Another use case referred to in a number of comments that the Committee appears not to have considered is the AVR of statements made in jails and prisons. It is unclear at this time how many such statements would be substantively admissible under the Proposed Amendment.

A particularly interesting use case not contemplated by the Committee is the one cited by a federal judge concerning "wiretap intercepts." The traditional intercept would only contain audio, and, accordingly, would fail to meet the content requirements of the Proposed Amendment. However, with the proliferation of technologies such as Skype, FaceTime, and Amazon Echo Show, the intercepts of the future could contain a video component as well.

It is impossible to predict how many such AVR intercepts would be admissible under the Proposed Amendment as technology and police practice evolve together. However, it is likely that many of such intercepts would exceed even a strong content requirement. For example, in these AVR intercepts, the demeanor of declarants and questioners would both be visible. This is unlike the typical non-GUPP AVR PICS now used in courts, which, according to the survey responses analyzed in Section VI.A.1, generally do not include the questioner's demeanor.

VIII. Differences between non-GUPP AVR PICS Used Substantively and Those Used for Impeachment

The survey sought to understand what if any difference there was between the non-GUPP AVR PICS admitted as substantive evidence and those used for impeachment.

The following question was only asked of the substantive state litigators who reported having encountered non-GUPP AVR PICS:⁸⁰

Based on your [STATE] litigation experience, please describe any differences between the Audiovisually Recorded Prior Inconsistent Statements admitted as substantive evidence and those admitted for the purpose of impeaching the credibility of a witness.

Only the comments applicable to the Proposed Amendment are listed below.

The criminal litigators provided the following comments:

- *Prior statements that were not recorded or made under oath are admissible for impeachment only. As to recorded statements, whether the prior statement is offered as substantive evidence is most often a function of the attorney's trial tactics and strategy. That is, if the recorded statement contains evidence damaging to the questioning attorney and it has not been offered by opposing counsel, the attorney may wish to use it only to impeach on a discrete issue.*
- *I have long suspected that juries in other jurisdictions ignore the "for impeachment only" instruction that is routinely given to limit the use of prior inconsistent statements. And that's because the distinction we draw makes little to no sense, especially in today's world. So long as one knows that what purports to be a witness's prior statement was an accurate transcription thereof, the evidentiary value of the statement relates to that fact, and not the fact of the oath.*
- *It depends upon the circumstances of the particular case, and rarely are there any meaningful differences.*
- *None. Wisconsin does not distinguish between such statements.*
- *The first problem of course is that neither jurors or most litigators distinguish between the two. When grounds exist to use the audiovisual recording as substantive evidence, it is more likely to play the recording in its entirety. The video can become the focus of the case. In deliberations, it is one form of testimonial evidence most likely to be replayed by the jury. The introduction of that recording as a substantive exhibit can shift the focus from the courtroom evidence, subject to cross-examination to the unchallenged video recording.*

The civil litigators provided the following responses:

- *Little difference. Juries really don't understand this distinction. They consider the evidence as substantive every time.*
- *I find no difference in Arkansas. Deposition testimony may be admitted for any purpose. Recordings made by investigators are routinely received.*
- *Difference is hard to understand. If you impeach a witness, that could be considered substantive evidence*

⁸⁰ This was determined based on their responses to the questions discussed in Sections III, IV, and V.

- *The differences lie in the way they are used in closing—the inconsistent statement is limited to “he/she told you x, then you found out that they said y”—up to you to decide which if either you are going to credit. If it is substantive evidence, the argument is “x is a fact” “X happened”. The real difference is that the writing if it is a document or writing actually comes into evidence under the Connecticut rule and sits on the jury room table and counsel can put it up during argument and argue the significance of it to the case. Prior inconsistent statement is much more deflected.*
- *None*
- *Little difference since prior inconsistent statement is admissible as substantive if witness is present and available for cross-examination*
- *no difference*
- *My experience in the civil arena is that the use of prior inconsistent statements is largely overrated. In juror interviews most jurors were unimpressed with the use of the inconsistent statement. I believe that we as lawyers assign more weight to the inconsistent statement than most jurors. Also, I do not believe jurors understand the difference between use of the prior statement as impeachment or substantive evidence.*
- *Those admitted for impeachment could not be used on appeal to support the ultimate decision or argued to the jury or factfinder to support the verdict.*

A litigator whose practice was evenly split between criminal and civil stated:

- *In either instance the recording can be either greatly helpful of extremely damaging, depending on the side of the case you are representing.*

These comments suggest that there was no real difference in the nature of the non-GUPP AVR PICS used as substantive evidence and those used for impeachment in the substantive states.

In addition, these comments confirm the observations articulated in other parts of this memorandum. As noted in Section III.C, while litigators doubted that jurors or even they themselves could understand and apply the difference in the two uses of PICS, they actually do appear to observe and uphold them. The comment by the litigator that the PICS admitted for impeachment “could not be used on appeal . . . or argued to the jury” is clear support for this observation. Even the litigator who stated that “neither jurors or most litigators distinguish between the two” actually pointed to how non-GUPP AVR PICS were used and treated differently by litigators, stating that “[w]hen grounds exist to use the audiovisual recording as substantive evidence, it is more likely to play the recording in its entirety.”

IX. Elimination of Jury Instructions Distinguishing between the Substantive and Impeachment Uses of PICS

Adoption of the Proposed Amendment may reduce the amount of jury instructions concerning the permissible uses of PICS. The survey sought to understand whether jurors find the instructions difficult to understand and whether there would be benefit in eliminating them.

A. Difficulty for Jurors to Understand Instructions Concerning PICS

The federal judges were asked their level of agreement with the following statement:

*It is difficult for jurors to understand the instruction that a prior inconsistent statement is admissible only to impeach and not for the truth of the matter asserted.*⁸¹

Their responses were as follows:

Response	<i>n</i>	%
Strongly Disagree	3	4%
Disagree	13	17%
Neither Agree nor Disagree	10	13%
Agree	35	46%
Strongly Agree	15	20%
TOTAL	76	

Table IX-A: Responses of federal judges as to whether the instructions about permissible uses of PICS are difficult for jurors to understand

A majority of the judges believed that the jury instructions distinguishing between substantive and impeachment uses of PICS are difficult to understand. To that end, it is worthwhile to consider these responses in view of those obtained in the 2012 survey the Center conducted for the Committee concerning FRE 801(d)(1)(B), which governs the admissibility of prior consistent statements.⁸² In that survey, federal judges were asked their opinion about the following sentence:

It is difficult for jurors to understand the instruction that a prior consistent statement is admissible only to rehabilitate and not for the truth of the matter asserted in the statement.

⁸¹ The question can be accessed through the links provided in Appendix B.

⁸² TIM REAGAN & MARGARET S. WILLIAMS, FED. JUDICIAL CTR., SURVEY OF DISTRICT COURT JUDGES ON A PROPOSED AMENDMENT TO FEDERAL RULE OF EVIDENCE 801(D)(1)(B) CONCERNING PRIOR CONSISTENT STATEMENTS (March 2, 2012).

The responses from these studies can be compared below:

<i>It is difficult for jurors to understand the instruction that a prior inconsistent statement is admissible only to impeach and not for the truth of the matter asserted.</i>		<i>It is difficult for jurors to understand the instruction that a prior consistent statement is admissible only to rehabilitate and not for the truth of the matter asserted in the statement.</i>	
Response	%	Response	% ⁸³
Strongly Disagree	4%	Strongly Disagree	2%
Disagree	17%	Disagree Somewhat	10%
Neither Agree nor Disagree	13%	Neutral	5%
Agree	46%	Agree Somewhat	33%
Strongly Agree	20%	Strongly Agree	50%

Table IX-B: Comparison of the present survey responses with the survey responses obtained in the 2012 survey study

A majority of judges surveyed in 2012 believed that instructions concerning prior consistent statements are difficult to understand, just as a majority of judges surveyed now believed that instructions concerning PICS are difficult to understand. However, it appears that judges generally believed that the distinction between rehabilitative and substantive use of evidence⁸⁴ is more difficult for jurors to understand than the distinction between impeachment and substantive use.

B. Benefits of Eliminating Jury Instructions about PICS

The federal judges along with the federal and impeachment state litigators were asked their level of agreement with the following statement:

*The elimination of jury instructions distinguishing between the substantive and impeachment uses of prior inconsistent statements would be beneficial.*⁸⁵

⁸³ The percentages were tabulated out of 500 respondents. Unlike this current study, which only sampled experienced federal judges, the earlier study invited all federal judges. Accordingly, the number of responding judges was much higher. *Id.* at 1-2.

⁸⁴ In the wake of the 2012 study, the Committee amended FRE 801(d)(1)(B) such that “prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.” FED. R. EVID. 801 advisory committee’s note.

⁸⁵ The question can be accessed through the links provided in Appendix B. It should be noted that substantive state litigators were asked a parallel question concerning their opinion about the following statement:

The absence of jury instructions distinguishing between the substantive and impeachment uses of prior inconsistent statements is beneficial.

The explanations provided by these litigators suggest that the question was defective. For example, a respondent who responded “Strongly Disagree” stated, “[j]uries do not understand the distinction.” Another who responded “Disagree” explained, “I don’t think jurors draw the distinction much—seems like a technicality—legal trickery—etc.” Their explanations cannot be reconciled with their answer choices.

Their responses are summarized in the following table:

Responses	Federal Judges		Federal Litigators		Impeachment State Litigators	
	n	%	n	%	n	%
Strongly Disagree	9	12%	2	10%	2	7%
Disagree	19	25%	7	33%	5	17%
Neither Agree nor Disagree	9	12%	1	5%	5	17%
Agree	30	39%	11	52%	13	45%
Strongly Agree	9	12%	0	0%	4	14%
TOTAL	76		21		29	

Table IX-C: Responses as to whether the elimination of jury instructions distinguishing between substantive and impeachment uses of PICS would be beneficial

The opinions of all three groups were consistent.

The respondents were given an opportunity to explain their answers. The judges provided the following comments, excluding the one which simply made reference to comments provided elsewhere:

- *In my experience, jurors are very capable of reading, understanding and applying the jury instructions.*
- *With properly worded instructions given at the time the prior inconsistent statement is admitted, I think jurors are fully capable of understanding the distinction between the admission for impeachment vs admission as substantive evidence.*
- *I don't believe jurors distinguish between the truth of the prior inconsistent statement and the general credibility of the witness. I think they simply decide which version they believe is true in the context of all the evidence and render their verdicts accordingly.*
- *I don't think jurors (a) understand the distinction or (b) follow the instruction if they understand it. It seems like a waste of time and also seems the epitome of the legal system making a distinction that ordinary folks find laughable.*
- *I agree if there would be some means of making sure that the video/audio were not tampered with.*
- *Jury instructions are to educate the jury about nuances in the law. Jury instructions serve that purpose.*
- *I don't think that a jury understands the difference between impeachment evidence and substantive evidence.*
- *Although I believe jurors largely do not understand this distinction, I believe it should be included nevertheless. What was said at a deposition or before the grand jury should only be admitted to impeach the witness rather than as substantive evidence.*
- *Although this can be a difficult distinction for a juror, I think it is perfectly feasible to explain to the jury that the inconsistent statement is offered for credibility purposes only. If the inconsistent statement is introduced as substantive evidence, this may lead to a wild goose chase in explaining the inconsistent statement via other substantive evidence. I well understand the benefit, still, of giving up on the distinction.*
- *Depends on the statement and the context of how it is being used*

- *I think the distinction is worth making even if not uniformly followed because it is more likely to be invoked during deliberations should such a statement become important to the jury deciding the issue before them.*
- *If there continues to be a distinction between the use allowed, why would you not instruct the jury correctly? That makes no sense.*

The impeachment state and federal litigators provided the following responses, excluding ones which made reference to comments provided elsewhere:

- *I don't think jurors understand the instruction so might as well get rid of it.*
- *Juries don't make the nice distinction between impeachment and substantive proof.*
- *I prefer not giving any jury instructions on interpreting prior inconsistent statements, but if we are we should make little or no distinction between those made under oath and while not under oath*
- *Jurors do not understand the distinction now.*
- *I know that it is difficult for jurors to understand the distinction, but I think the distinction is valid.*
- *There should be no distinction when the making of the statement is recorded.*
- *The use of prior inconsistent statements is to test credibility. It appears to me that what the rule change attempts is covered by the rules concerning admissions against interest.*
- *Although it is very hard for juries to make the distinction, the distinction is real and exists for a good reason. Counsel can then use the instruction in argument. If inconsistent statements are admissible one could have a case where a woman says she was abused and at trial recants, the State offers the woman's recorded statement to the police incriminating the defendant, and the defendant is then convicted. This is not hypothetical.*
- *I am not sure jurors really appreciate the difference. I think the change would be beneficial in civil cases because the jurors likely ignore the instruction anyway in some cases. I am more likely to support the status quo in criminal cases because liberty is at stake and too much can turn on hearsay testimony of prior statements by witnesses whose credibility is low, but are nonetheless influential in the outcome of the case. (Although I still think that jurors often ignore the difference between substantive and impeachment evidence.)*
- *I don't think the finder of fact really makes the distinction, regardless of instructions*
- *Juries are confused by instructions that tell them to consider a form of evidence for one purpose but not another. Practically, jurors consider this evidence on equal terms and do not distinguish between substantive and impeachment. Simplification of jury instructions is important.*
- *In my opinion the earlier statement normally is more credible than the trial testimony. Thus, the statement deserves equal treatment as to the weight of the evidence.*
- *Unfortunately, many jurors do not understand the distinction.*
- *I believe that when a person is caught off guard by a scripted government witness, that Declarant's statements are far less likely to be the truthful and intended statements of the Declarant and therefore should not be the equivalent of under oath statements or testimony. On the other hand, I very much doubt that the average juror will make the distinction between statements that are impeachment vs. substantive evidence, so it may not matter.*
- *Particularly in lengthy trials in which there is voluminous evidence, it is highly unlikely that, by the end of the trial, the jurors remember what documents or statements were admitted with some*

form of qualifying or limiting instruction and which ones were admitted without any restriction or qualification. Nevertheless, the only potential way to remind jurors of the limitations or restrictions on their use of particular evidence is by way of limiting instructions, which should be given when the evidence is first admitted and in final instructions. Lawyers are then permitted to refer to these instructions in final arguments, pointing out to the jury the limited use for which some evidence was admitted. There is always a risk, however, that prior inconsistent statements admitted for impeachment only will nevertheless be considered by the jury as substantive evidence.

In general, the minority who disagreed with the statement believed that jurors are capable of applying the jury instructions while the majority who agreed with the statement expressed the belief that the distinction is not understandable to jurors. These responses are within expectation and consistent with the judges' responses about the ability of jurors to understand the distinction between impeachment and substantive uses of PICS.

C. Implications

It is clear that the federal judges who responded to the survey believed that jurors find instructions distinguishing between the impeachment and substantive uses of PICS difficult to understand. Nonetheless, the federal judges as a whole did not appear to find the distinction as difficult to understand as that between the rehabilitative and substantive uses of prior consistent statements. It is also clear that the responding federal judges, along with the impeachment state and federal litigators, generally believed that the elimination of the distinction in the jury instructions would be beneficial.

Nonetheless, comments provided by the litigators concerning closing arguments suggest that, while the distinction in the law about impeachment and substantive uses of PICS may not mean much to jurors, it does affect how litigators present the evidence.⁸⁶

⁸⁶ Although the responses from substantive states were excluded for reasons explained in the previous footnote, one explanation is particularly interesting and instructive:

- *Although a jury will inevitably use whatever they hear in their evaluation of a witness, a judge's instruction that a prior inconsistent statement can be considered as substantive evidence will reinforce that natural inclination.*

X. Incentive to Make AVR of Statements

This Committee considered the policy implications of the Proposed Amendment. According to the minutes of the Spring 2017 meeting:

[Committee] members noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively—which is a good result even beyond its evidentiary consequences.⁸⁷

This section of the memorandum first explores whether the Proposed Amendment may actually result in increased making of AVR. It then examines the support for the policy among federal judges who completed the survey.

A. Increased Recording of Potential PICS

1. Litigators

The substantive state litigators were asked if they were encouraged to make AVR of potential PICS by the substantive admissibility of such PICS:

In your __[STATE]__ litigation experience, how often have you recorded a statement by audiovisual means in anticipation of the possibility that the recording may become a prior inconsistent statement and be admissible as substantive evidence?

The responses were summarized in the table below:⁸⁸

Response	Criminal				Civil					
	Government		Defendants		Plaintiffs		About Evenly Split		Defendants	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Never	0	0%	3	38%	1	25%	1	25%	6	46%
Rarely	0	0%	3	38%	1	25%	0	0%	3	23%
Sometimes	0	0%	1	13%	1	25%	1	25%	4	31%
Frequently	3	100%	0	0%	1	25%	2	50%	0	0%
Always	0	0%	1	13%	0	0%	0	0%	0	0%
TOTAL	3		8		4		4		13	

Table X-A: Responses of substantive state litigators about how often they made AVR of statements in anticipation that the statements may become substantively admissible

⁸⁷ Spring 2017 Minutes, *supra* note 4, at 22.

⁸⁸ The four respondents who stated that their practices were evenly split between criminal and civil were excluded from the table because it is impossible to split their answers about their experience between their criminal work and their civil work. Two of them answered “frequently” and two others answered “rarely.” The one respondent who provided an explanation stated:

- *Most inconsistent statements arise from pre-trial depositions; cost often precludes “audiovisual” recording.*

The few responses suggest that some criminal prosecutors did create AVR in the hope that the recorded statements would become substantively admissible PICS. The other litigators, however, did not appear to be much encouraged to make AVR by the state rules that broadly admit non-GUPP PICS as substantive evidence.⁸⁹

The litigators were also given an opportunity to explain their answers. The three criminal litigators who primarily represented the government stated:

- *Because witnesses so frequently disavow information given to the police (often because of intimidation) it is common practice in murder and other serious felony cases to record witness statements.*
- *Again, I must argue for the admission of recorded prior statements even if they were audio recordings only. Such is the real world of state-level criminal prosecution. Many victims or witnesses are questioned at the scene only, and video recording is thus not possible. That said, lawyers have the time and means to engage in videorecording, and in cases where there is a credible fear of witness recalcitrance or recantation borne of fear or intimidation an early-stage videorecording was frequently done to preserve testimony.*
- *Prosecutors currently encourage the audiovisual recording of individuals at crime scenes and in interview rooms. My jurisdiction routinely uses audiovisual recordings of witnesses and suspects as well as employing body and dash cameras. In domestic violence and child sexual abuse cases these recordings frequently play a key role in the trial even when used for impeachment purposes.*

⁸⁹ The Reporter provided an explanation as to why this may be the case:

Let's assume that criminal defendants become aware of an amendment to the Evidence Rules that provides for substantive admissibility of audiovisual recordings of inconsistent statements of a trial witness. Remember that the statement, if inconsistent, is already admissible for impeachment. So we need to assume that the defendant is aware of the extra potency of a statement when it is offered for truth rather than impeachment—a potency that is less for the defendant than for the prosecution because it is the government that has the burden of presenting substantive evidence to prove the case beyond a reasonable doubt. What we must posit then is a defendant who says: "I wasn't planning on recording my accomplice's lying statement because it was only going to be admissible to impeach him when he testifies for the government; but I am now going to record it because it will be given substantive effect—thank you Advisory Committee on Evidence Rules!"

The truth is that if the defendant wants to generate a lying statement to use at trial should the accomplice testify for the government, he has ample incentive to record the statement today. Recording the statement will make it easier to prove at trial that the statement was made. And using the statement to impeach the witness can be quite powerful. It is hard to see how the greater use of the statement for substantive purposes will lead to more false statements being recorded.

Capra Spring 2017 Memorandum, *supra* note 4, at 14. Although the explanation was written in the context of "lying statement[s]," it seems applicable to truthful statements as well.

Two of the criminal defense litigators observed:

- *It is common practice for my investigator to take recorded statements by audio means of prospective witnesses. Sometimes these statements will be deemed inconsistent as the witness testifies at trial. However, my investigator has never taken a statement by audio-visual means.*
- *In criminal cases, there is little opportunity for the defense to record. Civil cases are about money, so we permit depositions of witnesses. Criminal cases are only about liberty, so we don't. Police increasingly record statements through the use of body cameras. Defense investigators have much more difficulty in persuading witnesses to talk to them because they don't have uniforms, badges or other imprimatur of the State. When a private investigator for the defense produces a recording device, the few that had been willing to speak, clam up. So, when I answer the above question with "rarely," it's not for lack of effort. This is an area where the playing field is not level.*

The civil litigators generally referred to their use of depositions to record statements that may potentially become PICS, although some litigators did point to the expense or inadvisability of taking AVR depositions. These civil litigators appeared to struggle to think of contexts outside of depositions where they would obtain AVR statements. One particular respondent did refer to the existence of AVR in “some type of medical evaluations.”

2. Federal Judges

The federal judges were asked the following question:

How often do you think the substantive admissibility of prior inconsistent statements that are audiovisually recorded will result in these statements being specially recorded in case the declarant may ultimately testify inconsistently?

Their responses are as follows:

Response	n	%
Never	0	0%
Rarely	13	17%
Sometimes	36	47%
Frequently	27	36%
Always	0	0%
TOTAL	76	

Table X-B: Responses of federal judges about how often the substantive admissibility of PICS will result in statements being recorded

The expectations of the judges appear in line with the responses of the substantive state criminal prosecutors.

The judges were given an opportunity to explain their answers, and the following responses were provided:

- *law enforcement and insurance companies are the ones I can think of*
- *I think it unlikely that the frequency of AV recordings will be impacted one way or the other by a change in the Federal Rules of Evidence regarding their admissibility.*

- *In the civil arena, videotaped depositions are frequently taken. The rule would most significantly impact criminal practice.*
- *I do not think litigants and their lawyers will consider the applicability of a particular rule of evidence in the early stages of litigation in a manner that would increase the instances of these statements being specially recorded*

B. Support for the Policy of Incentivizing AVR among the Federal Judges

The federal judges were asked the extent to which they agreed or disagreed with the following statement:

It would be beneficial if more statements were audiovisually recorded in the hope that they would be substantively admissible as prior inconsistent statements.⁹⁰

Their responses are summarized in the following table:

Response	n	%
Strongly Disagree	4	5%
Disagree	7	9%
Neither Agree nor Disagree	28	37%
Agree	32	42%
Strongly Agree	5	7%
TOTAL	76	

Table X-C: Responses of federal judges as to whether the creation of more AVR of statements would be beneficial

Some judges took advantage of the opportunity to explain their answers:

- *I think the important point of the present rule is the statement substantively admitted was made UNDER OATH. The use of audiovisual recording only bolsters the evidence of whether the statement was actually MADE, not the truth of the statement. Therefore, the prior inconsistent statement is only evidence that a person has told a different story than he is now telling on the witness stand, i.e. the statement is admissible for impeachment purposes.*
- *I agree with this only because Jurors have come to expect recordings.*
- *Most of the prior inconsistent statements not given under penalty of perjury (i.e., not depositions or affidavits) are just statements people make in life—letters, emails, etc. I don't know how you are going to get people to audiovisually record their lives in case there's a later lawsuit. If you are talking about insurance company statements or law enforcement interviews, more recordings of those would be helpful, of course.*
- *This is particularly true of the FBI's old policy of deliberately not recording interviews so that the only contemporaneous record would be the agent's notes of the interview. I think they may have retreated from that policy recently.*
- *It is fairly easy to alter audiovisual recordings even by amateurs so any of those statements could be suspect regarding authenticity and potentially very prejudicial.*

⁹⁰ The question can be accessed through the links provided in Appendix B.

- *This statement seems to have it backward. If the rule were changed to allow A/V recorded statements into evidence then I believe that more statements would be A/V recorded. Several law enforcement agencies do not record witness or detainee interviews so the jury is left to consider only the memory of the interview by the parties present. This allows for distortion, exaggeration, etc. of the facts. With a rule permitting A/V statements into evidence, more agencies will start recording them in my belief.*
- *Given major recent developments in technological capacity to alter audio visual recordings and to falsify portions of the audio visual broadcast—and the likelihood that this is an evolving trend—I do not think that audiovisual recordings offer the panacea for the issue that it might once have promised. Additionally, in criminal cases, this may turn out to be a one way street, implemented in a way that some may see as totally self-serving. The government will have the benefit of conducting such recordings when it deems fit for later trial use. But many critical statements and interviews are recorded by agents without audio visual recording and this will remain within the discretion of the government—discretion that may be abused.*
- *There are two common situations where audiovisual recordings occur: recorded statements by the police and video depositions. Of course video depositions are preceded by an oath, so they are already admissible. When a police video recorded statement is used against the person making the statement, it is admissible as an opposing party admission. When police video record a statement and try to use it substantively against another person implicated by the statement, how unfair for that person. The interrogated person may have been casting blame on another to deflect the blame on themselves, NOT a truth seeking venture.*

It is evident that the majority of responding federal judges believed that an increase in the making of AVR to capture statements would be a positive outcome. Nonetheless, some judges appear concerned that police may abuse the expanded substantive admissibility of non-GUPP AVR PICS to selectively record statements helpful to their cases.

C. Implications

The federal judges generally expected that the Proposed Amendment would result in the creation of more AVR. A majority of judges believed that this would be a positive outcome.

The responses of the substantive state litigators suggest that it would primarily be the criminal prosecutors who would create additional AVR should more non-GUPP PICS be made substantively admissible. To that end, while some judges suggested that they would prefer that the police introduce PICS in court through AVR rather than through the notes of agents made in interrogations,⁹¹ there are others who are troubled that police may selectively record one-sided statements helpful to their cases for substantive use rather than record more statements generally.

⁹¹ This sentiment was shared by a former prosecutor and a current federal defender at the symposium held by the Committee at Pepperdine, both of whom criticized the reliance of the Federal Bureau of Investigation on Form FD-302. Pepperdine Symposium Transcript, *supra* note 4, at 1575.

XI. Support for the Proposed Amendment

The federal judges and the litigators were asked to indicate their level of support for the Proposed Amendment.⁹² In addition, federal judges were given the following question:

Which of the following would you prefer?

- No amendment to Rule 801(d)(1)(A)
- Adoption of the Proposed Amendment, but with additional restrictions on the admissibility of prior inconsistent statements that are audiovisually recorded
- Adoption of the Proposed Amendment
- Adoption of the Proposed Amendment, but with fewer restrictions on the admissibility of prior inconsistent statements that are audiovisually recorded
- Amendment of Rule 801(d)(1)(A) to admit all prior inconsistent statements as substantive evidence

A. Federal Judges

The Proposed Amendment found support among the responding judges:

Response	<i>n</i>	%
Strongly Oppose	7	9%
Oppose	15	20%
Neither Support nor Oppose	10	13%
Support	39	51%
Strongly Support	5	7%
TOTAL	76	

Table XI-A: Attitude of federal judges towards the Proposed Amendment

A firm majority either “support” or “strongly support” the Proposed Amendment. A much smaller minority of the responding judges either “oppose” or “strongly oppose.”

Judges were provided an opportunity to explain their positions. The judges who “support” or “strongly support” the Proposed Amendment mostly declined to explain; the following comments were given:

- *as long as all other rules of evidence in the taking of those statements were in compliance.*
- *As long as declarant is given the opportunity to explain the prior statement.*
- *I suppose such a statement could be challenged, either as to admissibility or weight, if the opponent can demonstrate an absence of reliability, motive to lie, etc.*
- *I think the fact that the statement is not given under penalty of perjury should go to the weight and not the admissibility of the statement.*

⁹² The questions can be accessed through the links provided in Appendix B.

A larger proportion of the judges who “oppose” or “strongly oppose” the Proposed Amendment provided explanations. Their comments, excluding the ones which simply make reference to comments provided elsewhere in their survey responses, were as follows:

- *This is not a real fix. Very few statements are “audiovisual.” This issue arises most frequently in settings where someone writes a report or simply makes an oral statement.*
- *The oath requirement and the formality of testimony or statements given at a prior trial or hearing gives them sufficient reliability for admission as substantive evidence notwithstanding their hearsay status. Prior inconsistent statements not under penalty of perjury undermines the reliability factor which supports exempting them from the hearsay exclusion. I would leave well enough alone. These unsworn statements are effective when used for purposes of impeachment where context and purpose can be explored by redirect examination. To admit AV statements as substantive evidence without these safeguards would not, in my judgment, advance the search for truth.*
- *Again, these recordings can easily be doctored so that the authentication factor would be a mini-trial in itself. In addition, the prejudicial impact of an allegedly accurate, but actually doctored, video recording could not be countered with a curative jury instruction.*
- *Cell phones now capture many casual conversations where people may not be careful about what they say.*
- *I think this would open up the floodgates to every cell phone video, Facebook video, Instagram video etc. that someone posted as coming into evidence even though the person may have been joking around, saying things as part of an online character or persona, puffing to impress a love interest, etc. The typical person does not think that everything ever recorded of them will be substantive evidence in a trial offered as the truth of the matter asserted and I do not think it is fair to do so.*
- *(1) The current capacity for use of technology that alters the audiovisual recording substantively.
(2) The importance in the criminal process for witnesses or defendants to be properly advised of the significance of their statements by virtue of the warning that their statement is given under penalty of perjury.
(3) Expense and resources involved in reviewing and confirming the authenticity of the audiovisual recording.*

Two of the judges who responded that they “neither support nor oppose” the Proposed Amendment provided the following comments:

- *Based on my experience I do not believe courts will be presented with this scenario very often.*
- *I guess it’s better than the status quo, but it seems of limited applicability and to be primarily pro-prosecutor.*

Presented with the opportunity to express their preference for the Proposed Amendment among a set of alternatives, the judges provided the following responses:

Response	<i>n</i>	%
No amendment to Rule 801(d)(1)(A)	25	33%
Adoption of the Proposed Amendment, but with additional restrictions on the admissibility of prior inconsistent statements that are audiovisually recorded	7	9%
Adoption of the Proposed Amendment	22	29%
Adoption of the Proposed Amendment, but with fewer restrictions on the admissibility of prior inconsistent statements that are audiovisually recorded	5	7%
Amendment of Rule 801(d)(1)(A) to admit all prior inconsistent statements as substantive evidence	16	21%
TOTAL	75	

Table XI-B: Preference of federal judges for alternatives to the Proposed Amendment

While the position commanding the largest support among the five options presented is to not amend FRE 801(d)(1)(A), the vast majority of the responding judges were in favor of some amendment to the rule. At the same time, while there was some support for the full liberalization of FRE 801(d)(1)(A) to admit all PICS as substantive evidence, it only commanded a minority.

The explanations provided by the judges for their views were largely cumulative to the explanations discussed above.⁹³ Those who would prefer to either keep the existing rule or to impose further restrictions on the admissibility of non-GUPP AVR PICS stated that the Proposed Amendment seeks to solve a nonexistent problem. They also pointed to the difficulty with ensuring that AVR were not edited. Two of the judges who would prefer to loosen the restrictions of the Proposed Amendment would be willing to dispense with the requirement that there be video of the recorded statement.

In view of these survey results, the Proposed Amendment could be thought of as a compromise between a majority of survey respondents who supported liberalizing FRE 801(d)(1)(A) and a minority who was troubled by a change to the rule at all. It is not surprising then that adopting the Proposed Amendment, either as drafted or with additional tweaks, commanded a plurality of the judges' opinion.

These views of the federal judges mirrored those of the Committee itself. After all, the Committee itself has rejected full liberalization of FRE 801(d)(1)(A). However, it has arrived at the conclusion that there are benefits to expanding the rule to substantively admit non-GUPP AVR PICS because they are not as "subject to argument as to how and perhaps even when they were made."⁹⁴

⁹³ These comments are therefore not presented in full.

⁹⁴ Spring 2016 Minutes, *supra* note 4, at 38.

B. Litigators

The Proposed Amendment also found support among the litigators. The responses from all litigators⁹⁵ were as follows:

Response	Criminal ⁹⁶						Civil ⁹⁶					
	Prosecutors		About Evenly Split		Defendants		Plaintiffs		About Evenly Split		Defendants	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Litigators in the 28 States where Some or All non-GUPP PICS Are Substantively Admissible												
Strongly Oppose	0	0%	0	0%	2	11%	1	11%	0	0%	4	11%
Oppose	1	25%	0	0%	1	6%	3	33%	1	7%	3	8%
Neither Support nor Oppose	0	0%	0	0%	5	28%	1	11%	2	13%	5	14%
Support	1	25%	0	0%	8	44%	3	11%	10	67%	15	42%
Strongly Support	2	50%	0	0%	2	11%	1	11%	2	13%	9	25%
TOTAL	4		0		18		9		15		36	
Litigators in the 24 States where Non-GUPP PICS Are Not Substantively Admissible												
Strongly Oppose	0	0%	0	0%	2	40%	0	0%	1	25%	1	3%
Oppose	0	0%	0	0%	1	20%	0	0%	1	25%	4	12%
Neither Support nor Oppose	1	100%	0	0%	0	0%	3	19%	0	0%	9	26%
Support	0	0%	1	100%	1	20%	11	69%	1	25%	17	50%
Strongly Support	0	0%	0	0%	1	20%	2	13%	1	25%	3	9%
TOTAL	1		1		5		16		4		34	
Federal Litigators												
Strongly Oppose	0	0%	0	0%	2	50%	0	0%	0	0%	0	0%
Oppose	0	0%	0	0%	2	50%	0	0%	1	25%	0	0%
Neither Support nor Oppose	0	0%	0	0%	0	0%	0	0%	0	0%	1	14%
Support	2	100%	1	100%	0	0%	4	80%	3	75%	4	57%
Strongly Support	0	0%	0	0%	0	0%	1	20%	0	0%	2	29%
TOTAL	2		1		4		5		4		7	

Table XI-C: Attitude of litigators towards the Proposed Amendment

⁹⁵ The responses in this table include all responding litigators, including those who did not correctly answer about the rule on PICS of their states.

⁹⁶ The “criminal” and “civil” responses both include responses from the litigators whose practice was “about evenly split between civil and criminal.”

These results suggest that the Proposed Amendment enjoyed support among litigators.⁹⁷ While it is true and not unexpected that the Proposed Amendment would find more support among criminal prosecutors than criminal defense litigators, the criminal defense litigators were not entirely unsupportive. The two groups that appear to be against the Proposed Amendment were the criminal defense litigators in the impeachment states and in the federal courts, while their counterparts in the substantive state who had actual experience with a comparatively liberal rule on PICS were more supportive.⁹⁸

The litigators were given an opportunity to explain their answers, and many took the opportunity to respond.⁹⁹ In summary, there were three dominant views expressed. First, a number of litigators, on both sides of the criminal bar, saw no reason why the Proposed Amendment should be narrowed only to AVR as opposed to strictly audio recordings. Second, a number of litigators suggested that all non-GUPP PICS, whether AVR or not, should be substantively admissible. Third, a small number of litigators expressed concern with the possibility of doctoring of AVR and the cost in ascertaining and litigating authenticity.

Nonetheless, one comment from a criminal defense litigator does suggest a crucial difference between the state and federal systems:

- *In federal criminal cases, it is not unusual for cooperating government witnesses to have been interviewed multiple times by law enforcement agents. Unless the rules require that all interviews be audio-visually required, the risk of the proposed rule is that agents would not record a cooperating witness until the witness says what the agents want to hear. If the witness later recants that statement and testifies at trial it was not truthful, the proposed rule would permit the government to offer it as substantive evidence even if the witness testifies under oath it was false and even though other prior statements were not recorded. The rule would thus permit totally unreliable prior inconsistent statements to be admitted as substantive evidence, thus defeating the primary purpose of the rules of evidence. In some trials, that prior inconsistent statement may be the ONLY evidence on an essential element of the charged crime, thus permitting a jury conviction based on unreliable evidence.*

To the extent that federal investigators may be in a superior position to do what the litigator outlined, the state experience with substantive admissibility of non-GUPP PICS may not be directly applicable to the federal system.

⁹⁷ While there is insufficient responses to draw firm conclusions, it seems that the litigators as a whole may actually be more supportive of the Proposed Amendment than the federal judges.

⁹⁸ One substantive state criminal defense litigator pointed out, in a comment to another question, that non-GUPP PICS made by police on vehicular cameras and body cameras could be admitted against the government. The comment suggests that criminal defense litigators can also take advantage from the expanded substantive admissibility of non-GUPP PICS, though probably not as often as prosecutors. It also explains why some criminal defense litigators were in support of the Proposed Amendment.

⁹⁹ These views were largely cumulative to those expressed by the federal judges and therefore not presented in full.

XII. Additional Comments

Both federal judges and litigators were given a final opportunity to provide comments at the end of the survey questionnaires. This section of the memorandum only lists the comments pertaining to the Proposed Amendment; notes of thanks and praise concerning the survey study itself are omitted.

A. Federal Judges

The judges provided the following comments:

- *Although [FRE 801(d)(1)(A)] requires that prior statements be under oath (and of course inconsistent) to be admitted as evidence instead of simply impeachment, this rule is seldom followed in court. The lawyers typically don't know or don't follow the rule, and as a judge I don't stop every time a witness is being impeached to make clear whether the prior statement can be considered as substantive evidence. In short, the rule is silly and not followed.*
- *Fewer rules, please.*
- *I encounter many audio-recorded prior inconsistent statements. I also encounter audiovisually recorded prior inconsistent statements that are under oath (depositions). I cannot remember any or many prior inconsistent statements audiovisually recorded not under oath. One area where I would counsel caution is sting operations: I know of no good reason why statements made by a witness in that context—even the target's statements—should be admitted for their truth.*

B. Litigators

The litigators provided the following comments:

- *It seems to me that if a party is recorded making a statement, whether under oath or not, it is sufficiently reliable that a jury should be able to consider it; the party can certainly explain the reasons for their recorded statement if need be.*
- *Either way it can be argued to the jury. The only exception is if the statement allows one of the parties to win as a matter of law. In my experience it only involves credibility.*
- *I know that the hearsay rule has been much criticized, but to my mind the distinction between sworn testimony in a particular litigation and other statements in other contexts and circumstances is an important one and should be maintained. Only reliable sworn evidence should be admissible.*
- *The problem will be similar to the handling of Crawford issues after Crawford. The "rule" seemed to warp the routine of investigation.*
- *Once a juror hears the testimony, how can they separate what is substantive or impeachment only?*
- *Perhaps the increasing use of surveillance cameras will create more occasions for the existence of such statements, but even these cameras rarely include audio with the video, and my opinion is that the reliability of any such statements requires that the audio and video be recorded by an integrated system.*
- *Attempts at specific rules often have unforeseen consequences.*

- *Many times there is clear and convincing evidence that the witness had made statements clearly in conflict with his present testimony, without any recording whatsoever, and the trial judge has allowed it with a cautionary instruction.*
- *The use of reliable prior statements is vital in the search for the truth.*
- *In responding to this survey, I consulted with [another] member of the College, who for the last ten years has tried many homicide cases as court appointed defense counsel. Based on our collective experience, I would make the following closing comment: Rhode Island Rule 801D1 departs from Federal Rule 801 in that a prior inconsistent statement need not be made under oath and is admitted as substantive evidence if the examiner satisfies the requirements of Rule 613. Accordingly, we would support the proposed amendment to the Federal Rule regarding audiovisual prior inconsistent statements. However, we would note that while Rhode Island Judges allow a prior inconsistent statement to be admitted as substantive evidence under Rule 801 D 1, they generally follow older Rhode Island case law that prohibits the introduction of the extrinsic document itself once the witness admits the prior inconsistent statement. The rationale for this limitation is that if the actual police statement or grand jury statement is given to the jury, it would unfairly highlight that testimony over other testimony.*
- *I applaud the effort to change this rule in light of the changes in technology our society has experienced. We should constantly seek out ways to update the gathering and receipt of evidence to match the changing times while still maintaining the integrity of the truth-seeking process.*
- *We need to bring the law of evidence into the 21st century. The proliferation of recording devices cries out for this evidence to be considered by a jury . . . especially for impeachment.*
- *In light of the common manipulation of audio-visual media there is a grave danger that unreliable evidence will be admitted. The laying of foundation for the “prior inconsistent statement” will be time-consuming and expensive. My view is that the risk of misinterpretation, misuse or manipulation outweighs the effect of the evidence on actually establishment of the truth of the event which is addressed unless the requirement of “under penalty of perjury” is kept as a safeguard on the statement.*

Appendix A. Survey Invitation Emails

1. Federal Judges

The following survey invitation email was sent to the selected federal judges:

RE: Proposed Amendment to Rule 801(d)(1)(A) on Prior Inconsistent Statements

Dear [NAME],

The Advisory Committee on the Federal Rules of Evidence is considering an amendment to Rule 801(d)(1)(A), which concerns the admissibility of prior inconsistent statements. The Committee has asked the Federal Judicial Center to survey a sample of federal district judges about these proposed changes. The input you can provide will assist the Committee in its decision.

The survey should take fifteen to twenty minutes to complete. It can be accessed by clicking the following link:

[LINK]

We would be especially grateful to receive your response by **Friday, November 17, 2017**.

Under Rule 801(d)(1)(A), a prior inconsistent statement is admissible as substantive evidence only if the statement was “given under penalty of perjury.” The Committee is currently considering expanding the rule to admit a prior inconsistent statement that “was recorded by audiovisual means” for use as substantive evidence. To that end, it is interested to learn about the experience you have as a federal judge with the admissibility of prior inconsistent statements.

Thank you for your participation in the survey. Your views are very important to our Committee.

Yours truly,

Hon. Debra A. Livingston
Circuit Judge, U.S. Court of Appeals for the Second Circuit
Chair, Advisory Committee on Rules of Evidence

2. Litigators

The following survey invitation email was sent to the selected fellows of the College:

RE: Proposed Amendment to Federal Rule of Evidence 801(d)(1)(A)
on Prior Inconsistent Statements

Dear [NAME],

The Advisory Committee on the Federal Rules of Evidence is considering an amendment to Rule 801(d)(1)(A), which concerns the admissibility of prior inconsistent statements. The Committee has asked the Federal Judicial Center to survey a sample of trial lawyers about these proposed changes. Your name and contact information has been provided to the Center by the American College of Trial Lawyers, and the input you can provide will assist the Committee in its decision.

The survey should take fifteen to twenty minutes to complete. It can be accessed by clicking the following individual link, which is only for your use:

[LINK]

We would be especially grateful to receive your response by **Friday, November 17, 2017**.

Under Rule 801(d)(1)(A), a prior inconsistent statement is admissible as substantive evidence only if the statement was “given under penalty of perjury.” The Committee is currently considering expanding the rule to admit a prior inconsistent statement that “was recorded by audiovisual means” for use as substantive evidence. To that end, it is interested to learn about the practical experience you have with the admissibility of prior inconsistent statements under the rules of evidence of your local jurisdiction.

Thank you for your participation in the survey. Your views are very important to our Committee.

Yours truly,

Hon. Debra A. Livingston
Circuit Judge, U.S. Court of Appeals for the Second Circuit
Chair, Advisory Committee on Rules of Evidence

Appendix B. Draft Survey Questionnaire

The highly interactive nature of the online survey questionnaires makes it difficult to generate a printout with a sensible structure and flow. This appendix includes links to archival copies of the interactive survey questionnaires.

1. Federal Judges

An archival copy of the questionnaire sent to federal judges can be accessed at the following link:

https://fjc.co1.qualtrics.com/jfe/form/SV_6hz8oo0hWfb0YAJ

2. Litigators

An archival copy of the questionnaire sent to the litigators can be accessed at the following link:

https://fjc.co1.qualtrics.com/jfe/form/SV_dnXz7NcBaZwxxAh

Appendix C. Survey Limitations

Two features of this study limit the strength of the inferences that can be drawn from the survey results. The first is the complexity of the topic, which does not lend itself to the creation of concise, easy-to-understand, and easy-to-answer questions. The second is the lack of responses from the litigators.

The subject of this survey is complex and presented challenges in crafting survey questions. There is no good way to refer to the subject of the Proposed Amendment itself, namely, the subset of PICS which were *not* “given under penalty of perjury” and which were “recorded by audiovisual means.” Even the acronym used in this memorandum of “non-GUPP AVR PICS” is itself awkward. The survey questions were therefore unavoidably cumbersome.

Moreover, to be helpful to the Committee’s deliberation, this survey necessarily had to tease out the differences in the substantive and impeachment uses of non-GUPP PICS and to investigate those non-GUPP PICS which were AVR. The survey respondents had to be repeatedly asked to first consider non-GUPP PICS for either substantive or impeachment use, then those particular non-GUPP PICS that were also AVR, and then about the characteristics and uses of those non-GUPP AVR PICS.

Instructions to only consider non-GUPP PICS, which by implication required *not* considering GUPP PICS, proved difficult for some respondents to follow. With specific regard to responses concerning civil litigation, respondents appeared to have trouble ignoring AVR depositions, which naturally were GUPP and are therefore not of concern. For that matter, while not instructed not to do so, some respondents appeared to have considered what would fall under “opposing party’s statement” as defined in FRE 801(d)(2) when answering questions about PICS. Like GUPP PICS, this type of evidence is already substantively admissible and is also not of concern. The extent to which the overall responses were affected by the inability of the respondents to focus on non-GUPP PICS is not clear; the reader should be mindful of the possibility that survey respondents answered questions about non-GUPP PICS with other types of evidence in mind.

In addition, the need to include instructions requiring respondents to apply the substantive and impeachment distinction concerning the use of PICS raises a conceptual difficulty. The respondents did not appear to have problems applying the distinction; indeed, the survey results repeatedly suggest that litigators and judges had no problem applying and indeed did apply the distinction in practice. However, as discussed in Section IX, many respondents have stated in this very survey that the distinction between the impeachment and substantive uses of PICS was difficult to understand for jurors. Some have even questioned the validity of the distinction. There is therefore room for concern regarding how they applied the distinction in answering the survey questions.

Also, in seeking to study PICS that were AVR, the survey suffers from the difficulties attendant with asking respondents what they have seen in AVR. It is fundamentally tricky using only words to ask respondents, for example, about the context discernible in the AVR that they have encountered. To address this problem, the Center relied on static pictures to illustrate the questions. This is a practical but certainly imperfect compromise.

The low number of responses from litigators within this study is an unfortunate deficiency. The very subject of this survey—the use of a very specific type of PICS in litigation—fundamentally requires surveying litigators who had a high level of trial experience and who might actually have encountered such evidence. Because being an experienced trial lawyer is a prerequisite for invitation into the College, members of the College were a convenient sample.

Surveying the fellows of the College ran into an unexpected practical difficulty. Many fellows, even those who were “active” within the organization, were apparently retired from the practice. A number of them wrote the Center politely stating their reluctance or refusal to participate in the survey because they were no longer practicing.

In addition, as seen in Table I-B, the demographics of the College or, at least, of the responding litigators skewed towards the civil area. As discussed in Sections III and V, the impact of the Proposed Amendment would likely fall heavier in criminal rather than in civil litigation. The lack of participation from criminal litigators is therefore a weakness.

Moreover, with specific regard to the federal criminal litigators, the Center did not receive the necessary permission from the EOUSA to survey members of the College who were federal prosecutors. This largely eliminated one side of the federal criminal litigators from the survey, cutting further into an already small sample and precluding feedback from an important group of litigators whose practice may be affected by the Proposed Amendment.¹⁰⁰

For all of these limitations, the survey responses from the judges and the different groups of litigators generally seem consistent. Specifically, there do not seem to be sharp, unexplained divergences which would suggest either that the survey questions were incomprehensible to the respondents or that the characteristics of non-GUPP AVR PICS were so varied that useful information cannot be drawn without a much larger set of responses. Accordingly, even though these survey results should not be regarded as conclusive, they should still be informative about the uses of PICS in litigation.

From a broader perspective, these results may represent the best data that could be practically obtained about non-GUPP AVR PICS. There are not at present many practical, cost-effective ways to study this type of evidence beyond a survey. In principle, one can identify actual uses of such evidence in state and federal courts, obtain the actual AVR, and draw observations about the commonalities and differences of these AVR. However, given that evidence generally does not self-identify as admissible under the rule on PICS, much less self-identify as non-GUPP AVR PICS, it is not clear how one might without bias obtain a representative sample of this type of evidence for study.¹⁰¹ In addition, it is also not clear where or how to obtain the actual AVR for such a study even if particular uses of evidence can be identified from court documents.¹⁰²

¹⁰⁰ It should be noted that some former federal prosecutors who were members of the College responded to the survey invitation.

¹⁰¹ There does not appear to be a suitable search term for identifying the use of such evidence.

¹⁰² As discussed in Section IV, the admissibility of PICS, even when contested, was more often handled by oral ruling. Any paper record is likely to provide only a fragmented and incomplete picture of the use of such evidence.

Appendix D. State Rule on PICS

1. Classification

Within this memorandum, the state rules on PICS are classified¹⁰³ as follows:

Rule on PICS	States	Number
All PICS non-GUPP admissible as substantive evidence	Alaska, Arizona, California, Colorado, Delaware, Georgia, Kansas, ¹⁰⁴ Kentucky, ¹⁰⁴ Missouri, ¹⁰⁴ Montana, Nevada, Puerto Rico, Rhode Island, South Carolina, Utah, ¹⁰⁵ Wisconsin	16
Only some non-GUPP PICS admissible as substantive evidence	Arkansas, Connecticut, Hawaii, Illinois, Louisiana, Maryland, New Jersey, New York, ¹⁰⁶ North Dakota, Pennsylvania, Tennessee, ¹⁰⁶ Wyoming	12
Non-GUPP PICS not admissible as substantive evidence ¹⁰⁷	Alabama, District of Columbia, Florida, Idaho, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia	24

Table AD-A: Classification of the state rules on PICS

¹⁰³ This scheme is based on the classification system set forth in the Capra Fall 2016 Memorandum.

¹⁰⁴ The Capra Fall 2016 Memorandum identified a number of states whose rule on PICS admit all PICS for substantive purposes; these states were not explicitly identified as such within the memorandum. KAN. STAT. ANN. 60-460(a); KY. R. EVID. 801A; MO. REV. STAT. § 491.074; *Rowe v. Farmers Ins. Co., Inc.*, 699 S.W.2d 423, 425 (Mo. 1985).

¹⁰⁵ The Capra Fall 2016 Memorandum identified Utah as falling into the category of states whose rules on PICS was “Short of Outright Rejection of the Congressional Limitation.” However, the memorandum itself stated that:

Utah rejects the congressional limitation and also treats prior statements as not hearsay when the witness denies or has forgotten the statement. So there appears to be no concern at all in Utah about whether the prior inconsistent statement was ever made.

Capra Fall 2016 Memorandum, *supra* note 4, at 11. For purposes of this memorandum, Utah is treated as a state where all non-GUPP PICS were substantively admissible.

¹⁰⁶ The Capra Fall 2016 Memorandum identified a number of states whose rule on PICS admit some PICS for substantive purposes; these states were not explicitly identified as such within the memorandum. GUIDE TO NEW YORK EVIDENCE § 8.33; TENN. R. EVID. 803(26).

¹⁰⁷ Naturally, this restriction does not apply when the non-GUPP PICS is separately admissible under another rule of evidence.

2. Responses of the State Litigators about the State Rules on PICS

A summary of whether the litigators correctly answered about the state rule on PICS was provided in Section I.B. The following table presents a complete breakdown of their responses:

Response	Criminal		About Evenly Split		Civil		TOTAL	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Litigators in the 16 States where All Non-GUPP PICS Are Substantively Admissible								
Yes, because all prior inconsistent statements . . . may be admitted as substantive evidence	7	88%	3	50%	10	40%	20	51%
Yes, but only some prior inconsistent statements . . . may be admitted as substantive evidence	0	0%	0	0%	3	12%	3	8%
No	0	0%	3	50%	8	32%	11	28%
Not Sure	1	13%	0	0%	4	16%	5	13%
TOTAL	8 (21%)		6 (15%)		25 (64%)		39	
Litigators in the 12 States where Only Some Non-GUPP PICS Are Substantively Admissible								
Yes, because all prior inconsistent statements . . . may be admitted as substantive evidence	0	0%	0	0%	8	31%	8	24%
Yes, but only some prior inconsistent statements . . . may be admitted as substantive evidence	4	80%	1	33%	11	42%	16	47%
No	1	20%	2	67%	4	15%	7	21%
Not Sure	0	0%	0	0%	3	12%	3	9%
TOTAL	5 (15%)		3 (9%)		26 (76%)		34	
Litigators in the 24 States where Non-GUPP PICS Are Not Substantively Admissible								
Yes, because all prior inconsistent statements . . . may be admitted as substantive evidence	1	25%	0	0%	9	17%	10	17%
Yes, but only some prior inconsistent statements . . . may be admitted as substantive evidence	1	25%	1	33%	14	26%	16	27%
No	2	50%	2	67%	25	47%	29	48%
Not Sure	0	0%	0	0%	5	9%	5	8%
TOTAL	4 (7%)		3 (5%)		53 (88%)		60	

Table AD-B: Responses of the state litigators about the rules on PICS of their states, with correct responses shaded in grey

TAB 5

FORDHAM

University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Supreme Court decision affecting Fed.R.Evid. 606(b)
Date: April 1, 2018

At the Spring, 2017 meeting the Committee considered whether to amend Federal Rule 606(b) to take account of the Supreme Court's decision from the last term in *Pena-Rodriguez v. Colorado*. The *Pena-Rodriguez* Court held that the bar on juror testimony about deliberations, codified in Rule 606(b), is generally sound – but applying it to preclude testimony about racist statements made during deliberations violates the defendant's Sixth Amendment right to a fair trial.

The specific holding of the case is as follows:

For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

At the Spring 2017 meeting the Committee considered three possible amendments that might solve the problem of Rule 606(b) being subject to unconstitutional application:

1. Amending Rule 606(b) to codify the specific holding of *Pena-Rodriguez*, creating an exception to the prohibition on juror testimony to impeach a verdict in cases involving statements of racial bias only. The problem with that potential amendment would be that expansion of the *Pena-Rodriguez* holding to other types of juror conduct would necessitate yet another amendment to the Rule.

2. Amending Rule 606(b) to expand on the *Pena-Rodriguez* holding and to permit juror testimony about the full range of conduct and statements that may implicate a defendant's constitutional rights. The problem with that potential amendment is that it would require significant policy determinations and would be difficult to draft with precision.

3. Amending Rule 606(b) to include a generic exception to the Rule 606(b) prohibition of juror testimony, allowing such testimony whenever it is "required by the constitution." A problem seen by some members with this alternative was that it might be interpreted to permit juror testimony about any type of juror misconduct or statement that in some way could be argued to violate the Constitution.

The Committee chose at that time not to pursue any of these alternatives. The Minutes of the meeting summarizes the Committee's determination as follows:

Ultimately, the consensus of the Committee was that any amendment at this time could suggest expected expansion and potentially contribute to it. Therefore, the Committee resolved to postpone consideration of an amendment to Rule 606(b) in favor of monitoring the cases following *Pena-Rodriguez*. The Reporter agreed to monitor the cases and to keep the Committee apprised.

This memo provides the update that the Committee requested. The case law, as seen below, has so far consistently adhered to the line drawn by the Court in *Pena-Rodriguez*: the constitutionally-based exception to the Rule 606(b) bar on juror testimony is limited to proof of racist statements made during deliberations. Thus, it appears that the Committee's concern about attempts to expand upon *Pena-Rodriguez* have not occurred. Therefore, this memo proposes reconsideration of a generic exception to Rule 606(b), providing that juror statements are permissible to prove deliberations when the constitution so requires.

But the memo also analyzes a proposed amendment suggested in the discussion of Rule 606(b) at the Fall, 2017 meeting: adding an "if constitutionally required" exception but using the strict language of AEDPA: if proof from a juror is allowed under "clearly established constitutional law as determined by the Supreme Court of the United States."

Case Law Digest

Austin v. Davis, 876 F.3d 757 (5th Cir. 2017): The defendant was convicted of a capital crime and sentenced to death. He challenged his death sentence on the ground that a juror had made up his mind in advance to vote for death regardless of any mitigating circumstances. The proof offered was that the juror had made statements to that effect after the verdict was rendered. The court held that proof of those statements was barred by Rule 606(b). It noted that the Supreme Court had found that Rule 606(b) could not apply to bar statements in *Pena-Rodriguez* but found that the exception did not apply in this case:

The only exception that the Supreme Court has made to Rule 606(b)(1)'s prohibitions is “when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.” The Court reasoned in *Pena-Rodriguez v. Colorado* that “[a]ll forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution.” The Court concluded that “[a] constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.” There is no suggestion or indication of racial animus or bias in the present case, and the Supreme Court has not recognized an exception to Rule 606(b) that would apply to the post-trial statements at issue here.

Comment: The court is really holding the line on any extension of *Pena-Rodriguez*. The defendant has a Sixth Amendment right to have a juror excluded if they would vote for the death penalty regardless of mitigating evidence. *Morgan v. Illinois*, 504 U.S. 719 (1992). This would seemingly be just as important, if not more important, than the right to be free from racial biases in jury deliberation. But the court refused to go down (or up?) the slippery slope.

Young v. Davis, 860 F.3d 218 (5th Cir. 2017): The court held that Rule 606(b) applied to bar testimony that two jurors in a capital case thought they had to agree on evidence before it could be considered in mitigation. The failure of a juror to understand instructions is not an exception under Rule 606(b), and *Pena-Rodriguez* provided no relief:

The Supreme Court has since opened, narrowly we think, this door thought closed—a retreat from the traditional rule, adopted into the Federal Rules of Evidence, precluding juror testimony from being used to impeach a jury's verdict. In *Pena-Rodriguez*, Justice Kennedy wrote of the “substantial merit” of Rule 606(b), which “promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned

to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict.” Then, citing to the Fourteenth Amendment's purpose of “eliminating racial discrimination emanating from official sources in the States,” as well as the especially invidious threat posed by racial bias on jury panels, the Court held “that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.”

The Court’s emphasis on our long struggle against racial prejudice, and the “constitutional[] and institutional concerns” attending that history, evince its constrained relaxing of a traditionally inviolate rule. Prohibition of racial discrimination lies at the core of the Fourteenth Amendment. And in the erratic but relentless march toward a color-blind justice, its role in criminal proceedings has been salient. We decline the invitation to extend further the reach of *Pena-Rodriguez*, one antithetical to the privacy of jury deliberations—a principle whose loss would be attended by such high costs as to explain its veneration.

United States v. Robinson, 872 F.3d 760 (6th Cir. 2017): Following their convictions, defendants sought to present evidence from two jurors regarding racist comments made to them by the Caucasian jury foreperson during deliberations, suggesting that they were holding out against convicting the African-American defendants only because of their shared race. The discord in the jury room as a result of the racist remarks escalated to the point that a bailiff and courtroom deputy had to enter the jury room to restore order. Two judges on the panel found no error in excluding the evidence from the jurors under Rule 606(b). They found the foreperson’s racist comments about *fellow jurors* factually distinguishable from the racist comments made by the juror in *Pena-Rodriguez* about the *defendant*. Therefore, the majority held that the foreperson’s racist remarks were not the type justifying an exception to the no-impeachment rule under *Pena-Rodriguez*. The third judge on the panel filed a lengthy dissent (concurring in part), arguing that the racist comments about fellow jurors during deliberations were within the *Pena-Rodriguez* holding. (So the case shows that it would be difficult to codify the *Pena-Rodriguez* holding, even if it is agreed that the case should not be extended beyond race).

Berardi v. Paramo, 2017 WL 3188442 (9th Cir.): The court found that *Pena-Rodriguez* did not allow proof that a juror made a statement to other jurors that, if the races of the defendant and the victim were switched (the defendant was white and the victim was African-American), they would have convicted the defendant immediately. The court found that the state court had “reasonably interpreted that comment as reflecting not racial bias but rather Juror Nine’s frustration that deliberations continued for several days despite what he believed was strong evidence in favor of conviction. Indeed, Juror Nine’s comment was unlike those in [*Pena-Rodriguez*] that strongly indicated racial bias.

Memorandum to Advisory Committee on Evidence Rules
Re: Supreme Court decision affecting Fed.R.Evid. 606(b)
April 1, 2018

Montes v. Macomber, 2017 WL 1354779 (S.D.Cal.) (Huff, J.): Rule 606(b) bars proof that jurors in deliberations discussed the fact that the defendant did not testify. *Pena-Rodriguez* provides an exception only for proof of racial bias.

Patton v. First Light Property Management, Inc., 2017 WL 5495104 (S.D.Cal.): In a sex discrimination lawsuit, the court rejected an affidavit from a juror regarding improprieties in deliberations. The court excluded the affidavit under Rule 606(b). But in an extended discussion it found that *Pena-Rodriguez* was inapplicable because the affidavit gave no indication of blatantly racist statements made during deliberations. That discussion was made under the assumption that *Pena-Rodriguez* was applicable to *civil* cases. That would be an extension of the Supreme Court's holding, which was grounded in the Sixth Amendment.

Zamora-Smith v. Davies, 2017 WL 3671859 (C.D.Cal.): After an extensive discussion of *Pena-Rodriguez*, the court held as follows: "The Supreme Court has not established an exception to the no-impeachment rule for the type of misconduct alleged—rushed deliberations on a Friday afternoon when one juror claimed to have a flight and did not want to return on Monday."

Vera v. United States, 2017 WL 3081666 (D.Conn.): Language from *Pena-Rodriguez* supporting Rule 606(b) was used to reject an affidavit from a juror who said she was pressured by other jurors to vote guilty.

United States v. Davis, 2017 WL 2907112 (M.D.Pa.): The defendant, after the verdict was announced, accused the jurors of being racist. The judge, relying on *Pena-Rodriguez*, interviewed the jurors and found no basis for the claim.

Williams v. Price, 2017 WL 6729978 (W.D.Pa.): The defendant, an African American, sought to attack his conviction with evidence that one juror accused a holdout of being a "nigger lover." The court held that this evidence was barred by Rule 606(b). *Pena-Rodriguez* was inapplicable because the statement was directed to the holdout juror's biases, and not directly about the defendant. (Although the use of the racial epithet would in fact seem to be directly about the defendant). The court relied on *United States v. Robinson*, *supra*.

Sears v. Chatman, 2017 WL 2644478 (N.D.Ga.): *Pena-Rodriguez* mandates no exception from the Rule 606(b) bar for a claim that a juror was pressured by other jurors during deliberations.

Sanders v. Davis, 2017 WL 2591907 (E.D.Ca.): Rule 606(b) bars inquiry into allegations that jurors misunderstood the trial judge's instruction; the court describes the holding in *Pena-Rodriguez* as being that "the rule against inquiring into statements during jury deliberations gives way only where juror makes a clear statement of racial stereotyping or animus."

Anderson v. Kelley, 2017 WL 1160583 (E.D.Ark.): The defendant alleged that a juror voted guilty even though she didn't believe so; but the court found Rule 606(b) barred proof from

the jury to prove this claim. The court stated that “the allegations here are unlike the race-infected comments that lifted the Rule 606(b) bar in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). There’s no suggestion that Gipson's vote was motivated by racial bias.”

Proposal for a Modified “Constitutional” Exception

At the Spring 2017 meeting, the Committee declined to propose an exception for Rule 606(b) that would allow proof of juror statements when mandated by the Constitution. The exception was patterned after the exception that is found in Rule 412. The proposal on which the Committee passed provided as follows:

- (2) ***Exceptions.*** A juror may testify if:
- (A) the testimony is about whether:
 - ~~(A)~~(i) extraneous prejudicial information was improperly brought to the jury’s attention;
 - ~~(B)~~(ii) an outside influence was improperly brought to bear on any juror; ~~or~~
 - ~~(C)~~(iii) a mistake was made in entering the verdict on the verdict form; or
 - (B) excluding the testimony would violate a party’s constitutional right.

As stated above, the Committee thought that the language might invite random arguments about constitutional rights that a party might not otherwise have thought about.

One possible answer to this concern was raised in the discussion of an alternative at the last meeting – to narrow the constitutional argument in the manner that has been done in AEDPA. If the AEDPA language is used, then the proposal would look like this:

- (2) ***Exceptions.*** A juror may testify if:
- (A) the testimony is about whether:
 - ~~(A)~~(i) extraneous prejudicial information was improperly brought to the jury’s attention;
 - ~~(B)~~(ii) an outside influence was improperly brought to bear on any juror; ~~or~~

~~(C)~~(iii) a mistake was made in entering the verdict on the verdict form; or

(B) excluding the testimony would violate clearly established constitutional law as determined by the Supreme Court of the United States.

Possible Committee Note

The amendment recognizes that the bar on juror testimony to impeach a verdict can sometimes conflict with a constitutional right. See *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 869 (2017) (“where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement”). The amendment is not intended however, to provide constitutional exceptions to the bar on juror testimony beyond those clearly established by existing Supreme Court precedent. The policies against proof of juror deliberations remain sound, as the Supreme Court has recognized. *Id.* at. 865 (noting that Rule 606(b) “promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict” and that the rule “gives stability and finality to verdicts”). Thus, the amendment contemplates a constitutionally-based exception only if it is clearly established by the United States Supreme Court. cf. 28 U.S.C. §2254(d)(1).

Reporter’s Comment

The language in the text is AEDPA-strict, so it surely can be argued that it is no longer an open invitation – if it ever was – to all sorts of constitutional attacks on Rule 606(b). The proposed Committee Note emphasizes the limited nature of the exception. The proposal is directed toward the goals of any amendment where the problem is that the rule has been found unconstitutional as applied: 1) to avoid a trap for the unwary party or lawyer who would not be aware of a constitutional limitation on the rule barring juror testimony; and 2) to assure that the rule can never be applied in violation of the Constitution.

One serious concern about the rule, though, is that it might be seen as trying to constrain the judgment of the lower courts – in the way that AEDPA does. AEDPA imposes a substantive constraint on lower federal courts. Under AEDPA, a lower court cannot say, for example, that “the principles of *Pena-Rodriguez* logically extend to a juror’s statement that he was drawing a negative inference because the defendant didn’t testify; so I will grant relief.” While the determination of what is “clearly established law” can be argued, it is clear that the lower court’s

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power to apply Supreme Court opinions is constrained by the “clearly established” standard, in a way that it is not if the lower court is applying Supreme Court authority in other cases. In *Butler v. McKellar*, 494 U.S. 407 (1990), the Court found that a Supreme Court opinion when applied to a different fact situation is clearly established only if reasonable minds could not differ about the result. In contrast, outside of AEDPA, a lower court can apply principles from Supreme Court opinions and extend those principles to different fact situations – even though reasonable minds can differ.

It is true that nothing in an Evidence Rule can control a lower court’s substantive decision about the extent of a constitutional principle. Put another way, a judge under this amendment could not be put in the situation of saying, “I would like to consider the juror’s testimony about sexually discriminatory statements made during deliberations, because I think the *Pena-Rodriguez* analysis logically extends to this situation. But I can’t do so, because Rule 606(b) won’t let me. I wish the Advisory Committee had made that exception broader!” So it is unlikely that the proposal would constrain constitutional development of the *Pena-Rodriguez* principle. (And if that is the intent of the amendment, it seems like that intent will not be met.)

But if it is assumed that a lower court’s interpretation of *Pena-Rodriguez* will not be constrained by AEDPA-like language, then one of the goals of proposing the amendment in the first place is undermined– an amendment with the “clearly established” language is subject to unconstitutional application, by a lower court that extends the *Pena-Rodriguez* principles to situations on which reasonable minds can differ.

One can argue, though, that the risk of unconstitutional application of an exception limited to “clearly established” constitutional law is low, especially given the fact that the lower courts are appearing to adhere to the Supreme Court guidance that the exception is limited to cases of racial discrimination. And the proposal does fulfil the goal of providing notice of a constitutional issue, while also providing a yellow light on proliferation of constitutional arguments by litigants. Obviously it is for the Committee to determine whether the benefits of the proposal outweigh the risks.

Reconsideration of the Generic Constitutional Law Exception

If the Committee determines that the AEDPA-type language is problematic, then it may wish to reconsider the generic exception discussed above: that juror testimony is admissible when excluding it would violate a constitutional right. After more than a year has passed since *Pena-Rodriguez*, and the lower courts have shown no appetite for extending its holding, it can be argued that the generic constitutional language is a good solution for several reasons: 1. It tracks the language already in Rule 412; 2) It flags the issue for lawyers and so can help to avoid a trap for the unwary; 3) It absolutely assures that the rule cannot be unconstitutionally applied, without raising any concern about controlling the lower court’s substantive decision.

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To the extent there remains a concern that this generic language may be an invitation to constitutional challenges, that concern might be alleviated by a cautionary Committee Note – essentially the same note that could be applicable to the AEDPA-alternative, but without a reference to the AEDPA standard.

The Committee Note to the generic amendment might look like this:

The amendment recognizes that the bar on juror testimony to impeach a verdict can sometimes conflict with a constitutional right. See *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 869 (2017) (“where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement”). The amendment is not intended however, as an open door to extending the protections that are provided by the Supreme Court. The amendment is not intended however, to provide constitutional exceptions to the bar on juror testimony beyond those established by the courts. The policies against proof of juror deliberations remain sound, as the Supreme Court has recognized. *Id.* at. 865 (noting that Rule 606(b) “promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict” and that the rule “gives stability and finality to verdicts”).

TAB 6

TAB 6A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Consideration of Possible Changes to Rule 404(b)
Date: April 1, 2018

The Pepperdine Conference in Fall 2016 was largely devoted to the important case law developments regarding the use of Rule 404(b), especially in criminal cases. These case law trends essentially seek to assure that Rule 404(b) arguments are scrutinized so that the rule is not used as a device to admit evidence that is in fact offered for propensity. The fact that some courts – especially the Seventh and Third (and most recently a panel of the Fourth) Circuits – are taking a fresh look at the scope and meaning of Rule 404(b) raises questions about whether the rule can or should be amended to accommodate these new developments. It also raises questions about what, if anything should be done about the conflict between the circuits that are looking more closely at Rule 404(b) and those that are still taking the traditional broad approach to admissibility.¹

At the last two meetings, the Committee reviewed three strands of new case law that are intended to provide for more careful analysis of admissibility under Rule 404(b). These limiting principles are:

1. The prosecutor must explain particularly why and how the bad act evidence is admissible for a proper purpose, and the probative value as to the proper purpose must not depend on a propensity inference.
2. When the government is offering the bad act as proof of an element of the crime – particularly intent and knowledge – the evidence is not admissible under Rules 404(b) and 403 unless the defendant actively contests that element. An active contest is not found simply by entering a not-guilty plea.

¹ The “conflict” is not only that the circuits are in disagreement about whether there is an active dispute requirement for the evidence to be offered for a proper purpose, and over the breadth and meaning of the “inextricably intertwined” doctrine. The conflict is more generally about the fact that a criminal defendant is simply far better off in some circuits than in others – that is, that the same criminal defendant with the same bad act evidence is far more likely to get it excluded in some circuits than in others.

3. The “inextricably intertwined” doctrine – which holds Rule 404(b) to be inapplicable to bad acts that are part of the charged crime – is limited to bad acts that directly prove an element of the crime. Acts that require an inference and are not part of the crime itself– such as a threat to a witness – must proceed through Rule 404(b), even if they “complete the story” or are labelled “intrinsic”.

The Committee engaged in extensive discussion of these three limiting principles over the last two meetings, and also discussed possible changes to the Rule 404(b) notice requirement. Some proposed changes to the notice requirement actually went toward addressing the proposed substantive limitations on Rule 404(b) admissibility (such as requiring the prosecutor to provide notice of the proper purpose for the evidence), while others were intended to improve notice procedures (such as requiring that the notice be made 14 days before trial and requiring it to provide more information than the “general nature of the claim or defense”). Moreover, the Committee considered a proposal that would provide a more protective balancing test for criminal defendants than is currently provided by Rule 403 – the rationale for the proposal being that the intended protections provided by Rule 404(b) have been eroded because many courts have considered the rule to be a “rule of inclusion.” A mildly exclusionary balancing test would encourage courts to assure that bad acts evidence is not admitted unless it truly goes to a non-propensity use.

At the end of this discussion at the Spring, 2017 meeting, the Committee slightly narrowed the topics for a possible amendment. Specifically, the Committee agreed adding an “active contest” requirement to the Rule was ill-advised. But it resolved to devote more attention to the issues of the “inextricably intertwined doctrine,” the division in courts about proper articulation of non-propensity inferences, and the Rule 404(b) notice requirements.

At the Fall, 2017 meeting, the discussion ranged over a number of issues and served to provide a framework for future consideration. At the conclusion of the discussion, the Committee resolved to continue consideration of: (1) a potential propensity ban/articulation requirement; (2) a modified balancing test that would require probative value of Rule 404(b) acts to outweigh unfair prejudice to a criminal defendant; (3) language that would tie the coverage of Rule 404(b) to all bad act evidence that is offered as “indirect” evidence of the crime charged; and (4) enhanced notice requirements.

This memorandum is in four parts. Part One discusses the recent case law involving two of the three case law trends: articulating non-propensity inferences and limiting the “inextricably intertwined” doctrine. This discussion is in large part reproduced from previous memos to the Committee, but it is updated in parts. (The case law on the “active contest” requirement has been dropped). Part Two provides a response to a number of arguments and questions that were raised at the last meeting; this section includes analysis from Professor Richter on the history that supports a heightened balancing test to regulate bad acts offered against a criminal defendant. Part Three discusses drafting alternatives that would implement the two case law trends that the Committee is still considering; and, importantly, it includes a different alternative that would change the Rule 404(b)/403 balancing test to make it more protective for criminal defendants. It also includes proposed draft language for an enhanced notice requirement. Part Four sets forth the

proposed amendment to the notice provision of Rule 404(b) that the Committee has already approved unanimously. That amendment would delete the provision stating that the defendant must request notice before the government is required to provide it.

Finally, there are two appendices to this memo:

1. A report by Professor Richter on state law variations on Rule 404(b) (which was included in the agenda book for the last meeting).

2. A case law digest of every circuit court case on Rule 404(b) decided in the last 18 months, and a sampling of district court cases over that same time period. The case law digest was part of the Reporter's memo in the last agenda book, but there are so many new cases that the decision was made to break it off into a freestanding memo.

Finally, at this meeting the Committee has three options:

1. It can decide to continue to discuss potential amendments to Rule 404(b);
2. It can decide that an amendment addressing the conflict in the case law, the balancing test, enhanced notice provisions, etc. should be referred to the Standing Committee for release for public comment; or
3. It can decide to terminate consideration and drop Rule 404(b) as an agenda item – in which case it might still propose an amendment, to be released for public comment, that would delete the requirement that the defendant must request notice. That provision was unanimously approved almost two years ago.

I. Two Case Law Developments Imposing More Rigor on the Rule 404(b) Determination²

Rule 404(b) currently provides as follows:

(b) Crimes, Wrongs, or Other Acts.

- (1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

² This section is substantially identical to the section discussing case law developments in the memo for the last meeting.

- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Traditionally, the analysis of Rule 404(b) issues has not been rigorous. Typically, a court presented with a Rule 404(b) objection would take three quick steps:

1. Emphasize that Rule 404(b) is a rule of inclusion, not exclusion.
2. Find that the proffered bad act is probative of a not-for-character purpose (or, often, a laundry list of such purposes), regardless of whether the defendant actually contested the purpose for which the bad act was purportedly relevant.
3. Find that the probative value for the proper purpose was not substantially outweighed by the prejudicial effect.

As discussed at the last meeting, one of hundreds of examples of the traditional, “knee-jerk” approach to Rule 404(b) is found in *United States v. Geddes*, 844 F.3d 983, 989 (8th Cir. 2017).³ The defendant was charged with aiding and abetting sex trafficking by force, fraud or coercion. He moved to exclude testimony that four years earlier, he had physically assaulted and threatened to kill his girlfriend because of a text message that he found on her phone. The court stated first that there is no error under Rule 404(b) “unless the evidence clearly had no bearing on the case and was introduced solely to prove the defendant’s propensity to commit criminal acts.” It stated that Rule 404(b) is a rule of “inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition.” The court found that the prior act was probative of knowledge and intent, both of which were called into question because the statute required proof of knowing transportation in interstate commerce and intent to coerce. Those elements were in issue because of the defendant’s not guilty plea – regardless of whether they were actively contested by the defendant. Finally, the court noted that a limiting instruction was given and so the danger of unfair prejudice did not substantially outweigh the probative value of the act in proving knowledge and intent.⁴

³ The Federal Rules of Evidence Manual contains more than 300 pages of summarized circuit court cases that treat Rule 404(b) as a “rule of inclusion” and find bad acts admissible essentially whenever they are found probative of some not-for-character purpose, even if that purpose is not actively contested – and even when the probative value for the purpose proceeds through a character inference. In addition, the case digest of recent cases, attached to this memo, contains a large number of examples of almost-automatic admissibility of bad act evidence under the 404(b) “rule of inclusion.”

⁴ For another typical case involving drug charges, see *United States v. Smith*, 741 F.3d 1211 (11th Cir. 2013). The defendant was charged with cocaine distribution, and his prior convictions for *possessing* cocaine were admitted at trial. The court found no error, reasoning that 1) Rule 404(b) is a “rule of inclusion”; 2) “a not guilty plea in a drug conspiracy case makes intent a material issue and opens the door

The Rule 404(b) analysis in *Geddes* is arguably thin for a number of reasons. First, threatening to kill his girlfriend is relevant to prove intent to coerce the alleged victim only if you go through a propensity inference. Saying “if he had an intent to hurt his girlfriend it is more likely he had an intent to coerce the alleged victim” is just another way of saying that threatening his girlfriend shows a propensity to threaten women. Thus, the bad act is not truly offered for a non-propensity purpose. Second, the defendant was not actively contesting intent. He argued that he never made any threat at all. If simply pleading not guilty is enough to put intent into issue for purposes of Rule 404(b), then virtually any act somewhat similar to the charged act will be admissible. Third, the court’s statement that the government overcomes a Rule 404(b) objection by coming up with one non-propensity purpose for which evidence is at all relevant ignores the work that Rule 403 is supposed to do when the probative value for the non-propensity purpose is weak.

Finally, the *Geddes* court’s emphasis that Rule 404(b) is a “rule of inclusion” mischaracterizes the rule. It is true that Rule 404(b) directs the court to non-propensity purposes. But it remains the case that the bad act is excluded if the bad act is in fact offered to prove propensity. Calling Rule 404(b) a rule of inclusion distracts the court from analyzing whether the evidence is really being offered to prove propensity, even though the government has thrown in a non-propensity purpose. The Third Circuit, in *United States v. Caldwell*, 760 F.3d 267, 275 (3rd Cir. 2014) had an arguably more honest take on what it might mean for Rule 404(b) to be a “rule of inclusion”:

Throughout the nineteenth century and into the twentieth, American courts differed as to whether the common law rule was “exclusionary” or “inclusionary.” Both of these descriptors can be misleading. To be sure, no one doubted that evidence relevant only for the limited purpose of showing a defendant’s general propensity to commit the charged offense was inadmissible. Instead, the debate concerned whether the list of previously recognized non-propensity purposes was exhaustive (or “exclusive”), or whether any non-propensity purpose, even if not previously recognized, could support admission of the prior act evidence (the “inclusive” approach). See David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 4.3.2, at 224 (2009) (“[T]he real question ... is whether the courts actually confine admissibility to a set of enumerated purposes.”).

The matter was settled in 1975 with the adoption of the Federal Rules of Evidence. * * * By introducing the list of permissible purposes with the words “such as,” the drafters made clear that the list was not exclusive or otherwise limited to a strictly defined class.

to admission of prior drug-related offenses”; and 3) prior convictions for possession were sufficiently probative of intent to distribute.

We have on occasion noted that Rule 404(b) adopted an inclusionary approach. Our use of the term “inclusionary” merely reiterates the drafters’ decision to not restrict the non-propensity uses of evidence. It does not suggest that prior offense evidence is presumptively admissible. On this point, let us be clear: Rule 404(b) is a rule of general exclusion, and carries with it “no presumption of admissibility.”¹ Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, at 731 (4th ed.2013). The Rule reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is. And in recognition that prior offense evidence is generally more prejudicial than probative, Rule 404(b) directs that evidence of prior bad acts be excluded—*unless* the proponent can demonstrate that the evidence is admissible for a non-propensity purpose.

So to the *Caldwell* court, Rule 404(b) as a “rule of inclusion” simply means that the list of proper purposes in the rule is not exclusive. (Just recently, a panel of the Fourth Circuit, in *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017), rejected the broad “rule of inclusion” analysis and adopted the *Caldwell* view of Rule 404(b)).

The peril in following the traditional interpretation of “rule of inclusion” – in *Geddes* and like cases – is that the court will treat Rule 404(b) as a rule providing for presumptive admissibility of uncharged misconduct.

At the Spring meeting the DOJ representative suggested that the Reporter’s memo set forth only one case – *Geddes* – in which there was an asserted problem of “knee-jerk” admissibility under Rule 404(b), and that the trial court in that case was actually quite careful in its application of the Rule. The response to that argument is that *Geddes* is only one example of a typical analysis in many courts – as is seen in the copious annotations in the Federal Rules of Evidence Manual, and in the case law digest *infra*. The case law digest, attached to this memo, sets out only the most recent examples of cases at both the district and appellate level that cite “rule of inclusion” as a mantra and find evidence admissible under Rule 404(b) even though it is essentially offered for propensity.⁵

Geddes was chosen as an example because it involves the most frequent road to easy admissibility under Rule 404(b) – offering the bad act to prove intent. The line between intent and propensity is definitely thin: to say “he intended to do it before and therefore it is more likely that he intended to do it this time” is not a lot different from saying “because he did it before he is more

⁵ The digest covers all reported Court of Appeals decisions since April 2017. Of the 37 appellate decisions interpreting whether bad act evidence was admitted for a proper purpose, 23 of them are cases in which the court found no error even though the evidence appears to be not probative for the articulated purpose. The remaining 14 decisions were instances in which the court carefully evaluated the government’s articulated proper purpose and either found it wanting, or properly based on non-propensity inferences.

likely to have done it this time.” Professor Imwinkelried has surveyed the case law in drug cases and concludes as follows:

It is a commonplace observation that the courts have been very liberal in admitting uncharged misconduct evidence of other drug transactions to prove intent in drug prosecutions. Especially when the accused is charged with a possessory offense with intent to distribute, the courts routinely admit evidence of the accused’s other drug offenses. Although the accused is charged with intent to traffic and distribute, a large number of courts admit uncharged misconduct evidence that the accused possessed mere user quantities. The opinions are replete with sweeping assertions that “virtually any prior drug offense” is admissible to prove intent in a drug prosecution.⁶

We now proceed to two strands of case law that seek to impose limitations on Rule 404(b) so that it will be more carefully applied.

A. Requiring a showing that the probative value for a proper purpose proceeds through a non-propensity inference

Under Rule 404(b), bad act evidence is inadmissible if offered to prove that the defendant committed the charged conduct because he has the propensity to do so. But the evidence “may be admissible” if offered for a non-character purpose. Once the prosecution articulates a proper purpose, then the court assesses whether the probative value for that purpose is substantially outweighed by the risk of prejudicial effect, i.e., that the jury will 1) impermissibly use the evidence for the propensity purpose or 2) convict the defendant just for being a bad person, regardless of whether he has a propensity to commit the crime charged.

There is unquestionably a dispute in the courts about how to assess the probative value of bad acts offered for a proper purpose. Some circuits have recently pointed out that in assessing probative value for the non-character purpose, the court must assure itself that the inferences to be derived from the act are *independent of any propensity inference*. Other courts, like *Geddes* and *Smith*, discussed above, tend to find it sufficient that the bad act evidence is probative of one of the listed purposes, without worrying too much about whether the probative value is dependent on a propensity inference. The leading example of the more careful approach is the Seventh Circuit’s decision in *United States v. Gomez*, 763 F.3d 845, 862-63 (7th Cir. 2014) (en banc). In *Gomez*, the government had evidence that someone nicknamed “Guero” was a reseller of drugs. The government claimed that Gomez was Guero. Gomez claimed that it was his brother-in-law who was the drug dealer Guero. The trial court admitted evidence of the defendant’s prior cocaine possession, ostensibly for the proper, non-character purpose of proving identity. The court of appeals instructed that it was not enough for the bad act evidence to be relevant for a non-character

⁶ Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 Hofstra L.Rev. 851, 871 (2017), quoting *United States v. Sanders*, 688 F.3d 1298, 1314 (11th Cir. 2012).

purpose. Rather, “the district court should not just ask whether the proposed other-act evidence is relevant to a non-propensity purpose *but how exactly the evidence is relevant to that purpose*—or more specifically, how the evidence is relevant without relying on a propensity inference. Careful attention to these questions will help identify evidence that serves no permissible purpose.” (emphasis added) The *Gomez* court concluded that the cocaine possession was improperly admitted to prove identity, because the probative value for identity was dependent on an inference that because the defendant sold drugs before, he sold them again. It explained as follows:

Because the proponent of the other-act evidence must explain how it is relevant to a non-propensity purpose, the government needed a rationale for connecting the cocaine found in Gomez’s bedroom to his identity as Guero *without relying on the forbidden propensity inference*. * * * Gomez’s mistaken-identity defense singled out another person—his brother-in-law and housemate Victor Reyes—as the “real” Guero. The government introduced the user quantity of cocaine found in Gomez’s bedroom for the purpose of showing that as between the two, it was more likely that Gomez was Guero. * * * [But] the evidence of the defendant’s history of drug dealing tended to prove his identity as a participant in the charged drug deal only by way of a forbidden propensity inference: Once a drug dealer, always a drug dealer. * * *

* * * The government’s sole theory is that Gomez’s possession of a user quantity of cocaine 26 days *after* the conspiracy ended shows that he, rather than Reyes, was Guero. That argument is extraordinarily weak, but the more important point is that it rests on pure propensity: Because Gomez possessed a small quantity of cocaine at the time of his arrest, he must have been involved in the cocaine-distribution conspiracy. The district court should not have admitted this evidence.

Another illustration of a case holding that prior misconduct must be excluded where its probative value for the expressed purpose proceeds through the propensity inference is the Third Circuit’s decision in *United States v. Smith*, 725 F.3d 340, 342 (3d Cir. 2013). Smith was charged with threatening a federal officer with a gun and possessing a firearm during a crime of violence. The trial court admitted evidence that two years before Smith allegedly committed the charged crimes, he had been observed dealing drugs at the same location. The court of appeals found that the prior bad act evidence “violates our long standing requirement that, when seeking to introduce evidence of prior bad acts under Rule 404 (b), the proponent must set forth ‘a chain of logical inferences, *no link of which* can be the inference that because the defendant committed . . . offenses before, he therefore is more likely to have committed this one.’ *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1982) (emphasis added).” The government argued that the prior drug dealing at the location was probative of the defendant’s motive to commit the charged crime, i.e., it was evidence that he was protecting his turf. The court rejected that argument because, “for the evidence of the 2008 drug sale to speak to Smith’s motives in 2010, one must necessarily (a)

assume something about Smith's character based on the 2008 evidence (that he was a drug dealer) and (b) infer that Smith acted in conformity with that character in 2010 by dealing drugs and therefore had a motive to defend his turf." Thus, the mere fact that the government *articulated* a non-character purpose was not enough to admit the evidence for that purpose – that was because the evidence was probative of motive only under the assumption that the defendant had a bad character. The government was proceeding through a propensity inference.

But as stated above, many courts simply look to find probative value for the proper purpose cited by the prosecution without investigating whether the probative value for that purpose relies on a propensity inference. Exemplary is *United States v. Mathews*, 431 F.3d 1296, 1311 (11th Cir. 2005), a case in which the defendant's prior uncharged drug transaction was held properly admitted to prove his intent to conspire to commit drug transactions. The court stated its approach as follows:

The * * * question is whether the 1991 arrest is relevant to the intent at issue in the current conspiracy charge. In *United States v. Butler*, 102 F.3d 1191 (11th Cir.1997), this court held that a three-year-old prior conviction for possession of cocaine for personal use was relevant and admissible for purposes of demonstrating defendant's intent in the charged conspiracy for possession with intent to distribute. * * * It must follow then that, at least in this circuit, Matthews's 1991 arrest for distribution of cocaine was relevant to the intent at issue in the charged conspiracy to distribute cocaine.

Judge Tjoflat, in a concurrence in *Mathews*, argued that the majority had failed to explain how the probative value of the evidence of prior drug activity to show intent actually proceeded through a non-propensity inference:

I concede that the line between evidence admitted to demonstrate intent and evidence admitted to demonstrate propensity is hardly clear. It is difficult to argue that a person had an intention to do something on a similar occasion because he or she demonstrated that intention previously without implicitly suggesting that the person has a proclivity towards the intent. * * * [But] the rules distinguish between the two and so must we. * * * At the very least, where the evidence sought to be admitted demonstrates nothing more than a criminal intent ... it must be excluded as propensity evidence. If the inferential chain must run through the defendant's character—and his or her predisposition towards a criminal intent—the evidence is squarely on the propensity side of the elusive line. Where, on the other hand, an inference can be drawn that says nothing about the defendant's character—for example, based on the “improbability of coincidence”—the evidence is more properly permissible for non-propensity purposes.

See also *United States v. Henry*, 848 F.3d 1 (1st Cir. 2017) (noting that the court had “repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute”; concurring opinion concluding that prior drug activity to prove intent was nothing more than a propensity inference and suggesting that the Circuit should reconsider its case law); *United States v. Logan*, 121 F.3d 1172 (8th Cir. 1997) (evidence of prior possession of drugs was probative of knowledge and intent to distribute, with no analysis of how the bad act was probative for those purposes independent of any propensity inference); *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993) (same). See generally Ranaldo, *Is Every Drug User a Dealer?: Federal Courts are Split in Applying Fed.R.Evid. 404(b)*, 8 Fed. Cts. L.Rev. 147 (2014) (noting the dispute in the courts on whether prior acts of possession are probative of intent to distribute, and characterizing the difference as whether or not the court is considering that the probative value for intent proceeds through a propensity inference).

Most of the cases involving bad acts that proceed through the propensity inference are, like *Matthews*, cases involving use of prior drug activity in drug cases, with the prosecution arguing that the prior drug activity is offered for intent. Many have argued that when bad acts are offered, “intent” cannot be readily separated from the propensity inference. See Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L.Rev. 215, 218 (2011) (“What chain of reasoning can link the prior drug history to the charged crime other than one that infers that the defendant has a drug-related propensity * * *? The earlier drug use, which is behavioral evidence, can be relevant only if we assume that the defendant’s behavior forms an unchanging pattern.”).

But the problem of using propensity inferences for so-called proper purposes occurs for other purposes as well, such as identity (*Gomez, supra*), and motive. An example of the propensity problem with offers to prove motive is *United States v. Roux*, 715 F.3d 1019 (7th Cir. 2013). The court in *Roux* affirmed the defendant’s conviction for coercing a minor to create sexually explicit images. It held that the trial judge did not abuse discretion in admitting testimony from the victim’s minor sisters that they too had been sexually abused by the defendant. The court reasoned that “[t]he district court properly determined that the acts of abuse described by CC and SH [minor sisters] were probative of Roux’s motive to commit the charged child pornography offense” because “prior instances of sexual misconduct with a child victim may establish a defendant’s sexual interest in children and thereby serve as evidence of the defendant’s motive to commit a charged offense involving the exploitation of children.” But the court’s use of “motive” is really nothing but “propensity”: a defendant who has a “sexual interest in children” has the *propensity* “to commit a charged offense involving the exploitation of children.” Other examples are found in the case digest in Part Two.

In sum, there is conflict in the courts, and significant difficulty, in how and even whether to determine if the probative value of the bad act to prove the proper purpose actually proceeds through a non-propensity inference. An attempt to draft an amendment and Committee Note to deal with this conflict is set forth in Part Three.

B. Limiting the “inextricably intertwined” doctrine

Rule 404(b) requires that “crimes, wrongs, or other acts” cannot be offered as proof of character when character evidence is offered to prove conduct. But it is often difficult to determine which acts are “other acts” as opposed to acts that are part of the offense charged. The test used by most courts is whether the acts that are the subject of the proof are “inextricably intertwined” with the basic elements of the crime charged. If so, Rule 404(b) is considered inapplicable and there is no need to articulate a “not-for-character” purpose for the evidence. Nor is there any need to give prior notice of the intent to use the evidence, as is required if the evidence is covered by Rule 404(b). Of course, Rule 403 will still apply to the evidence.⁷ However, it would be the rare case in which proof of an inextricably intertwined act could be considered so prejudicial as to justify exclusion under Rule 403.

Sometimes it is pretty clear that bad act evidence is part of the charged misconduct. Take for example *United States v. Lyle*, 856 F.3d 191 (2nd Cir. 2017). The defendant was convicted of charges related to distribution of methamphetamine, including conspiracy. The charges resulted after he was arrested in a car containing a large quantity of meth. While on release after that arrest, the defendant was found in a hotel room weighing out baggies of meth, consistent with distribution. The court found that this evidence was inextricably intertwined. The defendant was charged with conspiracy, and the bad act was evidence in furtherance of the conspiracy – during the time in which the conspiracy was operating. Thus, the bad act evidence was direct proof of the crime charged.⁸ See also, *United States v. Pace*, 981 F.2d 1123, 1135 (10th Cir. 1992) (“Rule 404(b) only applies to evidence of acts extrinsic to the charged crime. Evidence of Leonard’s sale was direct evidence of the conspiracy, which the indictment charged as occurring between July 1 and October 26, 1990. Conduct during the life of a conspiracy that is evidence of the conspiracy is not Rule 404(b) evidence.”).

Lyle is fairly easy because any act that was part of the conspiracy is directly related to the conduct that the government alleged in the indictment, so there is no concern that evidence of that act is primarily used to prove propensity. This would be true whether or not the act was specifically alleged as an overt act.

The notion of “inextricably intertwined” evidence becomes more complicated when it is examined in cases such as *United States v. Hilgeford*, 7 F.3d 1340, 1346 (7th Cir. 1993). Hilgeford suffered what the court described as “hard times.” He had borrowed over one million dollars from

⁷ See *United States v. Hilgeford*, 7 F.3d 1340, 1344 (7th Cir. 1993):

When deciding if the other acts evidence was admissible without reference to Rule 404(b), we must determine whether such evidence was intricately related to the facts of the case at hand. If we find the evidence is so related, the only limitation on the admission of such evidence is the balancing test required by Rule 403.

⁸ The court held alternatively that the evidence was admissible to show knowledge and intent – a critique of that analysis is found in the case digest in Part Three.

a bank and the Farmer's Home Administration using the two farms he owned as security for the debt. When he suffered financial difficulties, the bank foreclosed on the mortgage it held on one of his farms. The bank then bought the farm at the foreclosure sale and evicted Hilgeförd. The United States foreclosed on his other farm.

Hilgeförd retaliated by sending bills to employees of the bank and the FHA and then taking deductions on his tax return for the unpaid bills. Among the charges brought against him were counts alleging willful filing of false tax returns. To prove the tax counts, the government offered evidence that in the years prior to the challenged tax returns, Hilgeförd had generated "a blizzard of complicated and groundless litigation, primarily involving his fruitless attempts to regain his two farms." Hilgeförd objected at trial under Rule 404(b). The court held that Rule 404(b) was not applicable to this evidence, because it was "intricately related to the fact of the case at hand."

Cases such as *Hilgeförd* are more difficult than a conspiracy case like *Lyle*, where the bad acts offered occurred while the conspiracy was ongoing. The bad acts in *Hilgeförd* did not occur in the time period covered by the indictment. The fact that the groundless litigation was probative of an element of the prosecution's case (the willfulness in the tax return filings) does not distinguish it from bad act evidence covered by Rule 404(b); all evidence offered by the prosecution in a criminal trial must be somehow probative of an element of the crime. The court's statement that the groundless litigation concerning the farm was "intricately related" to the tax counts is vague and conclusory.

Hilgeförd is hardly the only case in which courts have been muddled in applying the rule that evidence of acts "inextricably intertwined" with the charge is exempt from Rule 404(b). Part of the problem is that courts often use different phrases to capture the concept. Examples include acts that are "intrinsic" to the crime charged; acts that form part of a "single criminal episode"; acts that are an "integral part" of the crime; and acts that "complete the story" or "explain the context" of the crime. See, e.g., *United States v. Lucas*, 849 F.3d 638 (5th Cir. 2017) ("background" evidence is "intrinsic" to the crime charged – even though many cases evaluate background evidence under Rule 404(b)); *United States v. Payne-Owens*, 845 F.3d 868 (8th Cir. 2017) (in a felon-firearm prosecution, gang membership evidence was "intrinsic" because "contributed to the narrative of the charged crime" and "it helped to provide a total picture").

It gets even more confusing in some courts that have more than one doctrine for determining whether the bad acts are "other" acts outside Rule 404(b). Consider *United States v. Loftis*, 843 F.3d 1173 (9th Cir. 2016). In a wire fraud prosecution, the government sought interlocutory relief after the trial judge, in an *in limine* motion, held that evidence of frauds not specified in the indictment would be evaluated under Rule 404(b). The Court of Appeals held that Rule 404(b) was inapplicable for two separate reasons. First, the frauds not specified in the indictment were not "other" acts because the crime charged included not only the specific executions of the fraud scheme alleged in the indictment, but also "the overall scheme." Thus, the acts were part of the charged conduct. This was because an element of the crime of wire fraud is "the existence of a scheme to defraud." Second, the uncharged acts were "inextricably intertwined" with the frauds specified in the indictment because the uncharged transactions were "part of the overall scheme" and "part of the same transaction." The Court did not explain why it had two

separate doctrines that found this evidence to be outside Rule 404(b), when the reason that both doctrines applied was exactly the same.

One noted commentator has summed up the “inextricably intertwined” doctrine with the following criticism:

“Inextricably intertwined” is the modern de-Latinized version of *res gestae*, and it has been savaged by a similar critique. The standard has been described as “lacking character” and “obscure” because it does not embody a clear principle. * * * The vacuous nature of the test’s wording gives courts license to employ sloppy analysis and allows them quickly to slip from a conclusory analysis to a desired conclusion. Simply stated, the indefinite phrasing of the doctrine is a virtual invitation for abuse.

Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the “Inextricably Intertwined” Theory for Admitting Evidence of an Accused’s Uncharged Misconduct*, 59 Cath. U. L.Rev. 719, 724 (2010) (citations omitted).

Several Circuits have been questioning whether there should even be an exception from Rule 404(b) for acts that are inextricably intertwined with charged offenses. For example, in *United States v. Green*, 617 F.3d 233, 246–247 (3rd Cir. 2010), a defendant charged with drug crimes challenged evidence that he threatened to kill the person who turned him over to authorities. The trial court admitted this evidence as inextricably intertwined with the charged crime. The court affirmed, but in an extensive and detailed analysis it rejected any broad use of the “inextricably intertwined” doctrine. The court noted three problems with the “inextricably intertwined” test:

The first is that the test creates confusion because, quite simply, no one knows what it means. Such an impediment stands as an obstacle to helpful analysis. Indeed, we have criticized the “inextricably intertwined” standard as “a definition that elucidates little.” * * * Whether evidence qualifies as intrinsic in a particular case may well depend on which version of the test one employs. For example, Green’s threat to kill A.G. would qualify as intrinsic if the test is whether it “pertain[s] to the chain of events explaining the context” of the crime. * * * The same threat would not be intrinsic, however, if the test were whether that threat was “an integral part of the immediate context of the crime charged.” * * * We see no principled way to choose among these competing incarnations of the test, yet that choice could well be determinative. * * *

The second problem with the inextricably intertwined test is that resort to it is unnecessary. The most common justification for admitting evidence of “intertwined” acts is to allow a witness to

testify freely and coherently; we do not want him to have to tiptoe around uncharged bad acts by the defendant, and thereby risk distorting his narrative. This is a worthy goal, but it can be accomplished without circumventing Rule 404(b). * * * [T]he same evidence would also be admissible within the framework of that rule because allowing the jury to understand the circumstances surrounding the charged crime—completing the story—is a proper, non-propensity purpose under Rule 404(b). * * * All that is accomplished by labeling evidence “intrinsic” is relieving the government from providing a defendant with the procedural protections of Rule 404(b).

The third problem with the inextricably intertwined test is that some of its broader formulations, taken at face value, classify evidence of virtually any bad act as intrinsic.

The *Green* Court declared that the “inextricably intertwined” standard “is not our test for intrinsic evidence. Like its predecessor *res gestae*, the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b).”

But the *Green* court did not “reject the concept of intrinsic evidence entirely.” It explained as follows:

[W]e will reserve the “intrinsic” label for two narrow categories of evidence. First, evidence is intrinsic if it “directly proves” the charged offense. This gives effect to Rule 404(b)’s applicability only to evidence of “*other* crimes, wrongs, or acts.” If uncharged misconduct directly proves the charged offense, it is not evidence of some “other” crime. Second, uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime. But all else must be analyzed under Rule 404(b).

Applying the narrowed test of “intrinsic” evidence to the defendant’s threat to kill the witness, the court held that it was not intrinsic and so was covered by Rule 404(b). First, it did not directly prove that Green attempted to possess cocaine with intent to distribute (it created an inference, but that was circumstantial, not direct). Additionally, it was not performed contemporaneously with the crime itself and did not facilitate the commission of the crime charged. Notably, though, the court affirmed the conviction, because the evidence was properly admitted under Rule 404(b), as providing context to the jury and as proof of motive.

The Seventh Circuit, in *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010), appears to have discarded the “inextricably intertwined” doctrine. *Gorman* was charged with lying to a grand jury when he testified that he did not store a particular car in the parking garage of his

condominium; the car was owned by his cousin and was related to drug activity. At trial the government offered evidence that the defendant had the car towed from his garage after police inquired about its location, and took two bags of money from the car. The trial court admitted this theft-related evidence as “inextricably intertwined” with the perjury charge. The court affirmed the conviction but stated that “[h]enceforth, resort to inextricable intertwinement is unavailable when determining a theory of inadmissibility.” The court explained as follows:

There traditionally have been subtle distinctions between direct evidence of a charged crime, inextricable intertwinement evidence, and Rule 404(b) evidence, but our case law has not often focused on these fine distinctions. We have often lumped together these kinds of evidence, and this has only served to further cloud the already murky waters of the inextricable intertwinement doctrine.

There is now so much overlap between the theories of admissibility that the intertwinement doctrine often serves as the basis for admission even when it is unnecessary [because the act is direct evidence of the crime]. Thus, although this fine distinction has traditionally existed, the inextricable intertwinement doctrine has since become overused, vague and quite unhelpful. To ensure that there are no more doubts about the court’s position on this issue—the inextricable intertwinement doctrine has outlived its usefulness.

As applied to the facts, the court found that the theft-related evidence was admissible, without the need to invoke the intertwinement doctrine. “Because the basis for the perjury charge was that [the defendant] denied ‘having’ the car in his garage, his theft of the car and extrication of the money from within were direct evidence of his false testimony. The fact that [the defendant] removed the Bentley from the garage demonstrated that he ‘had’ a Bentley in the garage in the first instance. Therefore, this evidence was properly admitted, albeit as direct evidence rather than under the inextricable intertwinement doctrine.” The court noted that “any confusion of the proper channel of admissibility” was “insignificant” to the ultimate outcome of admissibility.⁹

Relatedly, in *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000), the court rejected the “inextricably intertwined” rule where evidence was offered to “complete the story” of a charged crime. The court found the doctrine unnecessary.

⁹ For further discussion of the Seventh Circuit’s position, see Padgett, *How Less is More: The Unraveling of the Inextricable Intertwinement Doctrine under United States v. Gorman*, 6 Seventh Circuit Review 196 (2010). The author applauds the court for abandoning the “inextricably intertwined” doctrine and concludes as follows:

This area of the law is contentious enough, with Rule 404(b) being the most litigated rule in the Federal Rules of Evidence. Compounding the complexities of this Rule by continuing to have a vague and misused doctrine was wasteful of the judiciary’s already scarce time and dangerous for defendants.

As a practical matter, it is hard to see what function this interpretation of Rule 404(b) performs. If the so-called “intrinsic” act is indeed part of the crime charged, evidence of it will, by definition, always satisfy Rule 404(b). * * * So far as we can tell, the only consequences of labeling evidence “intrinsic” are to relieve the prosecution of Rule 404(b)’s notice requirement and the court of its obligation to give an appropriate limiting instruction upon defense counsel’s request.

In the end, the *Bowie* Court concluded that “there is no general ‘complete the story’ or ‘explain the circumstances’ exception to Rule 404(b) in the D.C. Circuit. Such broad exclusions have no discernible grounding in the ‘other crimes, wrongs, or acts’ language of the rule. Rule 404(b), and particularly its notice requirement, should not be disregarded on such a flimsy basis.”

But other circuits still employ the “inextricably intertwined” doctrine to find that Rule 404(b) is inapplicable. In these circuits, evidence used to “complete the story” is pretty much the same as evidence admitted for “context” – and yet “context” is a Rule 404(b) purpose while “complete the story” is not. And evidence found “intrinsic” often could also be characterized as evidence of state of mind or consciousness of guilt and so covered by Rule 404(b). *See, e.g., United States v. Ali*, 799 F.3d 1008 (8th Cir. 2015) (evidence that one defendant supported a terrorist group before it was designated as a terrorist organization was “intrinsic” to the crime charged because it explained how the fundraising began); *United States v. Ford*, 784 F.3d 1386 (11th Cir. 2015) (common methods used by the defendant to commit fraud were “intrinsic” because they were similar to the charged offenses); *United States v. Castleman*, 795 F.3d 904 (8th Cir. 2015) (in a drug prosecution, evidence of death threats against witnesses, offered to prove consciousness of guilt, were “direct evidence of the crime charged” and so “not subject to a Rule 404(b) analysis” – though such evidence is clearly circumstantial, not direct). *See also Imwinkelried*, *supra*, at 726 (“In many of the cases in which the courts have invoked the [inextricably intertwined] doctrine, they could just as easily have relied on a recognized noncharacter theory, such as motive.”).

C. Restyling and the “Inextricably Intertwined Doctrine”

As seen above in the discussion of the *Green* case – and as discussed at the last Committee meeting – the linchpin of the “inextricably intertwined” doctrine is that Rule 404(b) applies to “other crimes, wrongs or acts.” Specifically, the original rule provided that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” That phrase is quoted in *Green* to indicate that acts that are actually part of the crime charged are not “other” and so are not covered by Rule 404(b).

Green was decided before the rules were restyled. And the restyling made a change to the phrase. The first sentence of Rule 404(b) now states that “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion

the person acted in accordance with the character.” This change was raised at the last Committee meeting as one that might have affected the scope of any “inextricably intertwined” doctrine. It can be argued that the relocation of the word “other” makes a substantive change, because now “other” is just describing acts that are neither crimes nor wrongs – it is no longer describing the kind of evidence that is covered by Rule 404(b) *because it is not part of the charged crime*.

That argument would lead to the conclusion that the restyling made a substantive change to the coverage of Rule 404(b). There are two responses to that argument. The first is that any inference of a substantive change is forestalled by the Restyling Committee Note, which says that no substantive change is intended. The second and more important response is that the substantive change described would make no sense. It would mean that *all* bad act evidence is covered by Rule 404(b), even the evidence of the charged crime itself. That is to say, the rule would mean that evidence of *any* “crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” And it makes no sense for Rule 404(b) to cover evidence of the crime itself, because that evidence by definition is not offered to prove the defendant’s character. For example, in a murder case, could the restyling be interpreted to mean that evidence of the murder itself is covered by Rule 404(b)? Literally, perhaps, because it is evidence of a “crime, wrong, or other act.” But the coverage is silly because the charged act of murder is not offered to prove character; it’s offered to prove the murder.

Ultimately, then, it would seem that the restyling had no effect on the scope of Rule 404(b)’s coverage of bad act evidence – and there is no call to propose an amendment designed only to correct the restyled iteration. That said, the phrase “other crimes, wrongs, or acts” is *different* from the phrase “crimes, wrongs, or other acts.” It seems to describe something that is different. And the former seems a better way to capture the point that the rule is covering acts that are “other” – and so not part of the crime charged. So the Committee may wish to consider changing the language back to the original, *as part of a broader amendment*. Though the counterargument is that it might be taken as a concession that there was an error in the restyling, and the differential here does not really amount to an error – not an error with any practical effect, at any rate.

D. Drafting Possibilities

Trying to regulate the “inextricably intertwined” doctrine through a textual change is a challenge. There will always be some line-drawing required between the acts that are charged in an indictment and those that are not but yet appear pretty “close” to the charged acts or covered by the indictment. The courts above that try to reject the doctrine are still left to define the line between the crime charges and “other” acts – such as through the distinction between direct and indirect evidence as in *Gorman* and *Green*. Perhaps a test that distinguishes direct and indirect evidence of the crime could be workable if its application was addressed in a committee note.

In Part Three, an attempt is made to codify a limitation on the “inextricably intertwined” doctrine.

II. Addressing Some Issues and Argument Raised at the Last Meeting

Several questions and arguments were raised at the last meeting that either specifically asked for, or seemed to require, some research or response. This section addresses those matters.

A. Does the More Protective Balancing Test “Overrule” Supreme Court Precedent?

At the last meeting the DOJ representatives argued that the proposal for a more protective balancing test for criminal defendants would “overrule” Supreme Court precedent, specifically *Huddleston v. United States*, 485 U.S. 681 (1988). Certainly, a rules committee should think twice or three times before overruling Supreme Court precedent. But there is no way that the heightened balancing test can be interpreted to “overrule” *Huddleston*.

Huddleston was a case in which the defendant was charged with selling and possessing stolen property. The defendant contested whether he knew the merchandise was stolen. To prove knowledge, the government offered evidence that Huddleston had engaged in previous transactions in allegedly stolen merchandise. But Huddleston claimed that the merchandise involved in the uncharged transaction was not stolen.

So *Huddleston* is a case in which the disputed issue was – what if the defendant contests having committed the bad act that the government seeks to introduce? It is not about proper purposes, whether the act is inextricably intertwined, or how to balance probative value and prejudicial effect. It is not about any of the issues that the Committee is reviewing regarding Rule 404(b).

The specific question in *Huddleston* was, what is the proper standard of proof for determining that the defendant committed the prior bad act? *Huddleston* argued that the government should have to convince the judge by a preponderance of the evidence, essentially relying on Rule 104(a). But the Court rejected this argument, and found that the preliminary question was one of conditional relevance – the relevance of the bad act is conditioned on whether the defendant actually committed it. As such, the preliminary finding is controlled by Rule 104(b) – the judge must find that a juror could find that the defendant more likely than not committed the act.

None of the proposed changes being considered by the Committee alter the standard that the court is to use to determine whether the defendant committed an uncharged bad act. The standard remains Rule 104(b). It should be noted that a number of states, such as Minnesota, require the government to prove that the defendant committed the act by clear and convincing evidence.¹⁰ But the Reporter has not developed this issue, or presented it to the Committee, because elevating the standard of proof for the preliminary finding *could* be considered to be

¹⁰ The Minnesota version, as well other state versions that require a showing by clear and convincing evidence, are set forth in the attachment on state law variations, prepared by Professor Richter.

coming a bit too close to *Huddleston*.¹¹ In any case, there is no dispute or conflict among the courts as to the *Huddleston*/Rule 104(b) standard.

So on what basis could the more protective balancing test be considered as “overruling” *Huddleston*? The argument must lie in the Court’s response to *Huddleston*’s argument that a higher standard of proof was required to protect him from prejudice suffered from acts he might not even have committed. In response to the concern about prejudice, the Court had this to say:

We share petitioner’s concern that unduly prejudicial evidence might be introduced under Rule 404(b). See *Michelson v. United States*, 335 U.S. 469, 475–476 (1948). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, see Advisory Committee’s Notes on Fed.Rule Evid. 404(b), 28 U.S.C. App., p. 691; S.Rep. No. 93–1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

Id. at 691-92 (footnote omitted).

What the heightened balancing test would do is to substitute one of the protections referred to by the Supreme Court (Rule 403), for a more protective balancing test. That switch simply does not overrule anything in *Huddleston*. The Court in the above paragraph is merely *describing* the protections provided by the rules. If there had been other or different protections, they would have been listed as well. The Court was not saying that the protections could not be strengthened. Indeed, the heightened balancing test could be seen as embraced by a Court that is trying to explain to the defendant why he does not need more protection regarding acts that he disputes having committed.

¹¹ This is not to say that heightening the standard of proof for contested bad acts would actually “overrule” *Huddleston*. It would simply change the underlying rule that *Huddleston* interpreted. That is not overruling. If changing underlying language previously interpreted by the Supreme Court is considered “overruling” then there are a number of Evidence Rule amendments that “overruled” Supreme Court precedent. Such as, the 2000 amendment to Rule 702 “overruled” *Daubert*; the Rule 801(d)(1)(B) amendment in Rule 2014 “overruled” *Tome v. United States*, 513 U.S. 150 (1995); and the 1990 amendment to Rule 609(a)(1) “overruled” *Green v. Bock Laundry*, 490 U.S. 504 (1989). None of that is so.

Fundamentally, *Huddleston* is not about balancing the probative value and prejudicial effect of a bad act. It specifically says, in footnote 8, that “petitioner did not seek review of the Rule 403 balancing performed by the courts below. We therefore do not address that issue.” There is no overruling when the Court simply says that Rule 403 exists as part of its description of protections provided to defendants.

B. The Contention that the Rule 609(a)(1) Test Should Not Apply to Rule 404(b) Because the Rule 609(a)(1) Test is for Prior Convictions

In addition to the “overruling *Huddleston*” argument, the DOJ representatives argued that the more protective Rule 609(a)(1) balancing test should not be applied to Rule 404(b), because that test is applicable to convictions, and Rule 404(b) applies to both convictions and bad acts. There are several possible responses to this argument.

First, while Rule 404(b) applies to bad acts, many of the reported cases involve prior convictions. In the attached case digest, 11 of the cases involved convictions, 35 involved bad acts. That is a small sample, but whatever the percentage, the fact is that prior convictions are often offered and admitted under Rule 404(b). So even if the DOJ’s argument is accepted, it would not at all foreclose a more protective balancing test for all the cases in which convictions are offered under Rule 404(b). Then the question would be whether different balancing tests for convictions and bad acts would be justified. It is hard to see why this could be so. Bad acts can raise the same risks of prejudice, and propensity inferences, as convictions. Indeed, it can be argued that bad acts should if anything be subject to *stronger* screening than prior convictions, because the defendant could suffer a different and more potent prejudice from an act for which he has not been convicted. One of the risks of prejudice is that the jury might want to *punish* the defendant for the uncharged misconduct – this is different from the prejudice involved in the propensity inference. The jury might (of course impermissibly think), I want to punish him for that terrible thing he did before. Certainly that risk of prejudice is higher with bad acts than for convictions, because of course, the defendant has *already* been punished for the act he committed. So if there is a good case for a special balancing test to protect the defendant from prior convictions (as shown in Rule 609(a)(1)) there appears to be no reason not to extend it to bad acts.

Second, if the DOJ is right in its assertion that the special balancing test should apply only to convictions, there would surely be a problem in having one balancing test for convictions and another for bad acts. Many defendants have both convictions and bad acts, and it would be unnecessarily complicated to have two different balancing tests apply to the same defendant. That might lead one to think that it would be better to have a unitary standard, for bad acts and convictions. Which takes you back to the question of what standard that should be – and if the Rule 609(a)(1) standard is right for convictions, the same approach for bad acts would not seem unreasonable.

Third, Rule 609(a)(1) and Rule 404(b) basically address the same concerns – that the defendant’s past may be used improperly by the jury, to draw propensity inferences or simply to punish the defendant for what he did previously. It can be argued then that if the defendant gets special protection under one rule, he should get special protection under the other. One

counterargument could be that Rule 609(a)(1) protects a special interest not found in Rule 404(b) – the defendant’s right to testify. That is a fair point, but another way to look at it is that Rule 404(b) also protects a special interest – the interest in trying cases and not people. And that interest is more at risk under Rule 404(b), because the defendant can avoid impeachment by not testifying,¹² whereas uncharged misconduct can often be admitted under Rule 404(b) even if the defendant puts on no defense at all (especially in those circuits still holding that a mental state is put in dispute simply by pleading not guilty). So even if one of the interests protected by Rule 404(b) is slightly different, it can be argued that the interest is as fundamental as that protected by Rule 609(a)(1).

Finally, it can be argued that the same protection is necessary under Rule 404(b) and 609(a)(1) in order to assure that a defendant with a prior record not be unreasonably deterred from going to trial in the first place.

Ultimately it is for the Committee, of course, to determine whether applying a more protective balancing test for criminal defendants “across the board” makes more sense than treating a conviction under Rule 609(a)(1) differently than the same conviction under Rule 404(b).

C. What is the Origin of the More Protective Balancing Test?¹³

At the Fall 2017 meeting, questions were raised about the origin of the enhanced balancing test, i.e., one that would require probative value to outweigh prejudicial effect. This more stringent balancing approach to acts of uncharged misconduct has a long pedigree. It is found in federal and state decisions prior to the enactment of the Federal Rules of Evidence. It was adopted by the National Conference of Commissioners on Uniform State Laws in the 1999 version of Uniform Rule of Evidence 404(c), along with procedural protections for criminal defendants, due to concerns about abuses in admitting such evidence. As noted in previous memoranda, some states continue to require the probative value of other acts evidence to outweigh the risk of unfair prejudice to a criminal defendant, either in rule text or in case law.

1. *Pre-Rules Federal Common Law Approach to Other Acts Evidence*

Professor Ed Imwinkelried, a noted authority on the subject of uncharged misconduct evidence, has characterized the pre-Rules approach to other acts evidence as a cautious one that placed the burden on the proponent of the evidence – typically the prosecution in criminal cases - - to demonstrate that the probative value of such evidence outweighed any unfair prejudice.¹⁴ According to his treatise devoted exclusively to uncharged misconduct evidence, the “virtually

¹² Though research shows that it may be a Hobson’s choice, given the silence penalty that is suffered for not testifying. That research is discussed in the memo on Rule 609(a)(1) included in this agenda book.

¹³ This section was prepared by Professor Richter.

¹⁴ See Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 Vill. L. Rev. 1465, 1500 (1985).

unanimous view” was that the proponent of the uncharged misconduct evidence had the burden of demonstrating that probative value outweighed prejudice, such that “whenever there [was] doubt about the propriety of admitting uncharged misconduct, the judge was [to] resolve the doubt in favor of the defendant and against the admissibility of the evidence.”¹⁵ In an article published in 1985, Professor Imwinkelried argued that the more stringent balancing test is the appropriate one for such evidence and that the Federal Rules eliminated it by providing only Rule 403 to protect criminal defendants against admission of other acts evidence. Professor Imwinkelried expressed concern that federal courts would disregard the (then) newly enacted Federal Rules and would continue to apply heightened balancing to this evidence, thus jeopardizing the authority of the Rules. He advocated an amendment to apply heightened balancing in the Rule 404(b) context to bring the Rules into alignment with the traditional approach that he predicted courts would continue to follow.

Cases decided in the federal courts close in time to the enactment of the Federal Rules of Evidence applied heightened balancing and a more cautious approach to the admission of other acts evidence against criminal defendants.¹⁶

- *United States v. Ostrowsky*, 501 F.2d 318 (7th Cir. 1974): The court reversed a defendant’s conviction for car theft due to the admission of excessive evidence regarding the uncharged killing of the vehicle’s occupant. The court stated that three requirements must be satisfied for the admission of other acts evidence against a criminal defendant: 1) the evidence must fit into one of the exceptions to the general rule of exclusion (knowledge, intent, motive, etc.); 2) the court must engage in a balancing process to determine that the **probative value of the evidence outweighs its**

¹⁵ Edward J. Imwinkelried, 2 Uncharged Misconduct Evidence § 8:27 (Thomson Reuters 2017).

¹⁶ It appears that many states also adopted a restrictive approach to evidence of prior crimes, wrongs, or acts. See e.g., *State v. Prieur*, 277 So. 2d 126 (La. 1973)(citing Wigmore and McCormick regarding “grave prejudice” caused by prior crimes evidence; placing burden on the State to show that the evidence is not cumulative of other evidence available to prove relevant point, is not a subterfuge for character, and serves an actual purpose); *People v. Alcalá*, 685 P.2d 1126, 1139-40 (Cal. 1984) (other acts evidence should be “examined with care” and admitted “with extreme caution” due to its inherently prejudicial nature; all doubts about admissibility should be resolved in the accused’s favor), *superseded by statute*; *State v. Brown*: 670 S.W. 2d 140 (Mo. App. 1984)(“evidence of other crimes, unless related to that for which the defendant is being tried, violates his right to be tried only for the offense for which he is charged”; “if there is not a clear connection between another crime and the crime charged, the defendant should be given the benefit of the doubt and the evidence not allowed.”); *Smith v. State*, 646 S.W.2d 452 (Tex. Crim App. 1983)(“[t]he admission into evidence during the trial of the charged criminal offense of an independent, unrelated, and collateral criminal offense is inherently prejudicial. It has a tendency to draw away the minds of the jurors from the subject in issue, the primary offense, and to excite prejudice toward the accused. It also may mislead the jurors as to the main issue they are to resolve, that is, whether or not the accused is guilty of the criminal offense for which he is on trial. The State, therefore, has a heavy burden to sustain before the admission into evidence of an extraneous offense may legally occur. In this instance, we hold the State failed to sustain its burden, because it did not properly establish that the spontaneous declaration [revealing an extraneous offense] was material, relevant, and probative to the appellant’s trial.”).

prejudice to the defendant; and 3) the court must find clear and convincing evidence that the defendant committed the prior act.

- *United States v. Feinberg*, 535 F.2d 1004, 1009 (7th Cir. 1976): The court outlined four requirements for the admission of prior crimes evidence to show specific intent in a criminal case: 1) the prior crimes or acts must be sufficiently similar to the charged offense and recent; 2) there must be clear and convincing evidence that the defendant committed the prior crime or act; 3) **the probative value of the evidence must outweigh risk to the defendant**; and 4) the issue to which the evidence is addressed must be disputed by the defendant.
- *United States v. Herrera-Medina*, 609 F.2d 376, 379 (9th Cir. 1979): The court stated that other act evidence is “not looked upon with favor” and held that it was admissible only if similar to the charged offense, proved by clear and convincing evidence, and if the **probative value of the evidence outweighed the risk of unfair prejudice**. The court emphasized that it was the government’s burden to show that the other act evidence was more probative than prejudicial.
- *United States v. Alfonso*, 759 F.2d 728, 739 (9th Cir. 1985): The court reversed the defendant’s conviction due to the admission of a drug smuggling incident that occurred five years prior to the charged offense. In so doing, the court explained that prior crimes evidence is only admissible against a defendant if the prior crime is sufficiently similar to the charged offense and sufficiently recent, if there is clear and convincing evidence that the defendant committed the prior crime, and **when the government bears the burden of demonstrating that the probative value of the prior crime outweighs potential prejudice to the defendant**. The court also noted that the government must “articulate precisely” the evidential hypothesis supporting admissibility of such other act evidence. *See also United States v. Bronco*, 597 F.2d 1300, 1302 (9th Cir. 1979) (**requiring probative value to outweigh prejudice**).
- *United States v. San Martin*, 505 F.2d 918, 922-23 (5th Cir. 1974): The court noted that the “cardinal principle of the common law” prohibiting evidence of prior crimes was “just and wise” and that exceptions to it should not be permitted to swallow the rule. The court held that prior crimes evidence could be admitted only when four prerequisites were satisfied: 1) proof of the prior crime was “plain, clear, and convincing”; 2) the prior offenses were not too remote from the charged offense; 3) the element to be proved with the prior crime must be a “material issue” in the instant prosecution; and 4) there must be **substantial need for the probative value provided by the prior crime evidence and that need must outweigh the prejudicial effect the evidence is likely to have**. The court reversed the defendant’s conviction for assaulting an FBI agent because the court admitted three prior assaults (two against police officers) to rebut the defense that he struck the agent accidentally. The court found the prior assaults too remote and inadequately probative of the specific “heat of the moment” intent required in the instant case. In so holding, the court emphasized that: “Although prior offenses may be valuable, and sometimes essential to prove intent or

design, the danger of their prejudicial effect is so great that all of the prerequisites must be met and the balancing test completely satisfied before they may be admitted safely into evidence.”

- *United States v. Anderson*, 509 F.2d 312, 329 (D.C. Cir. 1974): The court noted that evidence indicating the accused’s commission of an offense not on trial is generally to be excluded because of its potential for prejudice. The court further stated that: “We have consistently recognized, however, that the rule is subject to exceptions which may come into operation **when the probative value of the evidence outweighs its potentially harmful effect.**”
- *United States v. Cook*, 538 F.2d 1000, 1003 (3d Cir. 1976): The court opined that the strong common law rule against admission of other crimes was being “greatly eroded,” specifically noting the recent passage of FRE 404(b). The court found that the balancing test weighing probative value against unfair prejudice constitutes “the modern bastion of a long standing tradition that protects a criminal defendant” from “unnecessary prejudice” and from being adjudged “guilty by reputation.” The court further noted that the balancing must be performed with care “lest accommodation to the prosecutor’s needs result in subverting a principle that is central to our concept of fairness.” **Where prior crimes evidence poses a significant risk of unfair prejudice, it “must be overcome by a showing of necessity by the government.”**
- *United States v. Burkhart*, 458 F.2d 201 (10th Cir. 1972): The court reversed a defendant’s conviction for the interstate transportation of a stolen vehicle because the trial court permitted two prior convictions for similar crimes to be proved to refute the defendant’s argument that he had purchased the car in question from the used car dealer. In so doing, the court emphasized the common law rule against admission of prior crimes, noting that “although such evidence may have at least some relevance to the offense being tried, its predominant quality is to show up the defendant’s character.” The court further noted that **prior crimes evidence should be admitted “only in exceptional cases”** in part because “an obvious truth is that once prior convictions are introduced, the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality.”

2. *Uniform Rule of Evidence 404(c) Heightened Balancing*

In 1999, the Uniform Rules of Evidence were modified to include Rule 404(c). This new subsection of URE 404 was purportedly drafted to address “procedural guidelines” for the admission of other acts evidence. Despite this “procedural” focus, URE 404(c)(2)(C) added a new balancing test making other acts evidence “presumptively inadmissible” when offered against an accused, as follows:

Rule 404. Character Evidence Not Admissible to Prove Conduct,
Exceptions; Other Crimes.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show the person acted in conformity therewith. However, it may be admissible for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) Determination of admissibility. Evidence is not admissible under subdivision (b) unless:

(1) the proponent gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of the evidence the proponent intends to introduce at trial;

(2) if offered against an accused in a criminal case, the court conducts a hearing to determine the admissibility of the evidence and finds:

(A) by clear and convincing evidence, that the other crime, wrong, or act was committed;

(B) that the evidence is relevant to a purpose for which the evidence is admissible under subdivision (b); and

(C) that the probative value of the evidence outweighs the danger of unfair prejudice; and

(3) upon the request of a party, the court gives an instruction on the limited admissibility of the evidence pursuant to Rule 105.¹⁷

The commentary to URE 404(c) explains its purpose as follows:

Rule 404 has been amended to add a subdivision (c) to incorporate procedural guidelines to govern the admissibility of other crimes wrongs, or acts evidence when it is offered for one of the permissible purposes authorized by Rule 404(b) and reflect in black letter a substantial body of decisional law existing among the several states. The notice provision in Rule 404(c)(1) applies to any party seeking to offer the evidence in any case, civil or criminal, without requiring a request by the accused, or any other party.

¹⁷ URE 404 (1999)(emphasis added).

Rules 404 (c)(2) through (c)(3) apply in criminal cases only when offered against an accused. The procedural provisions would then have to be satisfied before evidence could be admitted for one of the exceptional purposes authorized in Rule 404(b). Subdivision (c)(2) requires the trial court to conduct a hearing to determine the admissibility of the evidence and determine as a preliminary question for the court that the other crime, wrong, or act was committed. Subdivisions (c)(2)(A) through (C) also require that the court find by the clear and convincing evidence standard of persuasion that the other crime, wrong, or act was committed, is relevant to a purpose for which the evidence is admissible under Rule 404(b) other than conduct conforming with a character trait and **that the probative value of the evidence outweighs the danger of unfair prejudice.** * * *

The Reporter's Note to a draft of the URE presented for consideration at a July, 1999 meeting provides some insight into the origins of the more protective balancing test.¹⁸ The Reporter's Note describes a jurisdictional split with regard to the balancing test applicable to Rule 404(b) evidence. The Reporter found that some states applied a standard Rule 403 balancing test to other acts evidence, authorizing exclusion where the probative value of the evidence is "substantially outweighed" by the danger of unfair prejudice, but that several other states applied a more stringent balancing test (whether by rule or case law) that required probative value to "outweigh" the risk of unfair prejudice and thus presumed exclusion of other acts evidence offered against a criminal defendant.¹⁹ The Reporter found the states "almost evenly divided" on the issue of the balancing test, with a slight majority adopting the standard Rule 403 balance that favors admissibility.

In the original draft of URE 404(c), the less stringent Rule 403 balancing test was proposed for the admission of other acts evidence against a criminal defendant. When that draft was considered by the entire drafting committee, however, a question was raised about the quantity of unfair prejudice necessary to exclude other acts evidence required by the modifier "substantially" in the standard balancing test. The issue raised apparently was how much prejudice is necessary

¹⁸ National Conference of Commissioners on Uniform State Laws, Annual Meeting Draft of the Uniform Rules of Evidence, p. 52-53 (July 23-30, 1999), *available at* http://www.uniformlaws.org/shared/docs/rules%20of%20evidence/evid_am99.pdf.

¹⁹ The Reporter's Note listed decisions in California, Colorado, Connecticut, Kansas, Maryland, Nebraska, Nevada, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina, and Washington applying the more stringent balancing and decisions in Arizona, Arkansas, Delaware, Idaho, Illinois, Maine, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, Ohio, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming applying the standard Rule 403 balancing test. National Conference of Commissioners on Uniform State Laws, Annual Meeting Draft of the Uniform Rules of Evidence, p. 52-53 (July 23-30, 1999), *available at* http://www.uniformlaws.org/shared/docs/rules%20of%20evidence/evid_am99.pdf.

for that prejudice to outweigh probative value “substantially.” One proposal in response to this concern was to eliminate the modifier “substantially” in the standard Rule 403 balancing and to require exclusion of other acts evidence offered against an accused whenever its probative value was simply “outweighed” to any extent by unfair prejudice. The drafting committee decided that a superior approach would be to “reverse” the test to require that probative value actually *outweigh* any unfair prejudice to the accused. The drafting committee seemed to conclude that merely eliminating the modifier “substantially” was too modest a change to make a difference. The reverse balancing test presuming exclusion of other acts evidence offered against an accused was thought to be a better solution due to “the risks involved in the admission of other crimes, wrongs, or acts evidence” against criminal defendants.²⁰

Professor Leo H. Whinery, the Reporter for the National Conference of Commissioners on Uniform State Laws for the 1999 Uniform Rules of Evidence later wrote that the “apparent abuse of admitting other crimes, wrongs or acts evidence under these exceptions in the several states caused the National Conference to amend the *Uniform Rule* to provide procedural guidelines in determining the admissibility of other crimes, wrongs or acts evidence.”²¹ Professor Whinery also noted that URE 404(c) was “not revolutionary at all since it incorporates in the rule black letter decisional law recognized in a significant number of state jurisdictions.”²² He did, however, express concern about the adoption of the modified Uniform Rule:

However, in spite of these decisional precedents, one may wonder how influential the amendment will be insofar as its enactment in the several states is concerned. Defense lawyers will in all probability speak approvingly of the amendment because it brings to bear black letter procedural requirements that must be observed by prosecutors in offering other crimes, wrongs or acts evidence under one of the permissible purposes. Conversely, prosecutors will resist enactment of the amendment because the black letter focuses on stricter control in the admissibility of the evidence. In short, the amendment focuses on greater objectivity in the application of Rule 404 (b), but it directly impacts on the partisan self-interests of the parties.²³

²⁰ *Id.* at 53-54.

²¹ Leo H. Whinery, *The American Version of the Rules of Evidence- Can They Be Improved?*, 195 F.R.D. 57, 92 (1999).

²² *Id.*

²³ *Id.*

3. *State Cases*

In justifying a heightened balancing test for other acts evidence in criminal cases, the Maryland Court of Appeals explained the reasoning behind its even more stringent standard in detail:

By stating the rule in exclusionary form—evidence of other bad acts is generally not admissible—followed by an exception for those instances in which the evidence 1) has special relevance, i.e. is substantially relevant to some contested issue in the case and is not offered simply to prove criminal character, and 2) has probative force that substantially outweighs its potential for unfair prejudice, the focus is correct, and the burden is where it belongs. Considering the universe of possibilities and the evidence of other bad acts that probably could be found and offered against any defendant, the likelihood is that the relevance of most of the evidence would be limited to that of criminal character, i.e. evidence that the defendant is a bad person. This type of evidence, as we have said, is inadmissible. Accordingly, it will be the exceptional, and not the usual, case where the evidence of other bad acts is substantially relevant for reasons other than proof of criminal character. If that assumption is correct, and we believe it is, the exclusionary approach is certainly logical.

But quite apart from that, and perhaps more compelling in our choice of the approach most likely to produce a just result, is the need to ensure that adequate consideration be given to the conceded, but sometimes overlooked, potential for unfair prejudice that invariably accompanies the introduction of evidence of other bad acts. The exclusionary form of the rule clearly serves to remind the bench and bar that, unlike most other evidence, this evidence carries with it heavy baggage that must be closely scrutinized before admissibility is warranted. Finally, by employing the exclusionary approach, it is immediately clear that the party offering the evidence has a hurdle to overcome and must shoulder the burden of demonstrating relevance other than criminal character, as well as the burden of demonstrating that the probative value substantially outweighs the potential for unfair prejudice.²⁴

²⁴ *Harris v. State*, 597 A.2d 956, 961–62 (Md. App. 1991). The Maryland formulation of the balancing test is truly a “reverse” Rule 403 standard because it requires the probative value of the other acts evidence to “substantially” outweigh the potential for unfair prejudice. The standard in URE 404(c) (1999) requires only that probative value “outweigh” prejudice. This URE version of the balancing test is the one that has previously been discussed in connection with the potential amendment of FRE 404(b).

As outlined in the memorandum on state law variations, attached to this memo, Pennsylvania, Virginia, Tennessee, Minnesota, and Massachusetts have adopted some version of heightened balancing in their respective evidence rules.²⁵ Other states, like Maryland, include some form of heightened balancing in the case law interpreting their versions of Rule 404(b).²⁶

D. Are Appellate Courts Effective Regulators of Any Abuse Under Rule 404(b)?

At the last meeting the argument was raised that Rule 404(b) rulings by trial courts are the most frequent reason for reversal on evidentiary grounds – so amendments may not be necessary because the appellate courts are operating as a backstop for any abuse or misuse of uncharged misconduct. Of course, some appellate courts *have* been effective in generating more careful analysis under Rule 404(b) – those appellate decisions, in the Seventh and Third Circuits, were the catalysts for the Committee’s consideration of changes to Rule 404(b). The comment about appellate court scrutiny appeared to be broader than the fact that these circuits are providing more rigorous analysis. To the extent it was a broader comment, it might be useful to the Committee to get some indication of how often Rule 404(b) errors are found on appeal, as contrasted to other evidentiary errors.

One can argue that the level of appellate court scrutiny is a question of percentages, not frequency. That is, if Rule 404(b) appeals are more frequent than others, the greater frequency of reversals is not very remarkable. So in trying to get the Committee some perspective on Rule 404(b) appeals, the Reporter investigated all appeals on evidentiary questions in the federal courts in the years 2016 and 2017. The following provisos apply to the results:

1. No distinction is made between review for abuse of discretion and review for plain error. It appears that the percentage of plain error review is relatively steady over all evidentiary appeals (about 30%) so the thought was the different standard of review would even out.
2. In many cases a court reviews a number of rulings. If error is found in one ruling, this survey counts it as correcting an error under the particular rule. The point of the exercise is to see if courts are regulating Rule 404(b) at least as rigorously, if not moreso, as other rules.
3. A court that says “it might be wrong but we don’t have to decide” is counted as no decision.

²⁵ Although there are no Massachusetts Rules of Evidence, the Massachusetts Guide to Evidence Section 404(b) alters the balancing applicable to other acts.

²⁶ See *e.g.*, *Eizember v. State*, 164 P.3d 208, 230 (Okla. Crim. App. 2007) (“To be admissible, evidence of uncharged offenses or bad acts must be probative of a disputed issue of the crime charged, there must be a visible connection between the crimes, evidence of the other crime(s) must be necessary to support the State’s burden of proof, proof of the other crime(s) must be clear and convincing, **the probative value of the evidence must outweigh the prejudice to the accused** and the trial court must issue contemporaneous and final limiting instructions.”) (*emphasis added*).

4. Only published, precedential opinions are counted.
5. The review includes civil cases, both for Rule 404(b) and all other rules.

So with those provisions in mind, here are the numbers. The numerator is the number of cases finding an error, harmless or not; the denominator is the number of cases considering the evidence rule on appeal.

- Rule 401 -- 5/37
- Rule 403 -- 16/122²⁷
- Rule 404(a) – 0/3
- Rule 404(b) – 20/129
- Rule 405 -- 1/2
- Rule 406 – 0/2
- Rule 407 – 0/4
- Rule 408 – 5/7
- Rule 410 – 1/6
- Rule 412 – 0/7
- Rules 413-415 – 0/16²⁸
- Rule 501 -- 8/30
- Rule 601 – 0/2
- Rule 602 – 0/1
- Rule 606(b) – 1/6
- Rule 608 – 4/10
- Rule 609 – 1/7
- Rule 701 – 9/52
- Rule 702 – 32/150
- Rule 703 – 5/16
- Rule 704 – 4/18
- Hearsay rule and its exceptions – 33/164
- Authenticity – 3/33
- Best Evidence and summaries – 3/14

So on the basis of this study of two years of cases, it would appear that Rule 404(b) is not the most frequent ground for reversal. Nor is it the rule with the highest percentage of reversals. While this is obviously not a statistically significant study, it does seem to show that “leaving it to the appellate courts” is no better an argument for Rule 404(b) than it is for any other rule.

²⁷ About 30 of these are also picked up under Rule 404(b) because the court rules on both issues. And in that set, there were three cases that corrected errors under both rules.

²⁸ Perhaps the error rate is zero because it is pretty hard for a court to make an appealable error under those rules.

III. Drafting Alternatives²⁹

This section considers drafting alternatives for addressing the two case law trends discussed in Part Two, as well as other suggestions for change that have been raised by Committee members, the Reporter and Professor Richter. The changes will be taken, and commented upon, one by one.

A. Requiring the probative value of the bad act to proceed through a non-propensity inference

Alternative 1: Adding a simple statement to the substantive provision.

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Other Uses; ~~Notice in a Criminal Case.~~*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. But the probative value for the other purpose may not depend on a propensity inference.

(3) **Notice in a Criminal Case.** On request by a defendant in a criminal case, the prosecutor must:

- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Reporter's comments: If the sentence is added as above, it makes sense to drop the notice provision to another section. *Frankly, including the notice provision together with the most important substantive provision of Rule 404(b) – a decision made in the Restyling – was not an elegant choice.* And it would be most inelegant to retain the current structure if another sentence is added to the middle of the provision.

Moreover, the word “permitted” in the title of (b)(2) is not exactly correct because the bad act evidence is “permitted” only if the probative value for the purpose is not substantially outweighed by the prejudicial effect. The text catches that point by stating that the evidence “may be admissible” if offered for another purpose. But “may be admissible” is not the same as

²⁹ This section is changed slightly from the same section in the memo for last meeting.

“permitted.” So if the Rule is going to be amended, there is a good argument that the heading should be changed as indicated, from “permitted” to “other”. This is another thing that probably should have been caught in the restyling.

Committee Note for this change:

The amendment emphasizes that it is not enough simply to articulate a non-character purpose for evidence of other crimes, wrongs or acts. In order for Rule 404(b) to protect in accordance with its intent, the probative value of the evidence for the proper purpose cannot be dependent on a propensity inference. For example, if evidence of uncharged misconduct is offered to prove intent, it cannot be admitted for that purpose if the inference is, “because the bad act shows he has a propensity to commit a crime like the one charged, it tends to prove he had the intent to commit the charged crime.” The proponent must articulate to the court the chain of inferences from the bad act evidence to the purpose for which it is offered, and explain how that chain of inferences does not depend on the actor’s propensity.

Alternative 2: A more elaborate statement requiring a chain of reasoning without a propensity inference.

Judge Marten proposes that the *Gomez* principle be set forth in a more particularized form. His proposed amendment reads as follows:

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Other Uses; ~~Notice in a Criminal Case.~~*** ~~This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The court may admit this evidence for another purpose only upon making the following findings:~~

(A) The evidence is relevant to a specific purpose other than the person’s character or propensity to behave in a certain way;

(B) the specific purpose is established through a chain of reasoning that does not rely on the inference that the person has a certain character and acted in accordance with that character on the occasion in dispute in the case; and

(C) the probative value of the other act evidence is not substantially outweighed by the risk of unfair prejudice, after taking account of the extent to which the non-propensity fact for which the evidence is offered is disputed.³⁰

(3) Notice in a Criminal Case. On request by a defendant in a criminal case, the prosecutor must:

- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Reporter’s Comments: This proposal can probably have the same Committee Note as the prior one. It gets at the same point of protecting against propensity inferences but is more elaborate and specific. That may well be a good thing for such an important rule.

It seems drastic to cut out the list of proper purposes, though, as there are literally thousands of cases that have cited and used that rule language. (This point is discussed more fully below). And for purposes of this amendment it might well not be necessary. The amendment seems to work fine even with the list of proper purposes retained. Subdivision (A) might then seem a bit repetitive, but perhaps repetition is a good thing in this context.

Query whether it is useful to specifically incorporate a Rule 403 balancing test here. All courts agree that Rule 403 applies here. And it is not usual to specify that Rule 403 does apply – for example, there is nothing in Rules 407, 608, or 801 that refers to Rule 403, and yet the Rule is applied underneath those rules. Arguably mentioning Rule 403 here draws the use of Rule 403 in doubt when applied in these other contexts.³¹ Moreover, the “in dispute” clause fits somewhat awkwardly in a list of findings. To the extent that the “in dispute” language is added to incorporate an “active dispute” requirement, the Committee has determined that it does not wish to pursue that requirement in rule text. So it may be appropriate to drop subdivision (C).

³⁰ I added friendly amendments to Judge Marten’s draft that I found necessary to comport with the structure of findings having to be made by the court. I also took the liberty of changing the term “at issue” in (2)(C) to “disputed.” “Disputed” is the word used in Rule 407 and it accomplishes a similar purpose here – subsequent remedial measures can be offered to prove feasibility, for example, only if feasibility is “disputed.” Moreover, the term “at issue” might raise confusion when considered together with “character in issue” – which refers to cases in which character must be proven under the substantive law.

³¹ The only exception is Rule 609(a)(1), but Rule 403 is mentioned there because there are so many other balancing tests at work in that rule that it was thought that it would be confusing if Rule 403 were not specified.

Alternative 3: Adding to the notice provision.

One of the options being explored by the Committee is incorporating an emphasis on non-propensity inferences in the notice provision. It might look like this:

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~³² In a criminal case, the prosecutor must:

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

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice;

(C) articulate in the notice the non-propensity purpose for which the prosecution intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

Reporter's Comments: There are two important differences between adding to the substantive provision (alternatives 1 and 2) and addressing the problem in a notice provision (alternative 3).

The first difference is that if the provision is one of notice, it will not apply in civil cases. That may be a permissible result because most of the problems of overbroad application of Rule 404(b) have occurred in criminal cases. But it is a point to consider.

It would seem that requiring that probative value for a proper purpose must proceed through a non-propensity inference is a worthy goal in both criminal and civil cases. Therefore, if the Committee agrees to beef up the notice requirements, it is worth considering expanding those requirements to all cases. The reason given by the Advisory Committee for limiting the notice requirement to criminal cases was that the Civil Rules already contain broad discovery provisions, which are likely to result in full disclosure of all bad acts that the proponent would seek to admit. So at first glance a notice requirement for civil cases in Rule 404(b) would be superfluous at best and might be confusing. But if the "articulation" requirements are added to the notice provision,

³² The Committee has unanimously agreed that the request requirement should be eliminated.

then the overlap with civil discovery rules is not so clear. That is, the proposed *addition* to the Rule 404(b) notice requirement – which is not about production but about articulating a proper purpose – will in fact add something important to what the Civil Rules already provide. Therefore, if the Committee does decide to add an articulation requirement to the Rule 404(b) notice provision, it should also consider extending the provision to civil cases.

Extending the proposal to civil cases would look like this:

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

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

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice;:

(C) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

It should be noted that the above changes to the notice requirement would also result in a criminal defendant having an obligation to provide pretrial notice of “reverse 404(b)” evidence. That is of course a judgment call for the Committee. On a drafting level, it gets awkward to state that the notice requirement applies in civil cases and to the prosecutor in criminal cases, but not to the criminal defendant. On the merits, there is no obvious reason to exclude criminal defendants from having to articulate how evidence of other acts is probative to a proper purpose without proceeding through a propensity inference. Moreover, the extension would not result in a dramatic change because “reverse 404(b)” evidence is rarely offered.

The second difference between a substantive provision and a notice provision is that a violation of a substantive provision means that the evidence is inadmissible. A violation of the notice provision, in contrast, means only that the proponent failed to timely articulate a non-propensity purpose. Whether that results in exclusion of evidence is within the discretion of the court, which may instead impose other sanctions or even excuse the violation under the circumstances. The point is that a notice provision does not itself guarantee that the bad act evidence will have to proceed through non-propensity inferences; rather it guarantees only a timely articulation of the proponent’s arguments. Nonetheless this may be a good compromise position if the Committee determines that it is reluctant to take the step of making substantive changes to Rule 404(b).

There is yet another alternative: adding the substantive requirement that the evidence must proceed through non-propensity inferences, *and* adding to the notice provisions to require the proponent to *articulate* those inferences. Adding both provisions will assure that the non-propensity arguments are laid out for the court early on, and also will provide specific authority for the court to exclude the bad act evidence if the probative value for the asserted purpose actually proceeds through a propensity inference. The court can and must exclude the bad act evidence that proceeds through a propensity inference, even if the proponent satisfies the notice provision by articulating a chain of inferences. That is because the proponent's articulation of a chain of inferences doesn't preclude the possibility that in fact the probative value is based on a propensity inference.

Combining both alternatives:

For ease of reference, a change that would add the requirement that the probative value proceed through non-propensity inferences, and would also add the requirement that the proponent articulate those inferences, could look like this – with the inclusion of extending the notice requirement to a civil case, and deleting the request requirement (a point that has already been approved by the Committee):

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Other Uses; ~~Notice in a Criminal Case.~~*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. But the probative value for the other purpose may not depend on a propensity inference. [Or adding Judge Marten's subdivisions here, see Alternative 2.]

(3) **Notice in a Criminal Case.** ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

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

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice; ~~and~~

(C) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

Concern expressed about pretrial notification of proper purposes:

At a previous meeting, two concerns were expressed about requiring the proponent, in advance of trial, to disclose a proper purpose and articulate a chain of inferences that does not proceed through propensity. The first concern is that the proponent will over-notify; that is, the proponent will articulate every proper purpose under the sun so as not to be caught short for failing to articulate the purpose at a later date. It seems, though, that the risk of over-designation is not high because under the proposal the proponent must not only articulate a proper purpose but must also explain how, exactly, the bad act is probative for such a purpose without proceeding through a propensity inference. That required explanation is likely to temper the incentive to over-declare permissible purposes – because if the purpose is way off, the explanation of probative value should fail in the making. For example, take a felon-firearm case in which a prosecution witness says he saw the defendant with a gun and the defendant denies it. If a previous act of gun possession is offered, a prosecutor’s designation of “knowledge” would have to be followed by an explanation something like “the prior act shows he has familiarity with guns and so it makes it more likely that the defendant knew he was possessing a gun on the night in question.” But the probative value under that explanation is close to zero, because nobody is arguing that the defendant didn’t know what a gun was. The only probative value is that because he had a gun once he is more likely to have had one on the night in question. Thus, the potential over-designation of “knowledge” in this circumstance would be “outed” by the need to explain its true probative value.

Another concern about a pretrial “articulation” requirement is that the proponent might not be aware at the early stages of all the possible ways in which a bad act might become relevant. Proper purposes may reveal themselves as the case further develops. That is a very legitimate point, and surely a rule that imposes a requirement of advance articulation of a proper purpose needs to have some flexibility. That flexibility can be provided by a good cause exception. Of course, the Rule 404(b) notice requirement currently *has* a good cause exception. But as drafted above, there is a possible argument that the good cause requirement could be interpreted as applying only to *providing* the notice, not to the new articulation requirements. That reading is possible because the good cause exception is placed ahead of the new requirements. The problem looks like it is solved if the provisions are rearranged, as follows:

Extending the good cause protection to the requirement that the proponent articulate a proper purpose and a non-propensity chain of reasoning:

(3) Notice in a Criminal Case. ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

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

(B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence;

(C) articulate the chain of reasoning supporting the purpose for offering the evidence; and

(B D) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

This rearrangement could be coupled with a Committee Note providing that the good cause exception will apply to cases in which a proper purpose for the evidence does not become evident until after the trial begins.

That excerpt of a Committee Note could look like this:

As restructured, the good cause exception applies not only to the timing of the notice but also to the obligations to articulate a non-propensity purpose and explain how the evidence leads to that purpose independent of a propensity inference. A good cause exception for the articulation requirements is necessary because in some cases a permissible purpose for the evidence may not become clear until just before, or even during, trial.

B. Amendment to Deal with the “Inextricably Intertwined” Doctrine

As discussed above, there is much to dislike about the “inextricably intertwined” doctrine – it is fuzzy, it overlaps with Rule 404(b) for such matters as “context” and “background”, and it is not at all uniformly applied by the courts. But that said, there must be some line drawn between acts that are part of the charged crime and acts that are “other” and so covered by Rule 404(b). Otherwise Rule 404(b) would be applicable to eyewitness testimony such as “I saw the defendant rob the bank he is charged with robbing.”

One possibility is to try a “direct/indirect” distinction – indirect evidence would be covered by Rule 404(b) while direct evidence would be proof of the crime itself. A “direct/indirect” line – currently employed by some reform-minded courts, as discussed above – seems miles better than other possible fixes. For example, adding language that Rule 404(b) doesn’t apply to evidence of acts “inextricably intertwined” with the charged crime or “intrinsic” to the charged crime adds nothing to the enterprise. Also, courts are obviously familiar with the direct/indirect terminology and with the distinction between direct and indirect evidence. And finally, if applying Rule 404(b) to all indirect evidence would end up expanding the rule’s coverage in some courts, the consequences are not terrible. All that happens under current law is that the notice requirement of Rule 404(b) will apply – that is because indirect evidence that is close to the crime will almost certainly fit a non-character purpose like “background” or “context” and so will be admissible even if Rule 404(b) applies to it.

The question arises whether the direct/indirect distinction should apply to civil cases. Again, in theory there is no reason to distinguish civil and criminal cases in determining whether bad acts are “other” acts or whether they are part of the claim or defense. There do not appear to be any reported civil cases applying the “inextricably intertwined” doctrine. But it would not seem to hurt to give the same guidance to courts in civil cases as is given in criminal cases.

If the Committee wishes to address the “inextricably intertwined” doctrine in an amendment to the text of Rule 404(b), it might look something like this:

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act – offered as indirect evidence of a matter in dispute – is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

A Committee Note excerpt might look like this:

The amendment provides that Rule 404(b) does not apply to direct evidence of the matter in dispute. For example, in a prosecution for bank robbery, Rule 404(b) does not apply to testimony from an eyewitness that he saw the defendant rob the bank. Rule 404(b) has no application because there can be no argument that by presenting that evidence the government is trying to raise the inference that the defendant has a propensity; rather it is just proving the crime charged. On the other hand, evidence that the defendant threatened an eyewitness a week after the crime is indirect evidence of the bank robbery, and should be evaluated under Rule 404(b). Many courts, in determining the coverage of Rule 404(b), have held that evidence of acts “inextricably intertwined” with the charged crime, or “intrinsic” to it, are outside the rule’s coverage. But those and other like iterations have led to confusion and conflicting results in the courts. The Committee believes that a “direct/indirect” distinction is easier to apply and will provide the proper scope of coverage for Rule 404(b).

Moving “other”:

Another possibility, discussed earlier in the memo, is to return the word “other” to its original placement before “crimes” in the rule. That change would in some way be related to the “inextricably intertwined” doctrine because courts have relied on the original rule’s placement of “other” to implement that doctrine. See Kenneth Graham, *Federal Practice and Procedure* § 5239 (“One of the key words in determining the scope of Rule 404(b) is ‘other’; only crimes, wrongs or acts ‘other’ than those at issue under the pleading are made inadmissible under the general rule.”). It would not at all solve the problem of the breadth and fuzziness of the inextricably intertwined doctrine, however – because all that breadth and fuzziness was *created* at a time when “other” was placed before “crimes.” And the courts that have cut back on the doctrine – discussed earlier in the memo – have not relied on the text (or the restyling) to do so. They have cut back on the doctrine because it is amorphous and unhelpful. Moreover, courts that do continue to employ the inextricably intertwined doctrine cite and quote the restyled rule without missing a beat. See, e.g., *United States v. Loftis*, 843 F.3d 1173 (9th Cir. 2016) (quoting the restyled Rule 404(b)(1) in full,

and then applying the inextricably intertwined doctrine after stating that “Rule 404(b) applies solely to evidence of ‘other’ acts, not to evidence of the very acts charged as crimes in the indictment”). So putting “other” back in its original place will not solve the problems caused by the “inextricably intertwined” doctrine. That doctrine was a disaster when “other” was in its original place.

Independently of any move to resolve the inextricably intertwined doctrine, however, there is something to be said for returning to “other crimes, wrongs, or acts.” For the reasons discussed earlier, the original location of “other” makes more sense and avoids the nonsensical interpretation that Rule 404(b) governs evidence of the charged crime itself. But that said, the restyling, while arguably resulting in a weird change of meaning in Rule 404(b), has not actually created any practical problem. I have not found a case in which a court relied on the restyled rule to come to a result on “other” crimes that is different than it would have under the original rule.

If the Committee does wish to change the location of “other” then that change is pretty simple and it can be coupled with the direct/indirect distinction. It looks like this:

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a any other crime, wrong, or ~~other~~ act – offered as indirect evidence of a matter in dispute – is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

It should be noted that the rule cannot be turned back to the original exactly, because the original version was “evidence of crimes, wrongs, or other acts.” But the plural is frowned upon in restyling, and is no longer used throughout the Evidence Rules, so using the plural would raise hackles with the style consultants.

Also, it probably needs to be “any other”; it can’t be “another.” Because “another” is singular, it could raise the inference that *only one* other crime, wrong or act would be covered by the Rule. That problem was raised in the restyling when Rules 413-415 were proposed to be restyled as “another sexual assault.” The Evidence Rules Committee determined that this could be a substantive change – limiting admissibility to only one sexual assault – and so it was changed to “any other.” That’s probably what needs to be done here if the change is to be made.

One problem in moving “other” though, is the Committee Note. What could be said? Here are two possibilities, only partly in jest:

“Other is being returned to its original placement, because it makes more sense there, even though the restyling change hasn’t made a difference in any case.” Or

“Other is being returned to its original placement to provide better guidance on which acts are covered by Rule 404(b) and which are not – even though when it was in its original

place the courts responded by establishing a formless and confusing ‘inextricably intertwined’ doctrine.”

But it could be fair to conclude that nothing need be said about the restyling, if moving “other” is in tandem with adding a direct/indirect distinction. Then the draft Committee Note, set forth above, seems to adequately cover both changes without having to comment specifically on the change of “other.”

C. Other suggestions regarding the notice requirement.

1. Disclosure of the “General Nature” of the Evidence.

At a previous meeting, a Committee member argued that practice under Rule 404(b) would be improved if the government were required to provide a more detailed description of the other acts that it intends to introduce. The operative language in the Rule is that the government must disclose the “general nature” of the Rule 404(b) evidence. The assertion was that the notice provided was sometimes so general that it gave little if any assistance in knowing about or preparing for the evidence. There is case law that does support the contention that the term “general nature” requires relatively little of the government. *See, e.g., United States v. Watson*, 409 F.3d 458 (D.C.Cir. 2005), where the prosecution gave pretrial notice that it would offer the testimony of a cooperating witness, but did not provide the name of the witness, nor the facts or circumstances of the proposed testimony. The court found that this notice was sufficient because it provided the “general nature” of the testimony. Other examples of vague notice found sufficient under the Rule 404(b) “general nature” language include *United States v. Kern*, 12 F.3d 122, 124 (8th Cir.1993) (holding that the government’s statement that it “might use evidence from some local robberies” was sufficient to describe the general nature of the acts under Rule 404(b)); and *United States v. Schoeneman*, 893 F.Supp. 820, 823 (N.D.Ill.1995) (rejecting the defendant’s motion that the government provide notice of the dates, times, places and persons involved in the acts it planned to admit under Rule 404(b)).

The argument for more specificity in the notice requirement is straightforward: in order to determine whether the evidence is admissible for a proper purpose, and that the probative value does not proceed through a propensity inference, it is critical to know just what the evidence is. There might also be a dispute over whether the defendant even did the act – again that argument cannot be made effectively if the defendant doesn’t know what the act is. Moreover, it is important to get the court attuned to proper purposes and propensity inferences as soon as possible – and that is difficult to do if the court does not know what the evidence is.

Assuming the Committee wishes to require more specificity in the notice provision, the question is how to accomplish this objective.

One possible solution is simply to delete the “general nature” language – in which case the notice provision could look like this:

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

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

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

A Committee Note excerpt might look like this:

The notice provision has been amended to require the government to provide a more detailed description of the evidence that the government intends to offer. The term “general nature” has been read in some courts to allow the government to meet its disclosure obligation without describing the specific act that the evidence would be offered to prove, and without describing the source or form of the evidence. Deleting the term “general nature” means that the government must describe the source of the evidence, the form of the evidence, and the act that the government seeks to prove with the evidence. The notice needs to be sufficiently detailed to allow the defendant (and the court) to determine how the act to be proved is probative for a specific articulated purpose.

Another possibility is to borrow from the amendment to the Rule 807 notice provision that has been unanimously approved by the Committee. That amendment requires the proponent to disclose the “substance” of the evidence. Employing the same language in Rule 404(b) would of course promote uniformity. And the word “substance” arguably provides a bit more guidance than no guidance at all.³³

If the term “substance” is used, the amendment to the notice provision would look like this:

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge,

³³ The term “substance” in the Rule 807 proposal was thought to be too vague by one public commenter. That comment is addressed in the memo on Rule 807. A suggestion for amplification in the Committee Note is set forth in that memo, and basically the same language is added to the Committee Note excerpt immediately below.

identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

- (A) provide reasonable notice of the ~~general nature~~ substance of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

The Committee Note excerpt could look like this (borrowing from the Note to the proposed amendment to Rule 807):

The notice provision has been amended to require the government to provide a more detailed description of the evidence that the government intends to offer. The term “general nature” has been read in some courts to allow the government to meet its disclosure obligation without describing the specific act that the evidence would tend to prove, and without describing the source or form of the evidence. The notice needs to be sufficiently detailed to allow the defendant (and the court) to determine how the act to be proved is probative for a specific articulated purpose. The Rule requires the proponent to disclose the “substance” of the evidence. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. The term “substance” is intentionally taken from the requirement for a sufficient offer of proof under Rule 103(a)(2) – that is, the proponent must provide enough information about the evidence to allow the opponent to craft an argument and to allow the court to make a ruling. Under the amendment the government must describe the source of the evidence, the form of the evidence, and the act that the government seeks to prove with the evidence.

2. *Timing Issues.*

A number of Committee members have indicated an interest in moving up the timing of the notice of intent to use Rule 404(b) evidence. This could be a useful way to get the parties and the court attuned at the outset to whether the asserted purpose for the evidence proceeds through a non-propensity inference.

Currently, Rule 404(b) requires the government to provide “reasonable notice * * * before trial.” This essentially means that there is no clear time period within which notice must be provided, and courts have varied on what is “reasonable.” *Compare United States v. Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994) (stating there are three factors to consider in determining whether

notice was reasonable: 1) when the Government could reasonably have learned of the evidence; 2) the extent of prejudice to the defendant from a lack of time to prepare; and 3) how significant the evidence is to the prosecution's case), *with United States v. Williams*, 792 F.Supp. 1120 (S.D. Ind. 1992) (holding that reasonable notice under 404(b) requires notice to be provided at least ten days prior to the start of trial, unless the government can show a reason to deviate from that rule), and *United States v. White*, 819 F.3d 976 (8th Cir. 2017) (one week is sufficient). *See also United States v. White*, 816 F.3d 976, 984 (8th Cir. 2016) (rejecting the argument that notice must be provided two weeks prior to trial, because the standard is one of reasonableness under the circumstances; finding that notice provided one week before trial was reasonable).

Adding a specific time before trial by which notice must be provided would do a better job of accelerating the notice requirement than any "reasonableness" standard can provide. It is true that the virtue of clarity also leads to the possibility of rigidity. Surely there will be situations in which the proponent will not be able to comply with a specific deadline. But that concern is ameliorated by the good cause exception that is currently provided for in Rule 404(b).

The proposal for an amendment to the notice requirement that was made by a Committee member would require notice to be provided "at least two weeks before trial, unless the court, for good cause, excuses this requirement." Setting the date in terms of weeks would be unusual for the national rules – which are set in terms of days. *See, e.g., Evidence Rules 412 (14 days); Civil Rule 27(a)(2) (21 days); Civil Rule 12 (21 days); Criminal Rule 12.1 (14 days).* Thus, it would appear preferable, for purposes of uniformity, to set the period as "at least 14 days before trial."

One problem with a specific-days requirement is how to count the days. The other sets of rules have a specific method for counting days. *See, e.g., Civil Rule 6.* But these time-counting rules do not explicitly apply to the Evidence Rules. So there might be questions of what happens when a 14-day period falls on a weekend or holiday. The time-counting rules clearly say that you automatically add another day to the period (which means a 15-day notice period if the 14th day is a holiday). But, again, those rules do not apply to the Evidence Rules. But if the period is a multiple of 7, there is not much of a problem, because the time is counted backward from the day of trial, so counting multiples of 7 backward can at least never land on a weekend. While it might end on a holiday, a court in such a rare case could use the time-counting rules as guidance even though they are not binding.

If the time period for notice is to be 14 days before trial, the change could look like this:

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature [substance] of any such evidence that the prosecutor intends to offer at trial; and

(B) do so at least 14 days before trial — or at a later date during trial if the court, for good cause, excuses ~~—lack of pretrial notice—~~ this requirement.

The Committee Note excerpt for this change could look like this:

The rule has been amended to add a requirement that notice be provided at least 14 days before trial unless the court for good cause allows notice at a later date. The “reasonableness” standard under the original rule led to differing results, and in some cases courts found it “reasonable” when the notice was provided only a few days before trial. With Rule 404(b) evidence, it is particularly important to have accelerated notice, because it is critical for the parties and the court to discuss and evaluate the purpose for which the evidence is offered at an early point in the proceedings. Early notice allows the court to focus at the outset on whether the evidence is offered for a proper purpose, and on whether the probative value of the evidence for that purpose is dependent on a propensity inference.

3. Notice in Writing

The proposed amendment to Rule 807, currently out for public comment, requires notice to be in writing. There would appear to be no reason to have an inconsistency in Rule 404(b). The DOJ has argued that such a requirement is not necessary because prosecutors always give notice in writing. But if that is the case, there is no harm in adding a written notice requirement to Rule 404(b). The fact that it is always done means that adding the requirement is not enough in itself to justify an amendment to the rule. But along with other amendments, a written notice requirement may be thought useful. The benefit of adding the requirement, even if already complied with, is that the Rules are made consistent, which is a good thing. Moreover, if the notice requirements are beefed up in any way – such as by requiring articulation of proper purposes – or are extended to parties other than the government, then there is all the more reason for adding a requirement that notice be in writing.

The writing requirement is easy to add:

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~ In a criminal case, the prosecutor must:

(A) provide reasonable, written notice of the ~~general nature~~ substance of any such evidence that the prosecutor intends to offer at trial; and

(B) do so at least 14 days before trial — or at a later date during trial if the court, for good cause, excuses ~~lack of pretrial notice~~ this requirement.

And the Committee Note on the change can simply say what the Rule 807 Committee Note says:

The Rule now requires that the pretrial notice be in writing— which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

Putting all the notice provisions together – articulation requirements and procedural requirements, and extending it to all cases, would look like this:

(3) Notice in a Criminal Case. On request by a defendant in a criminal case, the prosecutor The proponent must:

(A) provide reasonable, written notice of the ~~general nature~~ substance of any such evidence that the ~~prosecutor~~ proponent intends to offer at trial; ~~and~~

(B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence;

(C) articulate the chain of reasoning supporting the purpose for offering the evidence; and

(B D) do so at least 14 days before trial — or ~~during trial~~ at a later date if the court, for good cause, excuses ~~lack of pretrial notice~~ this requirement.

D. The Suggestion to Delete the Proper Purposes Language in Rule 404(b)(2)

At the last meeting, a Committee member suggested that Rule 404(b)(2) should be amended to delete the list of proper purposes. One possible rationale for deleting the provision is that it states the obvious. The first sentence of Rule 404(b)(1) states that other acts evidence is not admissible to prove conduct in accordance with character. By inference that means the bar does not apply if the bad act evidence is offered to prove something *other* than conduct in accordance with character. So while the proper purposes provision might be useful to highlight the principle that the Rule 404 bar applies only if the evidence is offered to prove conduct in accordance with character, it is not necessary and arguably has no substantive effect.

Another possible argument for deleting the proper purpose language is that it has been read to mean that Rule 404(b) is one of presumptive admissibility – which should not be the case and which some courts have found to be an improper expansion of the rule, as discussed above. Deleting the language, with an explanatory Committee Note, might be used to signal that

Rule 404(b) is not a rule of inclusion but rather a rule that excludes bad act evidence unless the government can come up with a proper purpose, free of propensity inferences.

With that said, there are strong reasons to be cautious about deleting the proper purposes language. It has been cited and applied in hundreds of opinions and so deleting the language could throw decades of precedent into some question. It would be looked at as a major change, when theoretically it is no change at all to the meaning of the Rule. And there is surely a likelihood that over time the courts will work back to what they know – the list of purposes from the first forty years of Rule 404(b), so the payoff for such a dramatic rule change is uncertain.

It can be argued that any problem with the rule does not really come from the language, but rather from the knee-jerk application of the rule over time. The response to that argument could be that deleting the language is a necessary wake-up call to courts, to get them to apply the rule with more care. But the change seems so profound that perhaps the other suggested amendments regarding non-propensity inferences – such as the articulation requirements above, or the balancing test proposal below – would be a better way to provide a wake-up call.

E. A Different Solution – Changing the Balancing Test

Another possible response to the recent Rule 404(b) cases is to import the balancing test from Rule 609(a)(1), that provides a little more protection to criminal defendants, into Rule 404(b). Under this test, a court would have to find that the probative value of other crimes, wrongs, or acts *outweighs* the likely prejudicial effect to the defendant. This would ensure that the rule is no longer deemed a rule of inclusion, because there would be a mild presumption for exclusion. But the test would not go all the way to reversing the Rule 403 test – the probative value only has to outweigh, and not substantially outweigh, the prejudicial effect. This solution is pretty straightforward and could be a way to provide more protection without tinkering too much with Rule 404(b).

Here is what the balancing proposal could look like, when coupled with other changes previously discussed:

(b) Other Crimes, Wrongs, or ~~Other~~ Acts.

(1) ***Prohibited Uses.*** Evidence of a any other crime, wrong, or ~~other~~ act – when offered as indirect evidence of a matter in dispute – is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Other Uses; ~~Notice in a Criminal Case.~~*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. If the evidence is offered against a defendant in a criminal case, its probative value must outweigh its prejudicial effect to that defendant. In all other cases, admissibility is subject to Rule 403. ~~On request by a defendant in a criminal case, the prosecutor~~

(3) Notice. The proponent must:

(A) provide reasonable, written notice of the ~~general nature of~~ [the substance of] any such evidence that the ~~prosecutor~~ proponent intends to offer at trial; ~~and~~

(B) articulate in the notice the purpose for which the proponent intends to offer the evidence;

(C) articulate the chain of reasoning supporting the purpose for offering the evidence; and

(B-D) do so at least 14 days before trial — or ~~during trial~~ at a later date if the court, for good cause, excuses this requirement ~~lack of pretrial notice~~.

A more protective balancing test could offer a compromise solution that falls in between the circuits that treat Rule 404(b) permissively as a rule of inclusion and those that impose strict propensity prohibitions and active contest requirements on the use of other acts evidence. A more protective balancing standard might assist with the problem of pure propensity uses for other acts evidence without imposing a rigid propensity prohibition. By setting a higher standard for the admission of other acts evidence against criminal defendants, a heightened balancing test might also encourage prosecutors and trial judges to articulate the probative value of other acts evidence more specifically to ensure that it clears the higher hurdle and that its admission survives appellate scrutiny. A more protective test might also tilt the scales against admission of other acts evidence that creates significant propensity concerns. And it could be useful to help to exclude bad act evidence where the point to be proved is not actively disputed, because the evidence would be of minimal probative value and unlikely to satisfy the more protective balancing test. In other words, the change in balancing might solve many of the problems seen by courts like *Gomez*, without having to add new and potentially complex language to the rule. A balancing solution may also be more in tune with the contextual and fact-specific analysis required under Rule 404(b) and may avoid the “mechanical solutions” eschewed by the original Advisory Committee Note. It should be noted that the Evidence Rules frequently utilize a modified balancing test in order to strengthen protections for particular parties or against certain evidence; so this alternative may be more in keeping with the overall structure of the Rules than some of the protections suggested by the cases.³⁴

³⁴ Several Rules incorporate modified balancing tests to afford more protection than the standard Rule 403 balancing test offers in certain circumstances. *See* Fed. R. Evid. 412(c) (permitting evidence offered to prove a victim’s sexual behavior or predisposition in a civil case only “if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.”); Fed. R. Evid. 609(a)(1)(B) (requiring the probative value of a criminal defendant’s non-dishonesty felony conviction offered for impeachment to outweigh prejudicial effect to the defendant); Fed. R. Evid. 609(b) (allowing a conviction over ten years old to be used for impeachment only if “probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect”); Fed. R. Evid. 703 (permitting expert’s disclosure of otherwise inadmissible facts and data only if “their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”). Adding a specialized balancing test to Rule 404(b) to offer more protection to criminal defendants would, therefore, not be inconsistent with the operation of the Rules.

Here is a Draft Committee Note for a New Balancing Test

Rule 404(b)(2) has been amended to provide a more protective balancing test for criminal defendants. This is the same balancing test in favor of a criminal defendant prescribed by Rule 609(a)(1)(B). The more protective balancing test for criminal defendants clarifies that Rule 404(b) is not a rule of “inclusion” as many federal opinions have stated. The Committee has determined that in many cases bad acts have been admitted against criminal defendants that are, in effect, used as proof of the defendant’s bad character and propensity to commit a crime. The chances of such an outcome are reduced by a more protective balancing test. The new test will help to ensure that other bad acts are admissible only when they are highly probative for a non-character purpose. It will also help to ensure that other bad acts, even when offered for a proper purpose, are admissible only when the government shows a substantial need for admitting them, such as when the issue is actively disputed by the defendant. For example, the balancing test is unlikely to be met when a bad act is offered to prove the defendant’s intent to commit the charged crime, and the defense contends that the defendant never committed the crime in the first place.

The Rule 403 test continues to apply to other act evidence when offered in a civil case or against the government in a criminal case.

Comments on the New Balancing Draft:

1. The change seems much less disruptive than language requiring a chain of non-propensity inferences. And it has the virtue of applying a balancing test with which courts and litigants are already familiar. Moreover, as Professor Richter’s memo on state variations points out, a few states are already employing this balancing test, apparently to good effect (i.e., it provides a measure of protection without excessively barring bad act evidence).

2. The draft excludes language about non-propensity inferences and active disputes, because the idea is that a stricter balancing test will work in a flexible way to deal with those issues on a case by case basis.

3. If this change were to be adopted, the distinction between “intrinsic” and “extrinsic” acts would take on a greater importance – because the former would be governed by Rule 403 and the latter governed by the more protective balancing test. That is why the draft *retains* the “direct/indirect” language, which is designed to provide more clarity and more regulation of the

inextricably intertwined doctrine. *Alternatively, a Committee Note could address the inextricably intertwined problem. That might look like this:*

Rule 404(b) and the amended balancing test for criminal defendants apply only to evidence of “other” crimes, wrongs, or acts. Trial judges must, therefore, determine which acts are “other” or extrinsic to the charged offense, necessitating Rule 404(b) analysis, and which are direct proof of the charged offense and free from Rule 404(b) scrutiny. Courts should not circumvent the more protective balancing test by attaching vague and conclusory labels to a defendant’s other acts, such as “inextricably intertwined” or “complete the story.” Trial judges should explain *how* an act is so connected to the charged offense so as to avoid Rule 404(b) treatment, in place of employing conclusory labels. Because appropriate line-drawing in this context is impossible to capture with precision, close calls in classifying a defendant’s acts should be resolved in favor of Rule 404(b) application – especially given the importance of filtering bad act evidence through the new and more protective balancing test.

4. If the balancing test is changed for criminal defendants, then it is important to add in text that Rule 403 applies to everything else. It is true that Rule 403 applies now, even though it is not specified. But there will be a negative inference that could be drawn if a specific balancing test is added for criminal defendants and nothing is said about other cases. The precedent for including a reference to Rule 403 is found in Rule 609(a)(1). It wasn’t absolutely necessary to mention Rule 403 there in cases not involving criminal defendants, as Rule 403 applies by default. But it was considered helpful to do so in order to differentiate the Rule 403 test from the special balancing test set forth for criminal defendants in Rule 609(a)(1), and to clarify that Rule 403 applies wherever the special balancing test does not.

5. The changes to the notice provision discussed previously are included in this draft, because they are useful even with the changed balancing test. That is, the Committee might find that even with a more protective balancing test it would be useful to require the proponent to provide an explanation of proper purpose and probative value. And the proposed procedural changes to the notice requirement, such as timing and substance of the notice, work independently of the balancing test.

6. For the ease of the Committee’s review, what is set forth below is the entire Committee Note for the above proposal – direct/indirect, change to the balancing test, and beefing up the notice requirements:

Rule 404(b) has been amended to assure that its promised protection— against admission of uncharged misconduct to prove a

person's propensity to commit an act in dispute – is more fully and efficiently implemented.

The amendment provides that Rule 404(b) does not apply to direct evidence of the matter in dispute. For example, in a prosecution for bank robbery, Rule 404(b) does not apply to testimony from an eyewitness that he saw the defendant rob the bank. Rule 404(b) has no application because there can be no argument that by presenting that evidence the government is trying to raise the inference that the defendant has a propensity; rather it is just proving the crime charged. On the other hand, evidence that the defendant threatened an eyewitness a week after the crime is indirect evidence of the bank robbery, and should be evaluated under Rule 404(b). Many courts, in determining the coverage of Rule 404(b), have held that evidence of acts “inextricably intertwined” with the charged crime, or “intrinsic” to it, are outside the rule's coverage. But those and other like iterations have led to confusion and conflicting results in the courts. The Committee believes that a “direct/indirect” distinction is easier to apply and will provide the proper scope of coverage for Rule 404(b).

Rule 404(b)(2) has been amended to provide a more protective balancing test for criminal defendants. This is the same balancing test in favor of a criminal defendant prescribed by Rule 609(a)(1)(B). The more protective balancing test for criminal defendants clarifies that Rule 404(b) is not a rule of “inclusion” as many federal opinions have stated. The Committee has determined that in many cases bad acts have been admitted against criminal defendants that are, in effect, used as proof of the defendant's bad character and propensity to commit a crime. The chances of such an outcome are reduced by a more protective balancing test. The new test will help to ensure that other bad acts are admissible only when they are highly probative for a non-character purpose. It will also help to ensure that other bad acts, even when offered for a proper purpose, are admissible only when the government shows a substantial need for admitting them, such as when the issue is actively disputed by the defendant. For example, the balancing test is unlikely to be met when a bad act is offered to prove the defendant's intent to commit the charged crime, and the defense contends that the defendant never committed the crime in the first place.

The Rule 403 test continues to apply to other act evidence when offered in a civil case or against the government in a criminal case.

The notice provision has been amended in a number of respects:

- The proponent must provide a detailed description of the evidence that it intends to offer. In criminal cases the term “general nature” has been read in some courts to allow the government to meet its disclosure obligation without describing the specific act that the evidence would tend to prove, and without describing the source or form of the evidence. Under the amendment, the notice in all cases needs to be sufficiently detailed that it allows the opponent (and the court) to determine how the act to be proved is probative for a specific articulated purpose. The Rule requires the proponent to disclose the “substance” of the evidence. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. The term “substance” is intentionally taken from the requirement for a sufficient offer of proof under Rule 103(a)(2) – that is, the proponent must provide enough information about the evidence to allow the opponent to craft an argument and to allow the court to make a ruling. Under the amendment the proponent must describe the source of the evidence, the form of the evidence, and the act that the proponent seeks to prove with the evidence.³⁵
- The Rule now requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.
- The notice requirement has also been amended to require the proponent to give notice of the purposes for which the other act evidence is to be offered, and to provide an explanation for how the probative value of the evidence proceeds through a chain of reasoning that avoids propensity inferences. This advance notice of a proper theory of admissibility will assist the parties and the court in resolving Rule 404(b) issues in advance of trial.
- Notice must be provided at least 14 days before trial unless the court for good cause allows notice at a later date. The “reasonableness” standard under the original rule led to disparate results, and in some cases courts found it “reasonable” when the notice was provided only a few days before trial. With Rule 404(b) evidence, it is particularly important to have accelerated notice, because it is critical for the parties and the court to discuss and evaluate the purpose for which the evidence is offered at an early point in the proceedings. Early notice allows the court to focus at the outset on whether the evidence is offered for a proper purpose, and on whether the probative value of the evidence for that purpose is dependent on a propensity inference.
- As restructured, the good cause exception applies not only to the timing of the notice but also to the obligations to articulate a non-propensity purpose and explain how the evidence leads to that purpose independent of a propensity inference. A good cause exception for

³⁵ All the references to the proponent can be changed to “the government” if the Committee decides against extending the notice requirement to civil cases and to criminal defendants.

the articulation requirements is necessary because in some cases a permissible purpose for the evidence may not become clear until just before, or even during, trial.

- Finally, the amendment eliminates the requirement that the criminal defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, the benefit to the government of the requirement is minimal, because many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is inevitably provided anyway when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus become a technicality that has outlived any usefulness it may once have had.

IV. The Proposal to Delete the Requirement that the Defendant Must Ask for Notice

The Committee has already decided unanimously to go forward with an amendment to the notice provision of Rule 404(b). That amendment would delete the requirement that the defendant must ask the government to provide notice. If the Committee eventually decides that it does not wish to consider any broader amendment to Rule 404(b), then this minor amendment to the notice provision could be proposed to the Standing Committee with the recommendation that it be issued for public comment. But if the Committee decides to continue consideration of broader amendments to Rule 404(b), then this minor proposal will be held back, because amendments to the same rule should be packaged if possible.

The text of the proposed amendment to delete the request requirement is as follows:

Rule 404. Character Evidence; Crimes or Other Acts

* * *

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On~~ ~~request by a defendant in~~ In a criminal case, the prosecutor must:

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

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

The Committee Note for the amendment to delete the request requirement is as follows:

The amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, the benefit to the government of the requirement is minimal, because many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is inevitably provided anyway when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus become a technicality that has outlived any usefulness it may once have had.

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The University of Oklahoma
COLLEGE OF LAW

To: Professor Daniel J. Capra, Reporter to the Advisory Committee on Evidence Rules

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

Re: State Variations on Federal Rule of Evidence 404(b)

Date: September 19, 2017

In light of recent opinions from the Third, Fourth, and Seventh Circuit Courts of Appeal restricting the admissibility of “other acts” evidence offered against criminal defendants, the Advisory Committee has been exploring the possibility of amendments to Federal Rule of Evidence 404(b). Many state counterparts to Federal Rule 404(b) vary from the federal provision in certain respects that may prove helpful to the Advisory Committee in contemplating potential amendments.

Some states impose stricter procedural requirements on the admission of evidence of other crimes, wrongs, or acts. For example, several pre-trial notice provisions require notice within a specific time period. Others demand more particularized notice of the details of any other acts evidence the prosecution intends to proffer, as well as articulation of the rationale supporting admissibility. Some states demand hearings outside the presence of the jury to determine the admissibility of other acts evidence and require detailed findings on the record supporting a judge’s decision to admit such evidence.

Some state provisions provide enhanced substantive restrictions on the admissibility of other acts evidence offered against a criminal defendant. Several states have modified the traditional Rule 403 balancing test in the context of Rule 404(b) evidence. In place of the Rule 403 balancing that favors admissibility of other acts evidence, these states have recalibrated the balance to reject other acts evidence in close cases. Similar to federal judicial opinions that have emphasized the importance of a defendant “actively contesting” an issue proved by other acts evidence, at least one state has a genuine “dispute” requirement in the text of its counterpart to Rule 404(b). Importantly, some states combine enhanced procedural protections with substantive restrictions on the admission of other acts evidence to ensure that their versions of Rule 404(b) constitute rules of “exclusion” designed to limit evidence of other crimes, wrongs, or acts.¹

¹ See e.g., Tenn. R. Evid. 404(b), *discussed supra*, p. 16-18 (requiring: a hearing outside the presence of the jury to consider other acts evidence; a finding by the trial judge that the defendant committed the other crimes, wrongs, or acts by clear and convincing evidence; exclusion where unfair prejudice outweighs probative value (even if not substantially); record findings by the trial judge articulating the rationale for admitting the other acts evidence).

Finally, some state rules of evidence contain language that seeks to differentiate between “other” crimes, wrongs, or acts that are not part of the charged offense for which a defendant is on trial from “inextricably intertwined” or “integral” acts that should be proved as part of the charged offense. As described below, these provisions have not necessarily created greater clarity than the federal courts have achieved in drawing lines under Federal Rule 404(b).

This memorandum will address the state variations on Federal Rule of Evidence 404(b) summarized above in four sections:²

- Procedural Protections: Notice/Record Findings
- Protective Balancing Tests
- Active Contest Requirements
- Inextricably Intertwined Provisions

A. Procedural Protections: Notice/Record Findings

Several state provisions contain procedural requirements for the admission of other crimes, wrongs, or acts evidence that are more stringent than the requirements of Federal Rule of Evidence 404(b). The procedural protections required by rules in Florida, Hawaii, Kansas, Kentucky, Michigan, Minnesota, Tennessee, and West Virginia are discussed below.

1. Florida

Florida Statute § 90.404 governs the admissibility of “similar fact evidence of other crimes, wrongs, or acts.”³ Subsection (d) of the provision requires the prosecution in a criminal case to provide pre-trial notice of similar fact evidence, as follows:

(d) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), paragraph (b), or paragraph (c), no fewer than 10 days before trial, the state shall furnish to the defendant or to the defendant’s counsel a written statement of the acts or offenses it intends to offer, describing them with the particularity *required of an indictment or information*. No

² Some state versions of Rule 404(b) depart from the federal model in other respects. For example, several states do not require pre-trial notice of Rule 404(b) evidence. Others contain exhaustive lists of proper purposes for admitting other act evidence and/or specify additional proper purposes not contained in the Federal Rule. A few states exclude evidence of crimes, wrongs, or other acts only where their “sole” purpose is to prove a person’s propensity to engage in certain conduct. Finally, several states demand “clear and convincing” proof of a defendant’s commission of a crime, wrong, or other act, setting a higher burden of proof than the preponderance standard mandated by Federal Rule of Evidence 104(b) and the Supreme Court’s opinion in *Huddleston v. United States*. See e.g., Tenn. R. Evid. 404(b); Neb. Stat. Ann. §27-404(3). Because these state variations are not implicated by the recent Circuit precedent and are not consistent with potential amendments the Committee has been discussing, this memorandum does not address these state variations.

³ F.S.A. 1 90.404(2)(a).

notice is required for evidence of offenses used for impeachment or on rebuttal.⁴

Some Florida cases reject pre-trial notice of “similar fact” evidence pursuant to this provision due to the prosecution’s failure to describe the rationale for admitting such evidence.⁵ Others have suggested that the notice need not detail the chain of inferences supporting admissibility of similar fact evidence.⁶ Other Florida courts have focused on the detail with which the notice describes the specific similar facts that the prosecution intends to offer, rejecting notice where there is inadequate factual particularity.⁷ Still, Florida courts permit less specific notice where it is clear that the defense obtained the requisite information prior to trial.⁸

Strict compliance with the 10-day rule is not required and Florida courts excuse timing defects in the notice in cases where the defendant suffered no prejudice.⁹ Only very rarely do defects in the requisite notice result in reversals of convictions in Florida.¹⁰

⁴ F.S.A. § 90.404(2)(d) (emphasis added). Paragraph “(a)” referenced in the notice provision is the standard provision permitting evidence of other crimes, wrongs, or acts to be used for proper non-character purposes. Subsections “(b)” and “(c)” referenced in the notice provision refer to other acts evidence offered in sex offense and child molestation cases, which are also covered by the same Florida statute.

⁵ See *State v. Zenobia*, 614 So.2d 1139 (Fla. 5th Dist. Ct. App. 1995) (“the state has failed utterly to suggest in its notice what particular aspect—i.e., motive, opportunity, intent, preparation, plan, knowledge, or lack of consent—it really seeks to prove by such evidence. Hence, we think the kind of notice used here should be grounds for the exclusion of the evidence, simply because of the insufficiency of the notice.”).

⁶ See *Quinn v. State*, 662 So.2d 947 (Fla. 5th Dist. Ct. App. 1995) (In furnishing notice of intent to offer evidence of other crimes, State need not state purpose of its use of the evidence or specific reasons or explanations of what jury might deduce from the evidence).

⁷ See *Sabine v. State*, 58 So.3d 943 (Fla. 2d Dist. Ct. App. 2011) (where motion did not contain dates, locations, or details of the uncharged sexual conduct that it sought to introduce, it was not sufficiently particular to satisfy section 90.404’s notice requirement); *Garcia v. State*, 521 So.2d 191 (Fla. 1st Dist. Ct. App. 1988) (State’s service of notice of similar fact evidence was defective where notice did not describe the offenses State intended to offer with particularity, but error was harmless).

⁸ *Jaggers v. State*, 588 So.2d 613 (Fla. 2d Dist. Ct. App. 1991) (state provided sufficient notice of intent to offer other crimes testimony in retrial on charge of sexual battery of a child, where notice directed defense counsel to transcripts from prior trial).

⁹ *Miller v. State*, 632 So.2d 243 (Fla. 3d Dist. Ct. App. 1994) (trial court did not abuse its discretion in admitting evidence of prior criminal conduct by defendant even though less than ten days’ notice had been given by state, where court conducted hearing *in limine* on issue and was told, without contradiction, that matters which were subject to state’s belated notice had all been covered by parties during depositions of relevant witnesses and there was no suggestion that defendant had been prejudiced by late notice); *Barbee v. State*, 630 So.2d 655 (Fla. 5th Dist. App. 1994) (finding notice given nine days prior to trial sufficient in absence of prejudice to defense and rejecting defendant’s argument that the statutory rule precludes judicial discretion to excuse tardy notice); *State v. Paille*, 601 So.2d 1321 (Fla. 2nd Dist. Ct. App. 1992) (holding that lack of notice was harmless where it was apparent that the defendant knew of the other crimes evidence, and the defendant knew of the State’s intent to introduce the evidence at trial).

¹⁰ See *Gardner v. State*, 821 So.2d 1220 (Fla. 2nd Dist. Ct. App. 2002) (State’s error in failing to provide notice of its intent to introduce evidence of other crimes provided by defendant’s out-of-court statement required reversal, as it was not clear that such failure did not prejudice defendant in preparation of his defense); *Wightman v. State*, 982

2. Hawaii

Hawaii Rule of Evidence 404(b) contains a notice provision that was added in 1994, as follows:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.¹¹ *In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.*¹²

The Hawaii notice provision differs from the existing federal rule in three ways: 1) it does not require an opponent of Rule 404(b) evidence to request notice; 2) it imposes a notice obligation on all proponents of other acts evidence in criminal cases, including on defendants; and 3) it demands more detailed notice of the date and location of the prior crime, wrong, or act.¹³ The Hawaii Supreme Court has stated that the notice requirement is designed “to reduce surprise and promote early resolution of admissibility questions.”¹⁴

The requirement that all proponents provide notice of Rule 404(b) evidence in criminal cases definitely has some teeth and has been used to exclude defense Rule 404(b) evidence. The Hawaii Supreme Court analyzed the constitutionality of the notice provision, as well as the trial court’s decision to exclude defense Rule 404(b) evidence for lack of notice in *State v. Pond*.¹⁵ In that case, the defendant was charged with physically abusing his live-in girlfriend and his principal defense at trial was self-defense. Specifically, the defendant claimed that the victim was drunk and attacked him on the night in question. On the first day of trial, the defense sought permission to introduce testimony from the defendant concerning an alleged incident approximately a week and half prior to the charged incident in which the victim also “smacked” the defendant, pursuant

So.2d 74 (Fla. 2d Dist. Ct. App. 2008) (“Because Wightman was not given the pretrial notice and the other due process safeguards discussed in *McLean* were not employed, the State cannot invoke section 90.404(2)(b) to justify the admission of other-crime evidence in this case.”).

¹¹ Unlike its federal counterpart, Hawaii Evidence Rule 404(b) specifically lists modus operandi as a proper purpose for other acts evidence.

¹² Hawaii R. Evid. 404(b).

¹³ *State v. Pond*, 193 P.3d 368, 379 (Hawaii 2008).

¹⁴ *Id.*

¹⁵ *State v. Pond*, 193 P.3d 368 (Hawaii 2008).

to Hawaii Evidence Rule 404(b). Although the defense lawyer argued that he had been unable to comply with the detailed pre-trial notice provision sooner because he could not pinpoint the date of the prior incident, the trial judge excluded the evidence based upon lack of reasonable notice.

On appeal following the defendant's conviction, the defense claimed that the exclusion of defense Rule 404(b) evidence for lack of notice violated his Sixth Amendment rights and that the trial judge abused his discretion in excluding the evidence based upon a lack of pre-trial notice. The Hawaii Supreme Court rejected the defendant's constitutional challenge to the notice provision, stating that: "The HRE Rule 404(b) notice requirement comports with this court's interest in promoting the orderly administration of justice and does not interfere with the defendant's constitutional rights."¹⁶ The court further found that the trial judge did not abuse discretion in excluding evidence of the prior altercation due to a lack of notice by the defense. The Hawaii Supreme Court noted that the defense was previously aware of the incident and still could not pinpoint the date even during trial. The court suggested that the defense should have provided at least "general notice" of the evidence prior to trial, even if it could not pinpoint the date as required by the Rule. For these reasons, the court found that the defense argument to excuse pre-trial notice for good cause was "disingenuous at best" and that the trial judge was free to reject it.¹⁷

The requirement of detailed notice of the "date" and "location" of other act evidence has been less stringently enforced. In *State v. Barrios*, the appellate court upheld the trial court's decision to admit the defendant's specific acts of drug use, notwithstanding very generic pre-trial notice by the prosecution, where the defendant failed to object to the lack of more detailed notice.¹⁸ The court reasoned as follows:

Nor did the Circuit Court plainly err, or abuse its discretion, in determining that Barrios had reasonable notice under HRE Rule 404(b), of the drug evidence that the State intended to introduce at trial. First, as noted above, the Circuit Court instructed defense counsel to object at trial to any previously unknown evidence of drug use or drug paraphernalia. Defense counsel agreed to do so. No objections were made. The State filed a Notice of Intent to Rely on

¹⁶ *Id.*; See also *State v. So'o*, No. 28023, 2008 WL 1922975 (Hawaii Ct. App. April 30, 2008) (Trial court, in prosecution for abuse of family or household member, did not violate defendant's right to confrontation by precluding defendant from asking victim during cross-examination about prior acts of violence or aggressive behavior by victim, where defendant failed to give reasonable notice of that evidence in advance of trial and failed to establish good cause for having failed to do so).

¹⁷ The court vacated the conviction, however, based upon the trial court's refusal to allow cross-examination of the victim regarding her marijuana use on the night of the alleged attack due to lack of pre-trial notice. The Hawaii Supreme Court found that the defense was *not* required to give reasonable notice of intent to cross-examine the victim about her marijuana use on the night of the alleged attack because the defendant intended to show that her perception and testimony about the incident were not credible, and Hawaii Rule 404(b) did not apply to evidence introduced to impeach a witness's sensory or mental defect. *Id.*

¹⁸ *State v. Barrios*, 383 P.3d 124 (Hawaii Ct. App. 2014), *sentence vacated on other grounds*, 389 P.3d 916 (Hawaii 2016).

Potential Rules 404(b), 608, or 609.1 HRE Material, ... which indicated an intent to introduce “[e]vidence of drug and alcohol use during the commission of the crimes.” Although the drug use testimony described details concerning the acquisition of the drugs and the preparation for and methods of drug use that took place before, as well as during, the commission of the crimes, no objections were raised as to a lack of reasonable notice and we reject Barrios’s argument that the alleged deficiencies in providing him more specific notice of such evidence warrant the vacating of his convictions.

In *State v. Kekona*, the Hawaii Court of Intermediate Appeals found that the trial court abused its discretion in excluding defense Rule 404(b) evidence, notwithstanding the defendant’s failure to provide reasonable notice in advance of trial of the date, location, and general nature of the evidence.¹⁹ The court noted that “the purpose of the notice required ... is to reduce surprise and promote early resolution of admissibility questions.” Where the state filed a motion *in limine* in advance of trial seeking to exclude the defense evidence of past abuse by the victim, “prosecutors apparently had notice” that the defendant intended to support his defense with the evidence of prior abuse.²⁰

3. Kansas

The Kansas counterpart to Federal Rule 404(b) contains a notice provision that took effect in 2009 and is slightly different from the federal provision, as follows:

(e) In a criminal action in which the prosecution intends to offer evidence under this rule, the prosecuting attorney shall disclose the evidence to the defendant, including statements of witnesses, at least 10 days before the scheduled date of trial or at such later time as the court may allow for good cause.²¹

Like the Federal Rule, this notice provision applies only to the prosecution in a criminal case. Unlike the Federal Rule that mandates only “reasonable notice of the general nature of any such evidence,” the Kansas provision requires disclosure of “the evidence..., including statements of witnesses” and provides a time certain of at least 10 days prior to trial. Because the new notice provision was added in 2009, there are few cases interpreting it and I found no decisions analyzing the required disclosure of witness “statements” in connection with Rule 404(b). The cases that do exist predictably suggest that the pre-trial notice requirement has not led to reversals of criminal convictions.

The addition of a specific time limit in the notice provision does not eliminate needed flexibility in the admission of other acts evidence in Kansas. In *State v. Adkins*, the prosecution

¹⁹ *State v. Kekona*, 209 P.3d 1234, 1255 (Hawaii Ct. App. 2009).

²⁰ *Id.*

²¹ Kan. Stat. Ann. §60-455(e).

failed to provide the requisite notice within the 10-day time limit and the trial court granted the defense a continuance to ensure that there would be 10 days between the notice and the beginning of the trial.²² Following his conviction, the defendant appealed, arguing that the untimely notice violated his rights under K.S.A. §60-455(e). In an unpublished opinion, the Kansas Court of Appeals held that the statute did not prohibit the grant of a continuance to satisfy the 10-day requirement and that the trial judge was well within his discretion in selecting the continuance as a remedy. Therefore, in addition to the option of finding “good cause” to excuse pre-trial notice under the statute, a trial judge may order a continuance of the trial to afford time for compliance.

The prosecution in *State v. Fulson* provided no pre-trial notice at all of its intent to introduce other acts evidence.²³ At trial, however, an officer called as a prosecution witness testified that the victim identified the defendant from “some photos of [the defendant] from past history.” Following his conviction, the defendant argued that this testimony introduced evidence of his past misdeeds to the jury without any pre-trial notice. The appellate court rejected the defense argument, finding that the prosecution did not violate the notice provision because it had no intention of introducing any information about the defendant’s prior misdeeds that may have been suggested inadvertently to the jury through this testimony.²⁴

In *State v. Ulmer*, the defendant was convicted of assault and argued that admission of his prior threat against the victim was erroneous.²⁵ Even assuming that the prior threat was proper evidence of the defendant’s intent and motive in connection with the charged assault, the defendant claimed that he was not given notice that the threat would be admitted at least 10 days before the trial. The court found any error in failing to give the statutorily required notice harmless in light of the overwhelming evidence of guilt.

Defense counsel frequently fail to preserve objections to prosecutorial pre-trial notice, thus waiving any meaningful appellate review. In *State v. Massengale*, for example, the prosecution provided no pre-trial notice of evidence arguably constituting other acts evidence.²⁶ The appellate court rejected the defense challenge to pre-trial notice, finding that defense counsel was clearly well aware of the relevance of the other acts evidence based upon pre-trial proceedings and that the defense failure to object to any error in the admission of other acts evidence at trial also waived any error on this basis.²⁷

²² *State v. Adkins*, 264 P.3d 1060 (Table) (Kan. Ct. App. 2011).

²³ *State v. Fulson*, 326 P.3d 1090 (Table) (Kan. Ct. App. 2014).

²⁴ *Id.*

²⁵ *State v. Ulmer*, 386 P.3d 927 (Table) (Kan. Ct. App. 2016).

²⁶ *State v. Massengale*, 317 P.3d 149 (Table) (Kan. Ct. App. 2014).

²⁷ *See also State v. Herndon*, 379 P.3d 403 (Kan. Ct. App. 2016)(Defendant argues that the prosecutor introduced evidence in his opening statement which was not disclosed at least 10 days before trial, however, the court held that these statements were not testimony or evidence, and further, the issue was not objected to and therefore not preserved); *State v. Yeager*, 359 P.3d 1071 (Table) (Kan. Ct. App. 2015)(Yeager argues on appeal that he was not given 10-days’ notice regarding the admission of evidence of prior sexual acts, however, he did not object to this at trial and the issue was not preserved); *State v. Mondonedo*, 270 P.3d 1231 (Table) (Kan. Ct. App. 2012)(Defendant

4. Kentucky

Kentucky Evidence Rule 404(c) requires notice of Rule 404(b) evidence to be given, as follows:

(c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

The Kentucky notice provision is distinct from its federal counterpart in three respects: 1) it does not require a defense request for notice; 2) it requires reasonable pre-trial notice of other acts evidence to be offered by the prosecution during its case-in-chief only; and 3) it expressly provides for the remedy of a continuance in the case of a good cause exception to this pre-trial notice obligation.²⁸ “The intent of KRE 404(c) is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion *in limine* and to deal with the reliability and prejudice problems at trial.”²⁹

One of the earliest Kentucky cases regarding notice is *Gray v. Commonwealth*, a sexual assault prosecution.³⁰ The appellate court found that the trial court had abused its discretion in allowing testimony from three witnesses about uncharged acts of abuse by the defendant because the prejudicial effect of those uncharged acts substantially outweighed any probative value. The court also emphasized the importance of pre-trial notice of such evidence, noting that the prosecution had informed the defense of its intent to call the witnesses on the morning of the first day of trial. The court stated:

the present case vividly demonstrates that the integrity of the trial is jeopardized when previously unknown witnesses appear at the eleventh hour with evidence of uncharged collateral crimes”
...[e]ven in cases where evidence of prior uncharged criminal

attempts to object based on the State’s failure to disclose the evidence 10 days prior, however, the issue was not preserved).

²⁸ The Rule also expressly acknowledges the trial court’s ability to exclude other acts evidence for lack of notice. From a stylistic perspective, the Kentucky Rule differs in placing notice obligations in a separate subsection (c) of its version of Rule 404.

²⁹ *Bowling v. Commonwealth*, 942 S.W.2d 293, 300 (Ky.1997) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.25 (3rd Ed.1993)), *overruled on other grounds*, *McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011).

³⁰ 843 S.W.2d 895, 897 (Ky. 1992).

activity between the defendant and third persons is admissible, fundamental fairness dictates, and we hold, that the defendant is entitled to be informed of the names of the non-complaining witnesses and the nature of their allegations so far in advance of trial as to permit a reasonable time for investigation and preparation.³¹

The appellate court reversed the defendant's conviction in *Daniel v. Commonwealth* due to inadequate pre-trial notice of testimony by the victim's cousin that the defendant allegedly abused her as well.³² Although the State argued that a police report turned over to the defense listed the cousin as a witness who had been interviewed, the reviewing court found that inadequate to satisfy the notice requirement. The court found that a police report alone, made available to defendant through discovery, indicating that the state spoke to all children present as to whether they witnessed improper sexual activity did not provide reasonable pretrial notice of the victim's cousin as a potential witness to the defendant's other bad acts.³³

Notwithstanding strong language supporting a robust notice requirement in cases like these, reversal for lack of adequate pre-trial notice is extremely rare. Kentucky courts frequently reject defense arguments regarding the prosecution's failure to provide formal notice of other acts evidence where it is apparent that the defense had "actual notice" of the evidence and an opportunity to challenge it.³⁴ Appellate courts in Kentucky also forgive short notice.³⁵ Kentucky

³¹ *Id.*

³² 905 S.W.2d 76 (Ky. 1995).

³³ *Id.*

³⁴ See *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998) (defense had sufficient "actual notice" to file motion in limine and thus suffered no prejudice from lack of pre-trial notice); *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997) (defendant suffered no prejudice from any deficiency in prosecutor's notice of intent to use other crimes evidence, where defendant had actual notice and moved in limine to exclude such evidence), *overruled on other grounds*, *McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011); *Burgher v. Commonwealth*, 2009 WL 2707177 (Ky. 2009) (Defendant received actual notice reasonably sufficient to satisfy requirement where defendant received a copy of police report containing defendant's threats in discovery, and although receiving the police report in discovery would not be sufficient of itself, defendant's motion in limine to suppress the statements at issue showed he had actual notice as well as the opportunity to challenge the admissibility of the evidence.); *Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky. 2005) (Pre-trial proceedings made it clear that defense was aware that prosecution's theory of the case depended on other act and of intent to use other act evidence in prosecution.).

³⁵ See *Hoff v. Commonwealth*, 2011 WL 6820227 (Ky. 2011) (although defendant received notice only three days before trial, the present counts and others involving defendant's alleged rape of daughter were to be tried together until five days before trial, prosecutor notified defense of the evidence by telephone immediately after learning of it, and defendant was able to make motion in limine to exclude the evidence that was granted in part.); *Dant v. Commonwealth*, 258 S.W.3d 12 (Ky. 2008) (Defendant received adequate notice of the state's intent to introduce other-acts evidence at murder trial, even though defendant received notice only a few days before trial began; defendant was nonetheless able to file a motion in limine in which he challenged both adequacy of notice and substantive issue of whether other-acts evidence was admissible, and defendant was able to challenge admissibility of other-acts evidence again at trial.); *Hughes v. Commonwealth*, 2008 WL 3890165 (Ky. 2008) (Commonwealth provided defendant with reasonable notice of its intent to present the testimony of witness concerning defendant's uncharged criminal acts, even though defendant received the notice five days before trial); *Dillman v. Commonwealth*, 257 S.W.3d 126 (Ky.App. 2008) (Commonwealth disclosing its possession of evidence after hearing defense's

courts have found notice that describes other acts generically reasonable as well.³⁶ Similar to other jurisdictions, Kentucky courts also find errors with respect to pre-trial notice harmless.³⁷

5. Michigan

Michigan Rule of Evidence 404(b)(2) contains a notice provision that requires the prosecution to articulate its rationale for offering other acts evidence, as follows:

(b) Other crimes, wrongs, or acts.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial *and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence.* If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

To facilitate this mandate, the Rule provides that the defense “shall be required to state the theory” of defense, if necessary, subject to the constitutional privilege against self-incrimination.³⁸

The 1995 amendment that added the requirement that the prosecution specify its rationale for admitting the evidence was born of a 1993 decision by the Michigan Supreme Court.³⁹ In *People v. VanderVliet*, the court carefully articulated the process by which a trial court should assess admissibility of Rule 404(b) evidence and announced a pre-trial notice obligation for the prosecution in criminal cases:

To assist the judiciary in this extraordinarily difficult context and to promote the public interest in reliable fact finding, we intend to

opening statement did not violate notice requirements for introducing character evidence and evidence of other crimes; Commonwealth disclosed evidence at earliest feasible time in which it believed evidence was relevant).

³⁶ See *Ernst v. Commonwealth*, 160 S.W.3d 744 (Ky. 2005) (evidence that defendant's history of “theft related offenses” might be introduced sufficient to survive plain error review, even though it failed to specify that the Commonwealth might introduce evidence relating to his theft of money from purses of murder victim and her sister).

³⁷ See *Johnson v. Commonwealth*, 2016 WL 6125737 (Ky. 2016) (Commonwealth's error in failing to give advance notice to defendant of its intent to use prior bad acts evidence reflecting upon defendant's possessiveness and jealousy concerning victim was harmless).

³⁸ See *People v. VanderVliet*, 508 N.W.2d 114, 133 (Mich. 1993) (“no judge can be expected to correctly assess the evidentiary issue unless and until the court is presented with a concrete theory of defense that allows the court to determine relevancy. Without such a concrete presentation, a defendant's general posture, as here, requires the trial judge to assume the relevancy of other acts proffered under noncharacter theories of admissibility.”), *amended opinion* 520 N.W.2d 338 (Mich. 1994).

³⁹ Michigan Editor's notes to Michigan R. Evid. 404.

adopt a modification of Rule 404(b). We require the prosecution to give pretrial notice of its intent to introduce other acts evidence at trial, and authorize the trial judge, consistent with the law in ten other states, to require the defendant to articulate his theory or theories of defense.”⁴⁰

The court explained that: “A notice requirement promotes reliable decision-making, prevents unfair surprise, and offers the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice.”⁴¹ The court outlined a flexible approach to other acts evidence to allow trial courts to assess admissibility armed with all necessary information, as follows:

Where pretrial procedures, including requests for offers of proof, do not furnish a record basis to reliably determine the relevance and admissibility of other acts evidence, the trial court should employ its authority to control the order of proofs, require the prosecution to present its case in chief, and delay ruling on the proffered other acts evidence until after the examination and cross-examination of prosecution witnesses. If the court still remains uncertain of an appropriate ruling at the conclusion of the prosecutor’s other proofs, it should permit the use of other acts evidence on rebuttal, or allow the prosecution to reopen its proofs after the defense rests, if it is persuaded in light of all the evidence presented at trial, that the other acts evidence is necessary to allow the jury to properly understand the issues.⁴²

Potential difficulties in policing the notice-with-rationale requirement can be seen in *People v. Sabin*.⁴³ In that case, a defendant’s previous acts of sexual assault against a step-daughter were admitted by the trial court in his prosecution for the rape of his own daughter. The prosecution recited several of the Rule 404(b) purposes in support of admissibility at trial, including motive, intent, absence of mistake and the credibility of the victim.⁴⁴ The trial court ultimately instructed the jury that the prior assault could be used to show common plan, scheme or system.⁴⁵ Following the defendant’s conviction, the Michigan Court of Appeals reversed, finding no proper purpose for the prior assault evidence and significant unfair prejudice to the defendant. The Michigan Supreme Court reinstated the conviction, holding that the prior assault was admissible to show the defendant’s common plan, scheme, or system. The dissent disagreed

⁴⁰ *People v. VanderVliet*, 508 N.W.2d 114, 133 (Mich. 1993), *amended opinion* 520 N.W.2d 338 (Mich. 1994).

⁴¹ *Id.* at n. 51.

⁴² *Id.* at 133.

⁴³ *People v. Sabin*, 614 N.W.2d 888 (Mich. 2000).

⁴⁴ *Id.*

⁴⁵ Michigan does not have a counterpart to Fed. R. Evid. 414 and thus, this evidence was analyzed solely under Michigan’s version of Rule 404(b).

that the prior assault evidence had been properly admitted, but also took issue with the appellate court's reliance on a proper purpose never "articulated" by the prosecution either in a pre-trial notice or at trial itself. The dissent argued that the articulation requirement in the notice would become meaningless if a prosecutor or the court could reach for previously unarticulated proper purposes for the first time on appeal. This conflict between the Justices illustrates the concern that a specific prosecutorial or judicial "articulation" requirement could confine reviewing courts to the purposes identified and analyzed below.

Michigan cases often find defects in pre-trial notice harmless. For example, in *People v. Jackson*, the prosecution was permitted to introduce testimony from a witness about uncharged sexual relationships she had with the defendant under a *res gestae* theory in a prosecution involving sexual misconduct.⁴⁶ The court rejected the lower court's application of a *res gestae* exception to Rule 404(b) and found the prior acts covered by the Rule. The court nonetheless excused the failure to afford the required pre-trial notice of Rule 404(b) evidence as harmless:

[T]he lack of proper pretrial notice did not result in the admission of substantively improper other-acts evidence. Thus, although the defendant was not afforded his due 'opportunity to marshal arguments' against its admission before it was introduced at trial, he has not shown that any such arguments would have been availing, or would have affected the scope of testimony ultimately presented to the jury. Furthermore, while the defendant suffered 'unfair surprise' from the unexpected introduction of this testimony at trial, he was admittedly aware of [the witness's] general version of events before trial, including her and [another alleged victim's] prior relationships with the defendant, and he has not demonstrated how he would have approached trial or presented his defense differently had he known in advance that [the witness] would be permitted to testify as she did.⁴⁷

In finding harmless error from lack of pre-trial notice, the court also addressed the prosecutor's argument that a witness statement providing that the witness "was sexually assaulted in the past" and has spoken with "a former church member" who also had been "sexually assaulted by our pastor" was sufficient to satisfy the notice obligation. The court held that the witness statement was inadequate to satisfy the notice requirement of Rule 404(b)(2) because "neither her witness statement nor the fact of her endorsement suggested, let alone provided reasonable notice of, the prosecution's intent to have Price testify to her and Newsome's prior relationships with the defendant, or what the rationale for admitting that other-acts evidence might be."⁴⁸

⁴⁶ *People v. Jackson*, 498 Mich. 246 (2015).

⁴⁷ *Id.* at 270.

⁴⁸ *Id.*

In *People v. Hawkins*, the Michigan Court of Appeals also forgave the prosecutor's failure to provide the pre-trial notice required by the Rule.⁴⁹ The court in *Hawkins* explained that the notice requirement was designed:

(1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record.⁵⁰

Notwithstanding these important purposes, the court found a prosecutorial failure to follow the notice requirement harmless: “[b]ecause this evidence was admissible, notice to [the defendant] would not have had any effect on whether the trial court should have admitted it at trial, regardless of the record or arguments that could have been developed and articulated following notice.”⁵¹ In addition, the court noted that the defendant “never suggested how he would have reacted differently to this evidence had the prosecutor given notice,” and that the court could not find “that this lack of notice had any effect whatsoever.”⁵²

Interestingly, the Michigan Supreme Court has proposed an amendment to this notice provision that would clarify that: “This notice must be provided in writing 14 days before trial or orally in open court on the record.”⁵³ The proposal is currently in the notice and comment stage and a public hearing will be held on September 20, 2017.⁵⁴

⁴⁹ *People v. Hawkins*, 628 N.W.2d 105 (Mich. Ct. App. 2001).

⁵⁰ *Id.* at 113.

⁵¹ *Id.*

⁵² *Id.* at 114.

⁵³ See <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/pages/michigan-rules-of-evidence.aspx>. This proposal to amend the notice procedure follows a Michigan Court of Appeals decision stating that “[a]ccordingly, we hold that if the record does not demonstrate compliance by the prosecution with the mandatory notice requirement of MRE 404(b)(2), upon objection by the defense, the trial court must exclude the evidence absent a showing of “good cause” for the failure to provide the notice.” See *People v. Johnson*, 866 N.W.2d 883, 890 (Mich. Ct. App. 2015). The Michigan Supreme Court thereafter vacated the portion of the opinion discussing the notice obligation, but otherwise dismissed the appeal due to agreement that any errors were harmless in light of overwhelming evidence against the defendant. *People v. Johnson*, 864 N.W.2d 147 (Mich. 2015). Proposals to clarify the notice obligation in Michigan Rule 404(b) followed.

⁵⁴ A brief review of the comments suggests that prosecutors and defense attorneys generally support the time limitation (with a good cause exception retained), but disagree over the utility of “oral” notifications “on the record,” with defense counsel preferring written notice and prosecutors in favor of the flexibility that oral notice provides. At least one comment has highlighted the drafting ambiguity with respect to the applicability of the 14-day rule to oral notifications and has suggested revision to clarify that the time limit applies equally to written and oral notice.

6. Minnesota

Minnesota’s version of Rule 404(b) imposes stringent notice and articulation requirements on the prosecution, as follows:

(b) Other crimes, wrongs, or acts. Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless 1) *the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure*; 2) *the prosecutor clearly indicates what the evidence will be offered to prove*; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor’s case; and 5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.⁵⁵ Evidence of past sexual conduct of the victim in prosecutions involving criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct is governed by rule 412.

Minnesota Rule of Criminal Procedure 7.02 sets forth the specific requirements for prosecutorial notice of Rule 404(b) evidence, as follows:

Subd. 1. Notice of Other Crime, Wrong, or Act. The prosecutor must notify the defendant or defense counsel in writing of any crime, wrong, or act that may be offered at the trial under Minnesota Rule of Evidence 404(b) No notice is required for any crime, wrong, or act:

- (a) previously prosecuted,
- (b) offered to rebut the defendant’s character evidence, or
- (c) arising out of the same occurrence or episode as the charged offense.⁵⁶

Subd. 2. Notice of a Specific Instance of Conduct. The prosecutor must notify the defendant or defense counsel in writing of the intent to cross-examine the defendant or a defense witness under

⁵⁵ Minnesota is also one of the states that combines several procedural and substantive restrictions, modifying the traditional Rule 403 balancing in defendant’s favor by not requiring prejudice to outweigh probative value “substantially.” Modified balancing tests, including Minnesota’s, are discussed in the next section, *infra*.

⁵⁶ The Minnesota Rule expressly deals with the “inextricably intertwined” issue as it relates to notice with this “arising out of” standard.

Minnesota Rule of Evidence 608(b) about a specific instance of conduct.

Subd. 3. Contents of Notice. The notice required by subdivisions 1 and 2 must contain a description of each crime, wrong, act, or specific instance of conduct with sufficient particularity to enable the defendant to prepare for trial.

Subd. 4. Timing.

(a) In felony and gross misdemeanor cases, the notice must be given at or before the Omnibus Hearing under Rule 11, or as soon after that hearing as the other crime, wrong, act, or specific instance of conduct becomes known to the prosecutor.

(b) In misdemeanor cases, the notice must be given at or before a pretrial conference under Rule 12, if held, or as soon after the hearing as the other crime, wrong, act, or specific instance of conduct becomes known to the prosecutor. If no pretrial conference occurs, the notice must be given at least 7 days before trial or as soon as the prosecutor learns of the other crime, wrong, act, or specific instance of conduct.

These notice requirements originated in *State v. Spreigel*, where the court addressed the severe prejudice to a criminal defendant forced to defend against unanticipated allegations and held that:

although [other acts] evidence is otherwise admissible under some exception to the general exclusionary rule, it shall not hereafter be received unless within a reasonable time before trial the state furnishes defendant in writing a statement of the offenses it intends to show he has committed, described with the particularly required of an indictment or information, subject, however, to the following exceptions: (a) offenses which are part of the immediate episode for which defendant is being tried; (b) offenses for which defendant has previously been prosecuted; and (c) offenses which are introduced to rebut defendant's evidence of good character.⁵⁷

⁵⁷ *State v. Spreigel*, 139 N.W.2d 167, 173 (Minn. 1965). In subsequent cases, Minnesota courts have held that notice is not required for evidence used to establish a "relationship" between parties or for previously prosecuted offenses because there would be no unfair surprise to a defendant from such evidence. See *State v. Enger*, 539 N.W.2d 259 (Minn. 1995) (evidence establishing a relationship between the defendant and victim not subject to *Spreigel* requirements) and *State v. Feehan*, 412 N.W. 2d 309 (Minn. Ct. App. 1987) (where notice is designed to prevent surprise, it is not necessary for previously prosecuted offenses of which defendant is well aware). But, "[b]eyond the *Spreigl* notice requirement, when a defendant demands disclosure of state's evidence and other relevant material pursuant to Minn.R.Crim.P. 9.01, the state must disclose evidence of other crimes not included in the *Spreigl* notice requirement. For example, the state must disclose other crimes for which defendant was previously prosecuted." *State v. Bolte*, 530 N.W.2d 191 (Minn. 1995).

Shortly thereafter, the Minnesota Supreme Court also emphasized the need for the prosecutor to articulate the proper purpose for other act evidence.⁵⁸ The Minnesota Rule also has been interpreted to impose precise articulation requirements on the trial judge admitting other acts evidence.⁵⁹ Notwithstanding these more stringent notice and articulation requirements, appellate review of the admission of other acts evidence in Minnesota looks very similar to the appellate review of other acts evidence under Federal Rule 404(b). Much of the focus of the analysis is spent on the appellate court's assessment of the proper purpose for the evidence. Cases often examine a litany of potential proper purposes.⁶⁰ Little attention is paid to the prosecutor's notice, the prosecutor's precise articulation of the purpose for which evidence was offered, or the trial judge's specific record reasoning for admissibility in cases where there appears to be a proper purpose on review.⁶¹ Only very rarely does an appellate court base reversal on a failure of pre-trial notice.⁶²

⁵⁸ *State v. Billstrom*, 149 N.W. 2d 281 (Minn. 1967).

⁵⁹ *Angus v. State*, 695 N.W.2d 109, 120 (Minn.2005)(One of the requirements for admitting *Spreigl* evidence is that the district court “must identify the precise disputed fact to which the *Spreigl* evidence would be relevant.”); *See also State v. Farden*, 773 N.W.2d 303, 317 (Minn. 2009)(stating that “[t]o properly assess the relevancy and probative value of the evidence, the district court must first ““identify the precise disputed fact to which the *Spreigl* evidence would be relevant”” and evaluating only the purposes identified by the trial court).

⁶⁰ *See e.g., State v. Washington-Davis*, 867 N.W.2d 222 (Minn. Ct. App. 2015) (“We see no error in the admission of this evidence because it tended to show appellant’s intent, knowledge, absence of mistake or accident, and common scheme or plan.”).

⁶¹ *See State v. Whelan*, 189 N.W.2d 170 (Minn. 1971) (improper reference to other offenses perpetrated by defendant against victim without pre-trial notice harmless); *State v. Schweppe*, 237 N.W.2d 609 (Minn. 1975) (where evidence of defendant’s homosexual relationship with victim was properly admissible to show motive and where defense counsel was clearly aware that such evidence would be offered at trial, there was no unfair surprise and arguable failure to provide pre-trial notice was not prejudicial); *State v. Bolte*, 530 N.W.2d 191, 199 (Minn. 1995) (reaffirming the importance of and the need for full compliance with notice requirements, but approving “substantial compliance” with the notice requirements due to a lack of prejudice to the defendant in a case where the defendant was aware of the relevance of the prior offense and the prosecution gave notice during trial prior to proffering the evidence); *State v. Rossberg*, 851 N.W.2d 609, 615 (Minn. 2014) (finding that trial court erred in failing to identify the “precise disputed fact” to which prior act evidence was relevant, but that articulation error was harmless where prior act was not unduly prejudicial and where there was overwhelming evidence of defendant’s guilt); *Wanglie v. State*, 398 N.W.2d 54, 57–58 (Minn.App.1986) (holding that mention in complaint of other incidents, defense’s access to statements and other documents concerning the other incidents, and familiarity of defense counsel with them supported admission of *Spreigl* evidence); *State v. Barsness*, 2014 WL 5419726 (Minn. Ct. App. October 27, 2014) (failure to provide requisite notice of testimony regarding prior criminal act was plain error, but harmless); *State v. Washington-Davis*, 867 N.W.2d 222 (Minn. Ct. App. 2015) (rejecting challenge to state’s articulation of purpose with cursory analysis: “state clearly indicated what the evidence was offered to prove, both in its pretrial motion and during multiple pretrial arguments before the district court.”).

⁶² *See State v. Coonrod*, 652 N.W.2d 715, 720 (Minn. Ct. App. 2002) (finding prejudicial failure to provide pre-trial notice of evidence that defendant was collecting photos of “teen-age girls” on the Internet and using the Internet to ask a 15-year-old girl other than the victim for a date: “The state provided no notice of any intent to present evidence of the computer file folders, or any other *Spreigl* evidence. The state did disclose as a possible witness J.L., the subject of one of the computer file folders, but did not identify her as a *Spreigl* witness. Although defense counsel admitted receiving police reports referring to the computer file folders, the complaint merely mentioned the search of Coonrod’s

7. Tennessee

The Tennessee Supreme Court characterizes the Tennessee version of Rule 404(b) as a “rule of exclusion” to protect against the significant prejudice suffered by criminal defendants against whom other act evidence is admitted.⁶³ To facilitate this approach to other acts evidence, Tennessee Rule 404(b) imposes procedural requirements, including a mandatory hearing outside the presence of the jury and specific record findings by the trial court prior to admission of other acts evidence, as follows:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes.⁶⁴ The conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury’s presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and⁶⁵
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.⁶⁶

Because it relies upon the procedural requirements of a mandatory hearing and record findings, the Tennessee provision does not mandate pre-trial notice. A 1991 Tennessee Advisory Commission Comment describes the history of the procedural requirements:

The Commission drafted Part (b) in accord with the Supreme Court’s pronouncements in *State v. Parton*, 694 S.W.2d 299 (Tenn.1985). There the Court established precise procedures to

computer, without reciting any evidence found in that search to indicate the state might be using it to prove the offense. Thus, we cannot conclude that there was substantial compliance with the notice requirement.”).

⁶³ *State v. Rounsaville*, 701 S.W.2d 817, 820 (Tenn. 1985).

⁶⁴ Tennessee’s version of the Rule contains no illustrative list of proper purposes for such evidence.

⁶⁵ Tennessee is also a state that departs from the *Huddleston* view that a defendant’s commission of other crimes, wrongs, or acts should be treated as a matter of conditional relevance pursuant to Rule 104(b). Instead Tennessee demands that the trial judge find proof of the other act by clear and convincing evidence.

⁶⁶ Tennessee is also a state that removes the modifier “substantially” from the traditional Rule 403 balancing test applicable to other acts evidence and directs that the trial judge “must” exclude evidence failing this test. The impact of that change is discussed, *infra*, in the section on modified balancing tests.

emphasize that evidence of other crimes should usually be excluded. In the exceptional case where another crime is arguably relevant to an issue other than the accused's character--issues such as identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake--the trial judge must first excuse the jury. Then the judge must decide what material issue other than character forms a proper basis for relevancy. If the objecting party requests, the trial judge must state on the record the issue, the ruling, and the reason for ruling the evidence admissible. Finally, the judge must always weigh in the balance probative value and unfair prejudice. If the danger of unfair prejudice outweighs the probative value, the court should exclude the evidence even though it bears on a material issue aside from character. Finally, according to *Parton*, the trial judge must find that the evidence is "clear and convincing" that the defendant committed another crime.⁶⁷

The Tennessee courts have recognized that these requirements not only protect criminal defendants from prejudicial evidence, they also promote efficiency by requiring other acts issues to be resolved outside of trial without lengthening the trial itself and risking unnecessary distraction from the events at issue.⁶⁸ A trial court that substantially complies with the procedural requirements in the Rule is entitled to significant deference, whereas a trial court that does not will receive no deference on appeal.⁶⁹ A failure to comply substantially with the procedures mandated by the Rule is not necessarily fatal to admissibility, however. Tennessee appellate courts uphold admission of other acts evidence even in cases where the trial court failed to follow the mandatory requirements.⁷⁰

8. West Virginia

Prior to 2014, West Virginia Evidence Rule 404(b) was identical to its federal counterpart, requiring notice of Rule 404(b) evidence only by the prosecution in a criminal case and only upon

⁶⁷ Advisory Commission Comment to Tenn. R. Evid. 404.

⁶⁸ *State v. Bigbee*, 885 S.W.2d 797, 806 (Tenn. 1994) ("Not only does the admission of irrelevant bad acts evidence have a high potential for prejudice, the testimony required to establish, as well as rebut, the prior bad act can substantially lengthen a trial, as this case demonstrates. Rule 404(b) should be followed closely to avoid prejudicing the rights of the accused and to maintain the focus of the trial."); *But see State v. Gilley*, 173 S.W.3d 1 (Tenn. 2005) (noting that trial court may need to revisit any pre-trial rulings in light of actual evidence admitted at trial).

⁶⁹ *State v. Dotson*, 450 S.W.2d 1, 76-77 (Tenn. 2014); *see also State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997) ("in view of the strict procedural requirements of Rule 404(b), the decision of the trial court should be afforded no deference unless there has been substantial compliance with the procedural requirements of the Rule.").

⁷⁰ *State v. DuBose*, 953 S.W.2d 649 (Tenn. 1997) (trial court failed to comply substantially with Rule 404(b) procedures by failing to place findings on the record during hearing; appellate court reviews admissibility based upon evidence presented at hearing and without deference to trial judge's determination but nonetheless upholds admissibility); *State v. Sexton*, 368 S.W.3d 371, 406 (Tenn. 2012) ("the inadequacy of the proceeding, standing alone, would not serve as a basis for exclusion.").

request by the defendant. In 2014, the Rule was amended to broaden the notice provision.⁷¹ West Virginia Evidence Rule 404(b) currently reads:

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice Required.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *Any party seeking the admission of evidence pursuant to this subsection must:*

(A) provide reasonable notice of the general nature and the specific and precise purpose for which the evidence is being offered by the party at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

The current provision differs from its federal counterpart in three ways: 1) it does not require an opponent to request pre-trial notice of other acts evidence; 2) it requires all proponents, including defendants, to provide pre-trial notice in all cases (the language of the notice provision is not confined to criminal cases); and 3) it requires notice of the "specific and precise purpose for which the evidence is being offered" at trial.⁷² As a result of this amendment, the West Virginia Supreme Court of Appeals has held that a criminal defendant seeking to introduce Rule 404(b) evidence must now comply with the same notice and articulation requirements that the prosecution must follow.⁷³

State v. McGinnis is the seminal West Virginia case on the proper procedures for admitting Rule 404(b) evidence, and it inspired the contemporary Rule.⁷⁴ In that murder prosecution, the court did not focus on pre-trial notice, but demanded precise articulation of the purpose for Rule 404(b) evidence by the prosecution and by the trial court during trial. The *McGinnis* court rejected a recitation of all permissible purposes for other acts evidence and demanded that "the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury

⁷¹ See *State v. Zuccaro*, 799 S.E.2d 559, n. 12 (S.Ct. App. W.V. 2017) (upholding exclusion of other acts evidence proffered by the defense in a murder prosecution).

⁷² See *id.* (explaining that "modifications to the language included 'broad[ening]' the requirement of reasonable notice to every party, not just the state in a criminal prosecution, of the general nature of and the specific and precise purpose for which the evidence is being offered by the party at trial.").

⁷³ *Id.* (rejecting defendant's argument to apply relaxed standards to other acts evidence offered by a criminal defendant and finding no constitutional violation as a result).

⁷⁴ *State v. McGinnis*, 455 S.E.2d 516 (S.Ct. App. W.V. 1994).

must be instructed to limit its consideration of the evidence to only that purpose.”⁷⁵ The court found this safeguard “necessary to prevent prosecutorial abuse and overreaching.”⁷⁶ The court also chastised the trial judge for failure to articulate a Rule 403 balancing analysis on the record: “when admitting evidence under Rule 404(b), the record must clearly reveal the analysis the trial court used to comply with the mandates of Rule 403.”⁷⁷ The notice provisions were added to the West Virginia Rule thereafter, requiring precise articulation prior to trial to facilitate this detailed analysis.

The West Virginia cases mandate very precise articulation of purpose by the proponent and precise record findings by the trial court during an *in camera* hearing to support admissibility of Rule 404(b) evidence, and lower courts are sometimes reversed for failure to police these requirements carefully.⁷⁸ West Virginia courts sometimes relax those requirements, however. In *State v. Zacks*, the trial judge conducted an *in camera* hearing as required by *McGinnis* prior to allowing testimony concerning the defendant’s other acts.⁷⁹ On appeal of his conviction, the defendant claimed that the trial court had not identified precisely the relevance of his other acts or performed a Rule 403 balancing test supporting admissibility on the record. Although even appellate counsel for the State conceded that the trial court’s *in camera* findings did “not live up to appellate counsel’s expectations,” the appellate court found them sufficient to support the relevance and probative effect of the other acts evidence and affirmed. Notwithstanding case law suggesting the need for “precise” articulation of the Rule 404(b) analysis, therefore, West Virginia appellate courts may excuse general findings favoring admissibility in some cases.⁸⁰

State v. Graham addressed the sufficiency of pre-trial notice more directly.⁸¹ In that case, the defendant challenged the content of the Rule 404(b) pre-trial notice provided by the prosecution.

⁷⁵ *Id.* at 523. The *McGinnis* court also held that that the admissibility of Rule 404(b) evidence must be determined as a preliminary matter by the trial judge after an *in camera* hearing pursuant to Rule 104(a) by a preponderance of the evidence and not as a matter of conditional relevance under Rule 104(b). *Id.* at 527.

⁷⁶ *Id.* at 524. (finding that “[t]he burden is squarely on the prosecution to identify, with particularity, the specific purpose for which the evidence is being offered.”).

⁷⁷ *Id.*

⁷⁸ See *State v. MacFarland*, 721 S.E.2d 62, 73 (S.Ct. App. W.V. 2011)(concluding that the circuit court’s failure to conduct the balancing test required by Rule 403 on the record was erroneous because “If the factors used by the circuit court in conducting the Rule 403 balancing test do not appear on the record, this Court is unable to effectively review the circuit court’s decision to admit the evidence in question.”); *State v. Jonathon B.*, 737 S.E.2d 257, 266 (S.Ct. App. W.V. 2012)(finding that the circuit court abused its discretion by allowing other acts evidence to be admitted without holding a *McGinnis* hearing to fully consider all of the evidentiary requirements with regard to the pornographic file names on the defendant’s computer); *Stafford v. Rocky Hollow Coal Co.*, 482 S.E.2d 210, 217 (S.Ct. App. W.V. 1996)(“It is obvious that the trial court abused its discretion when it failed to comply with the gate-keeping requirement for the admissibility of prior bad acts.”).

⁷⁹ *State v. Zacks*, 513 S.E.2d 911 (S.Ct. App. W.V. 1998).

⁸⁰ *Id.* at n. 3 (“While the circuit court did not comply with the technical mandate of *McGinnis*, we have previously supported the admission of bad acts evidence under Rule 404(b) in cases where the circuit court’s actions, though not “ideal,” were adequate to show it has lived up to the spirit of *McGinnis*.”).

⁸¹ *State v. Graham*, 541 S.E.2d 341 (S. Ct. App. W.V. 2000).

The appellate court found the notice sufficient where “[t]he text of the notice specifically contain[ed] the style, the date, and the case number of the defendant’s prior conviction... [and] also state[d] that the purpose of the evidence [was] to prove the defendant’s lustful disposition toward children.”⁸²

West Virginia courts also excuse the pre-trial notice requirement altogether in appropriate circumstances, and the good cause exception to the pre-trial notice requirement has been utilized to permit use of Rule 404(b) evidence not anticipated by the prosecution prior to trial. In *State v. Mongold*, the prosecution stated before trial that it did not anticipate using any Rule 404(b) evidence, but was permitted to prove past acts of child abuse by the defendant during its rebuttal case.⁸³ The prosecution argued that it was unaware of the need for any other acts evidence until after the presentation of the defense, and the trial court found good cause to excuse pre-trial notice. The appellate court found that the trial court did not abuse its discretion in finding good cause where “Mr. Mongold put on apparently unanticipated extensive evidence regarding his good relationship with children, and evidence, including expert testimony, suggesting that Hannah’s death could have been caused accidentally while playing the game of ‘airplane.’”⁸⁴

⁸² *Id.* Although the content of the notice was not challenged in the attempted murder prosecution in *State v. Lewis*, the opinion set forth the detailed notice given in that case, which provides some indication of the type of notice given at the trial level in West Virginia:

The proposed 404(b) evidence shows that the Defendant was convicted of Domestic Battery on or about October 13th 2011. This incident occurred only nine months prior to the brutal attack on Ms. Thomas. According to Trooper See’s complaint, on February 15th 2011, the Defendant accused Ms. Thomas (who was his wife at the time) of being with a boyfriend. He then attacked her in their apartment. He started strangling her and said that “he was going to kill her.” At one point in the struggle he pulled out a knife and put it to her chest, and later cut her on her hand. * * *

This evidence clearly shows that the Defendant had a motive, jealousy, to commit the crime at hand. It further shows that the Defendant actually did intend to kill Ms. Thomas. Indeed, the Indictment charges the Defendant with Attempted Murder, and the State must prove that the Defendant actually intended to kill Ms. [Thomas] and not just maliciously wound her. The Defendant’s statement that “he was going to kill her” is very good evidence on that point. Lastly, it shows that the Defendant had a common scheme or plan to use a knife to kill Ms. Thomas. The Defendant used a knife in both the February and November attacks.

State v. Lewis, 797 S.E.2d 605, 609 (S.Ct. App. W.V. 2017).

⁸³ *State v. Mongold*, 647 S.E.2d 539 (S.Ct. App. WV. 2007).

⁸⁴ *Id.* at 548; *see also* *State v. Graham*, 541 S.E.2d 341 (S. Ct. App. W.V. 2000)(prosecutorial disclosure of Rule 404(b) evidence outside the original time frame mandated by the circuit court was not untimely because the defendant still received notice of the State’s intent to use the evidence approximately three months and fourteen days prior to trial).

B. Protective Balancing Tests

In *Huddleston v. United States*, the Supreme Court emphasized the importance of a Rule 403 balancing in connection with the admission of other acts evidence pursuant to Federal Rule of Evidence 404(b).⁸⁵ The standard Rule 403 balance permits the exclusion of relevant evidence whenever its probative value is “substantially outweighed” by a danger of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁸⁶ Of course, the risk of unfair propensity prejudice is the most salient in connection with the admission of a criminal defendant’s uncharged misdeeds through Rule 404(b). Although a Rule 403 balancing may suffice to exclude such evidence, the test favors admissibility by requiring that probative value be “substantially outweighed” by such prejudice. Some states have counterparts to Rule 404(b) that modify the traditional Rule 403 balance to offer criminal defendants greater protection and to err in favor of exclusion of other acts evidence in close cases.

1. Excluding Other Acts Evidence When Unfair Prejudice “Outweighs” Proper Probative Value

A few states have made a modest alteration to the standard Rule 403 balance by eliminating the modifier “substantially” from the balancing test applicable to Rule 404(b) evidence. State analogues to Federal Rule of Evidence 404(b) in Massachusetts, Minnesota, and Tennessee modify the Rule 403 balancing test traditionally applicable to other acts evidence in this way.⁸⁷ In these jurisdictions, other acts evidence will be excluded whenever unfair prejudice outweighs probative value at all – even if the prejudice does not “substantially” outweigh probative value. The balancing test in these states still favors admission slightly by requiring that unfair prejudice outweigh probative value, but offers more protection than the standard Rule 403 weighing.

- Massachusetts

There are no Massachusetts Rules of Evidence. Instead, there is a “guide” from the Supreme Judicial Court Advisory Committee on Massachusetts Evidence law as it exists today.⁸⁸ Massachusetts Guide to Evidence Section 404(b) alters the balancing applicable to other acts evidence as follows:

⁸⁵*Huddleston v. United States*, 485 U.S. 681 (1988).

⁸⁶ Fed. R. Evid. 403.

⁸⁷ See Mass. Guide to Evid. Section 404(b) (“However, evidence of other bad acts is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk.”); Minn. R. Evid. 404(b) (admitting other acts evidence only if “the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.”); Tenn. R. Evid. 404(b) (“The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.”).

⁸⁸ See Mass. Guide to Evid. Section 102 (“The sections contained in this Guide summarize the law of evidence applied in proceedings in the courts of the Commonwealth of Massachusetts as set forth in the Massachusetts General Laws, common law, and rules of court, and as required by the Constitutions of the United States and Massachusetts.”).

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. However, *evidence of other bad acts is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk.* Evidence of such an act is not admissible in a criminal case against a defendant who was prosecuted for that act and acquitted.⁸⁹

This more protective balancing test for other acts evidence offered against criminal defendants was announced definitively in *Commonwealth v. Crayton* in 2014.⁹⁰ In that prosecution for possession of child pornography, the trial judge admitted several pornographic sketches of underage girls found in the defendant's jail cell some ten months after the charged incident to show the defendant's "knowledge" and "state of mind," even though the only real issue in dispute was the defendant's identity as the perpetrator. On appeal, the Supreme Judicial Court of Massachusetts noted some disagreement in the Massachusetts case law regarding the appropriate standard for weighing other acts evidence, with some courts applying a traditional Rule 403 balancing test and others suggesting a higher standard. The court concluded that "because 'other bad acts' evidence is 'inherently prejudicial,' it makes sense to impose a more exacting standard on its admissibility than the standard applicable to other evidence."⁹¹ Therefore, the court held that other acts evidence would be excluded "where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk."⁹²

Applying this standard, the appellate court found that admission of the other acts was erroneous because the jury was instructed "to consider the hand-drawn sketches only as to issues that were not in dispute" and because "the drawings had only a general similarity to the child pornography found on the computer." Therefore, "the risk was enormous that the jury would use the drawings for the forbidden purpose of identifying the defendant as the person who viewed the child pornography on computer no. two based on his bad character and propensity to possess child pornography."⁹³

⁸⁹ Massachusetts is one of the jurisdictions that alters the *Huddleston* rule of conditional relevance for proof of other acts by a criminal defendant, at least with respect to acquitted acts.

⁹⁰ *Commonwealth v. Crayton*, 21 N.E.3d 157, n. 27 (Supreme Judicial Court of Massachusetts 2014).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 177.

The addition of this more protective balancing test has not prevented prosecutorial reliance on other acts evidence in appropriate cases and Massachusetts courts continue to uphold the admission of prior bad acts against criminal defendants for proper purposes.⁹⁴ Nor has the more protective balancing test completely prevented the questionable reliance on other act evidence by the prosecution in Massachusetts cases. In *Commonwealth v. Mazariego*, the defendant was charged with the murder of prostitute.⁹⁵ He admitted being present at the scene of the crime, having sexual relations with the victim, and failing to pay her. Importantly, he claimed that his accomplice, who was also present, was the one who killed her. The trial judge admitted the defendant's "history of bringing prostitutes to the same location" and the appellate court affirmed, stating that prior relations with prostitutes were relevant to show intent, similarity in location of past encounters, absence of mistake, and the defendant's level of involvement in planning the crime.⁹⁶ At least one Massachusetts court has noted, however, that the more protective balancing test could be outcome determinative in some cases.⁹⁷

- Minnesota

Minnesota Evidence Rule 404(b) also contains a more protective balancing test for criminal cases, as follows:

(b) Other crimes, wrongs, or acts. Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless 1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; 2) the prosecutor clearly indicates what the evidence will be offered to prove; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) *the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant*. Evidence of past sexual conduct of the

⁹⁴ See *Commonwealth v. Miller*, 56 N.E.3d 168 (Supreme Judicial Court of Massachusetts 2016) (evidence of domestic violence committed by defendant against his girlfriend, which led to confrontation between defendant and murder victim, properly admitted to show "contentious nature" of relationship between defendant and victim, which provided motive for killing); *Commonwealth v. Forte*, 14 N.E.3d 900 (Supreme Judicial Court of Massachusetts 2014) (instances of defendant's aggressive conduct in 16 hours preceding murder of homeless man admissible to illustrate angry state of mind); *Commonwealth v. McGee*, 4 N.E. 3d 256 (Supreme Judicial Court of Massachusetts 2014) (photograph of defendant holding a firearm that could have been the one used in the crime was more probative as to the means of committing the crime than it was prejudicial propensity evidence).

⁹⁵ *Commonwealth v. Mazariego*, 47 N.E.3d 420 (Supreme Judicial Court of Massachusetts 2016).

⁹⁶ *Id.*

⁹⁷ See *Commonwealth v. Christie*, 89 Mass. App. Ct. 665, 667, n.2 (2016) ("Had the judge had the benefit of the [more protective balancing test] he may, of course, have concluded that the challenged evidence was not admissible.").

victim in prosecutions involving criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct is governed by rule 412.⁹⁸

Much like the Massachusetts cases, Minnesota Supreme Court cases were inconsistent in articulating the balancing test applicable to Rule 404(b) evidence.⁹⁹ In 2006, Minnesota Evidence Rule 404(b) was amended to clarify that other acts evidence should be excluded in criminal cases whenever probative value is “outweighed” by unfair prejudice, even if not “substantially” outweighed by such prejudice.¹⁰⁰ The Rule was amended to reflect the Minnesota Supreme Court’s “longstanding view that because of the great potential for misuse of this evidence, the trial judge should exclude the evidence in the close case.”¹⁰¹ The Advisory Committee for the Minnesota Evidence Rules noted that “[a] slight balance in favor of unfair prejudice requires exclusion” pursuant to this modified balancing test.¹⁰²

This more protective balancing test leads to careful weighing of probative value and unfair prejudice in Minnesota and leads to the exclusion of other acts evidence in some cases.¹⁰³ That said, the Minnesota courts still find other acts evidence sufficiently probative to overcome this protective test in many cases.¹⁰⁴

⁹⁸ Minnesota Rule 404(b) also contains heightened notice and articulation standards as discussed in the previous section. Minnesota is also one of the states that demands “clear and convincing” proof of crimes, wrongs, or other acts.

⁹⁹ Minn. R. Evid. 404(b), Advisory Committee Comment to 2006 amendment.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² “We have repeatedly stated that if the issue of admissibility of other-crime evidence is, in the trial court’s view unclear, the trial court should give the benefit of the doubt to the defendant and exclude the evidence.” *State v. Sprei*, 139 N.W.2d 167, 172 (Minn. 1965).

¹⁰³ *See State v. Fardan*, 773 N.W.2d 303 (Minn. 2009)(evidence of another robbery committed with same firearm on same night as charged felony murder was admissible under Rule 404(b) to show intent and lack of accident in charged shooting where defense argued lack of intent, but distinct sexual assaults committed on same night without firearm were more prejudicial than probative and should have been excluded); *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006)(finding acts of sexual abuse 35 years prior to charged offense too dissimilar and remote to be probative as to whether current victim was mistaken and that any value was outweighed by prejudice where the government had little need for the evidence); *Angus v. State*, 695 N.W.2d 109, 120 (Minn.2005) (providing “guidance” for retrial after post-conviction relief and finding that prosecution had insufficient “need” for prior bad act evidence to justify prejudice to defendant; dissent forcefully arguing that prior bad act evidence was necessary to combat defense theory that defendant was an innocent bystander).

¹⁰⁴ *See e.g.*, *State v. Welle*, 870 N.W.2d 360 (Minn. 2015) (reversing court of appeals and affirming trial court’s admission of two prior assaults in which defendant punched a victim in the head and falsely claimed self- defense to rebut defendant’s claim of self-defense in instant murder/manslaughter prosecution: “Welle’s pattern of shifting blame and falsely asserting self-defense is relevant to one or more of the elements of Welle’s self-defense claim.”); *State v. Campbell*, 861 N.W.2d 95, 101 (Minn. 2015) (finding any alleged error in admitting evidence of previous shots fired incident harmless, but noting that “[i]f it is unclear whether the ...[404(b)] evidence is admissible, the benefit of the doubt should be given to the defendant and the evidence should be excluded.”); *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009) (“If it is ‘a close call’ whether the evidence should be admitted, the trial court should exclude it” and

- Tennessee

In addition to the many procedural protections incorporated into Tennessee’s counterpart to Rule 404(b) discussed above, Tennessee Rule of Evidence 404(b)(4) also alters the traditional Rule 403 balancing test with respect to evidence of other crimes, wrongs, or acts. This standard eliminates the modifier “substantially” in the traditional Rule 403 standard and provides that a “court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.”¹⁰⁵ The Tennessee courts have explained that this alteration in the required balancing is designed to facilitate Tennessee’s “restrictive approach” to evidence of other crimes, wrongs, or acts:

However, the test in Rule 404(b) for balancing probative value against prejudicial effect differs from that established in Rule 403. To be excluded under Rule 403, the danger of unfair prejudice must “substantially outweigh” the probative value. Under Rule 404(b), however, the danger of unfair prejudice must simply “outweigh” the probative value. The restrictive approach of Rule 404(b) recognizes that evidence of other crimes, wrongs or acts carries a significant danger of unfair prejudice.¹⁰⁶

This balance should result in the exclusion of other acts evidence whenever “the unfair prejudice outweighs the probative value or is dangerously close to tipping the scales.”¹⁰⁷ The combination of this more protective balancing test with the other procedural protections required by the Tennessee Rule serves to generate careful consideration of other acts evidence, as well as routine findings of error in the admission of such evidence.¹⁰⁸ Tennessee’s version of Rule 404(b) is thus

upholding admissibility of pattern of drive by shootings in murder prosecution for later drive-by shooting that killed bystander notwithstanding significant potential for unfair prejudice because trial was a bench trial) (citation omitted); *State v. Washington-Davis*, 867 N.W.2d 222 (Minn. Ct. App. 2015) (rejecting appellant’s challenge to testimony by alleged victims of prostitution scheme about defendant’s conduct before date of charged conspiracy “because it tended to show appellant’s intent, knowledge, absence of mistake or accident, and common scheme or plan.”).

¹⁰⁵ Tenn. R. Evid. 404(b)(4).

¹⁰⁶ *State v. DuBose*, 953 S.W.2d 649, 654 (Tenn. 1997)(citing *Tennessee Law of Evidence*, § 404.7 at 172).

¹⁰⁷ *See State v. Luellen*, 867 S.W.2d 736, 741 (Tenn. Ct. App. 1992).

¹⁰⁸ *See State v. Sexton*, 368 S.W.3d 371, 403 (Tenn. 2012) (“contrary to the requirements for admission under Rule 404(b), the unfair prejudicial effect of the alleged sex abuse outweighed the probative value as to motive.”); *State v. Gilliland*, 22 S.W.3d 266, 270 (Tenn. 2000) (trial court abused discretion in admitting evidence of prior shooting in felony murder trial because probative value was outweighed by unfair prejudice, but error was harmless due to overwhelming proper evidence of defendant’s guilt); *State v. McCary*, 922 S.W.2d 511 (Tenn. 1996)(explaining Tennessee’s restrictive approach and reversing sexual assault convictions due to trial court’s error in allowing testimony concerning identical uncharged assaults); *State v. Bordis*, 905 S.W.2d 214 (Tenn. 1995)(explaining restrictive approach to other acts evidence and reversing murder conviction based upon starvation death of three-month old child due to prosecution proof of defendant’s lifestyle that produced intentional neglect, including visits to gay bars, drinking, illicit sexual conduct, and prior arrests); *State v. Rounsaville*, 701 S.W.2d. 817 (Tenn. 1985) (reversing forgery conviction based upon admission of testimony from bank teller that defendant had attempted unsuccessfully to pass a forged instrument on another occasion); *State v. Fleece*, 925 S.W.2d 558 (Tenn. Crim. App.

treated as a rule of “exclusion” as a result of the numerous procedural and substantive protections it contains. Although the Tennessee Rule also demands a hearing outside the presence of the jury, the Tennessee Supreme Court has recognized that pre-trial rulings balancing probative value against unfair prejudice may need to be reconsidered during trial once the court can fairly evaluate other evidence presented at trial.¹⁰⁹

2. Excluding Other Acts Evidence in Criminal Cases Unless Probative Value “Outweighs” Unfair Prejudice

Two states have gone one step further and have adopted a balancing test that favors exclusion of other acts evidence by requiring the proper probative value of such evidence to “outweigh” any unfair prejudice. In Pennsylvania and Virginia, therefore, the appropriate probative value of a criminal defendant’s uncharged acts must be stronger than the unfair propensity inferences likely to be drawn from the evidence. Because this balancing sets exclusion as the default when both sides of the scale are equally weighted, it offers more protection against improper use of other acts evidence.

- Pennsylvania

The Pennsylvania Evidence Rules were adopted in 1998, enshrining Pennsylvania common law evidentiary principles in a code.¹¹⁰ Pennsylvania Rule of Evidence 404(b) is very similar to its federal counterpart with one major difference.¹¹¹ Pennsylvania Rule 404(b)(2) demands that other acts evidence presented in a criminal case clear a higher hurdle than that required in federal cases, providing for more stringent balancing, as follows:

(b) Crimes, Wrongs or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a

1995) (reversing DUI conviction where negligible probative value of defendant’s restricted license at the time of the offense was outweighed by the prejudicial suggestion that defendant had a prior DUI conviction); *State v. Luellen*, 867 S.W.2d 736, 741 (Tenn. Ct. App. 1992) (reversing convictions for possession with intent to distribute cocaine due to introduction of three prior acts of drug possession. Court found prior offenses admitted for the proper purpose of proving defendant’s knowledge and intent, which were contested, but found that the evidence failed the balancing test where the probative value of the other acts evidence was diminished by other evidence of knowledge and intent, thus making prejudice outweigh probative value).

¹⁰⁹ See *State v. Gilley*, 173 S.W.3d 1, 6 (Tenn. 2005) (“the existence of a material issue at trial and the balancing of the probative value and unfair prejudice—require consideration of the evidence presented at trial. Thus, trial courts must be cognizant that if pretrial evidentiary rulings are made, they may need to be reconsidered or revised based on the evidence presented at trial.”).

¹¹⁰ *Commonwealth v. Horvath*, 781 A.2d 1243 (Pa. Super. 2001).

¹¹¹ In addition to providing for more protective balancing in criminal cases of other acts evidence, Pennsylvania Rule 404(b) does not require criminal defendants to request notice of other acts evidence and imposes a general obligation on the prosecution to provide reasonable notice in advance of trial (unless excused for good cause) of the “general nature of any such evidence the prosecutor intends to offer at trial.” PA. R. EVID. 404(b)(3).

particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.*

Therefore, the Pennsylvania Rule favors exclusion of other acts evidence in criminal cases unless legitimate probative value eclipses any risk of prejudice to the defendant.

This rule of “exclusion” notwithstanding, the Pennsylvania cases reveal a steady flow of other acts evidence admitted against criminal defendants. Such evidence is routinely admitted to show common plan, intent or modus operandi.¹¹² And the Pennsylvania cases reveal that other acts evidence can survive the more protective balancing test even in the absence of “active contest” by the defendant.¹¹³

Although the Pennsylvania opinions generally do not emphasize the more restrictive balancing test, it has been utilized to exclude other acts evidence against Pennsylvania defendants in some cases. In *Commonwealth v. Santiago*, the prosecution in a murder case was permitted to introduce evidence that the defendant moved up a scheduled trip and left the country shortly after the alleged murder in an effort to show flight and consciousness of guilt.¹¹⁴ In addition, the government sought to prove that the defendant failed to inform his parole officer of the change in his plans, suggesting that he was in such a hurry to flee that he was willing to violate the terms of his parole.¹¹⁵ The trial court refused to allow such other acts evidence and the appellate court upheld that ruling, relying on the protective balancing test in Pennsylvania Rule 404(b)(2). Specifically, the court found that the probative value of the defendant’s parole violation in demonstrating consciousness of guilt was insufficient to outweigh the likely prejudice that would result from the jury learning that the defendant was already “on parole.”¹¹⁶ Therefore, even though

¹¹² See e.g., *Commonwealth v. Hicks*, 156 A.3d 1114 (Pa. 2017)(evidence of defendant’s prior assaults on other women constituted admissible other crimes evidence); *Commonwealth v. Johnson*, 160 A.3d 127, 145 (Pa. 2017) (rejecting trial court’s application of “identity” purpose for proving defendant’s prior drug partnership, but affirming admission of act where it was necessary to prove charged offense of murder in the course of a heroin robbery); *Commonwealth v. Arrington*, 86 A.3d 831 (Pa. 2014) (probative value of evidence of defendant’s prior crimes committed against three other girlfriends to show common scheme to control girlfriends through violence and intimidation, outweighed prejudicial effect to defendant from admission of this evidence); *Commonwealth v. Boczkowski* 846 A.2d 75 (Pa. 2004) (affirming admission of evidence regarding murder of wife prior to victim of charged murder to show absence of mistake or accident).

¹¹³ See *Commonwealth v. Boczkowski*, 846 A.2d 75 (Pa. 2004) (“the defendant does not have to actually forward a formal defense of accident, or even present an argument along those lines, before the Commonwealth may have a practical need to exclude the theory of accidental death”).

¹¹⁴ *Commonwealth v. Santiago*, 822 A.2d 716, 728 (Pa. Super. 2003).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

the government's proffered purpose in offering this other act evidence did not depend upon a propensity inference about the defendant's criminal tendencies for its value, it could not survive heightened balancing.¹¹⁷

- Virginia

Virginia's evidence rules have long been a product of its common law. In 2012, however, the Virginia Supreme Court enacted a body of evidence rules designed to bring coherence to the Virginia law of evidence.¹¹⁸ Although the Virginia Rules bear a close resemblance to the Federal Rules of Evidence in many respects, they include some important distinctions.¹¹⁹ One place where the Virginia Rules depart slightly from federal practice is with respect to admissibility of other acts evidence. The Virginia Rule applies a more rigorous balancing standard to such evidence, as follows:

Virginia Supreme Court Rule 2:404

(b) Other Crimes, Wrongs, or Acts. Except as provided in Rule 2:413 or by statute, evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. *However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.*

The common law of Virginia from which this Rule was recently adapted reflects a cautious approach to other acts evidence. The Virginia courts analyze common plan and scheme evidence narrowly, insist upon truly idiosyncratic evidence to show identity, and regulate the slippery purpose of intent with care.¹²⁰ For example, *Donahue v. Commonwealth* was a prosecution for

¹¹⁷ *Id.*; see also *Commonwealth v. Horvath*, 781 A.2d 1243 (Pa. Super. 2001) (conduct underlying previous convictions based upon the events that formed the basis for charged offense was admissible, but fact of "conviction" arising out of that conduct was more prejudicial than probative and could not be admitted).

¹¹⁸ Jeffrey Bellin, *The Virginia and Federal Rules of Evidence: A Concise Comparison with Commentary* (2015).

¹¹⁹ *Id.*

¹²⁰ See e.g., *Walker v. Commonwealth*, 770 S.E.2d 197 (Va. 2015) (analogizing Rule 2:404(b) to rules for joinder of crimes and finding a series of four drug sales involving identical participants in same neighborhood over a two week period *not* part of a "common scheme or plan"); *Pryor v. Commonwealth*, 661 S.E.2d 820 (Va. 2008) (erroneous to allow videotape of later drug transaction to go to jury room to prove identity in connection with earlier drug sale; even assuming the later transaction was somehow relevant to corroborate defendant's visits to the location, its probative value could not overcome prejudice to defendant); *Scates v. Commonwealth*, 553 S.E.2d 756, 763 (Va. 2001) (reversing conviction for burglary with unforced entry where prosecution introduced testimony that the defendant used credit cards to break into "homes"; there was no use of a credit card in the charged offense and the testimony prejudiced the defendant by suggesting multiple other offenses).

possession with intent to distribute marijuana and PCP.¹²¹ At trial, the defendant argued that the marijuana and PCP found in her apartment belonged to her husband and that she was not involved in its distribution. Over her objection, and much like many federal district courts, the Virginia trial court admitted her prior conviction for distribution of PCP to establish her “intent” to distribute drugs on the charged occasion. The Virginia Supreme Court reversed her conviction, however, finding the admission of her previous drug sale erroneous where its probative value depended on her propensity to sell drugs and did not outweigh its prejudice to her.¹²² Although decisions to exclude other acts evidence like *Donahue* rarely rest exclusively on the heightened balancing test, that test reflects the overall tenor of the cautious approach to other acts evidence in Virginia.

C. Active Contest Requirement

Some recent federal opinions have suggested that other acts evidence should not be admitted against a criminal defendant unless that defendant “actively contests” an issue to which the other acts evidence is probative. Although opinions in many states discuss the importance of assessing trial disputes in considering the admissibility of other acts evidence, New Jersey Rule of Evidence 404(b) expressly requires a “dispute” regarding issues proved by other acts evidence, as follows:

(b) Other Crimes, Wrongs, or Acts. Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident *when such matters are relevant to a material issue in dispute*.¹²³

The Editor’s comments to the Rule explain that this language was added to New Jersey’s version of Rule 404(b) to emphasize that ordinarily other crimes evidence is admissible only to prove “some other fact in issue,” and not a general disposition to commit crimes or other wrongs.¹²⁴

New Jersey courts characterize Rule 404(b) as one of “exclusion” and have noted that the approach to such evidence in the federal courts is more “permissive” than the New Jersey approach.¹²⁵ The New Jersey Supreme Court has set out a four-part test that a proponent of such evidence must satisfy:

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;

¹²¹ *Donahue v. Commonwealth*, 300 S.E.2d 768 (Va. 1983).

¹²² *Id.*

¹²³ N.J. Evid. R. 404(b) (emphasis added).

¹²⁴ Editor’s Comments to N.J. Evid. Rule 404.

¹²⁵ *State v. Cofield*, 605 A.2d 230, 233 (N.J. 1992).

3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.¹²⁶

The New Jersey Supreme Court has emphasized that the material issue “must be genuinely disputed” under the first prong of the analysis¹²⁷ and has explained what it means for a material issue to be in dispute:

In determining whether 404(b) evidence bears on a material issue, the Court should consider whether the matter was projected by the defense as arguable before trial, raised by the defense at trial, or was one that the defense refused to concede. Further, the other-crimes evidence must be necessary for the proof of the disputed element. Indeed, in assessing the fourth prong, courts should consider whether the matter can be proved adequately by other evidence.¹²⁸

The New Jersey appellate courts, therefore, routinely examine the arguments presented at trial to determine whether admitted uncharged acts evidence helped to resolve issues genuinely in dispute. Many New Jersey opinions find a sufficient trial dispute by the defense to satisfy the first requirement of the test.¹²⁹ In several cases, however, the New Jersey Supreme Court has reversed convictions due to the admission of uncharged bad acts not necessary to resolve any disputed issue

¹²⁶ *Id.* Although this formulation suggests more protective balancing akin to that required in Massachusetts, Minnesota, and Tennessee, New Jersey courts have not clearly articulated an intent to enhance the balancing standard and make inconsistent references to the balancing standard.

¹²⁷ *Id.* at 235.

¹²⁸ *State v. P.S.*, 997 A.2d 163, 180 (N.J. 2010) (discussing New Jersey’s restrictive approach to other acts evidence and reversing sexual assault conviction based upon trial court’s erroneous decision to permit evidence of very different sexual assault against a different victim) (citing *State v. Stevens*, 558 A.2d 833 (1989) and *State v. Marrero*, 691 A.2d 293 (1997)).

¹²⁹ *State v. Garrison*, 155 A.3d 996, 1003-04 (N.J. 2017) (notwithstanding defendant’s argument that his state of mind was “not genuinely contested” because he maintained that no sexual assault occurred, trial court properly admitted evidence of uncharged strip poker game with child victim in another state in sexual assault prosecution where defendant actively argued at trial that the child victim was the “aggressor” and that any inappropriate actions originated with her); *State v. Lykes*, 933 A.2d 1274 (N.J. 2007) (trial court did not err in permitting prosecution to cross-examine defendant concerning prior uncharged handling of cocaine where “defendant steadfastly urged that the sole issue in the case was whether he knew that the vials contained cocaine”); *State v. G.S.*, 678 A.2d 1092 (N.J. 1996)(evidence of prior sexual abuse of child in Monmouth County was relevant to dispute regarding whether the sexual contacts with same child in Sussex County were “inadvertent, accidental or unplanned” and to explain child’s delay in reporting abuse where defendant challenged her credibility on that basis); *State v. Oliver*, 627 A.2d 144 (N.J. 1993) (permitting evidence of uncharged assaults on women at defendant’s home when others were present downstairs to prove feasibility of occurrence in instant case; defense suggested that assault would not be possible without other occupants of house overhearing it); *State v. Parker*, 2007 WL 1425486 (N.J. App. 2007) (affirming admission of distinctive physical abuse of girlfriend in prosecution for manslaughter of child where the question of whether defendant inflicted injuries on the child inadvertently, while disciplining him, was material to the issues in dispute); *State v. Cusick*, 530 A.2d 806 (N.J. App. 1986) (holding other sexual assaults admissible at trial to prove lack of mistake where defendant argued sexual contact with victim was inadvertent).

at trial.¹³⁰ That said, the court has not always required a defendant to “actively” dispute a particular element to support admissibility of uncharged misconduct. In *State v. Stevens*, a police officer was charged with an unlawful search of a female motorist for purposes of sexual gratification.¹³¹ Over a defense objection, the prosecution was permitted to introduce evidence of prior uncharged instances in which the officer searched or sexually assaulted a female using his authority as a public officer in order to demonstrate the defendant’s “intent.” The New Jersey Supreme Court affirmed, notwithstanding the defendant’s failure to argue mistake or to actively dispute his intent:

Despite defendant’s denial that the searches occurred, the State was required to prove both their occurrence and defendant’s unlawful purpose in conducting the searches. Thus, defendant’s unlawful purpose was a genuine issue in the case. Defendant’s denial that the searches occurred did not relieve the State of its burden to prove that his purpose was to gratify his sexual desires, and not merely to discharge his official duties.¹³²

Analysis in *State v. G.V.*, however, suggested that the New Jersey Supreme Court was more concerned about “active contest” than it was about the prosecution’s reliance on propensity inferences.¹³³ In that case, the court found that the trial court erred in allowing testimony from the older sister of the victim in a sexual assault prosecution that she too was assaulted by the defendant because there was no dispute about “intent” or “mistake”:

[I]n a case involving a horrendous course of patent sexual depravity which continued for years, there was no defense that atrocious acts were simply misinterpreted expressions of fatherly affection ... Nor could it be fairly said that if the defendant committed the acts in question, there was a material factual dispute with regard to whether he was seeking sexual gratification. Neither absence of intent or accident or inadvertence or motive were genuinely at issue as to the main crime of sexual assault.¹³⁴

¹³⁰ See *State v. J.M.*, 137 A.3d 490 (N.J. 2016) (in prosecution of massage therapist for sexually assaulting a customer, error to allow previous customer’s testimony about a similar sexual assault; “Defendant does not argue that the alleged sexual assault of E.S. was consensual or accidental; rather, he maintains that the sexual assault never occurred. As such, A.W.’s testimony is inadmissible to establish motive, intent, or absence of mistake because defendant’s state of mind is not a “genuinely contested” issue in this case.”); *Carlucci v. State*, 85 A.3d 965, 976 (N.J. 2014) (reversing conviction because defendant’s statements to officer revealing that she had been in trouble for crack cocaine in the past should not have been admitted under Rule 404(b) where the defendant did not dispute her knowledge of cocaine at trial or the fact that confiscated baggies field tested positive for cocaine); *State v. G.V.*, 744 A.2d 137 (N.J. 2000)(trial court erred in allowing testimony from older sister of victim in sexual assault prosecution that she too was assaulted by the defendant where there was no dispute about “intent” or “mistake”).

¹³¹ *State v. Stevens*, 558 A.2d 833 (N.J. 1989).

¹³² *Id.*

¹³³ *State v. G.V.*, 744 A.2d 137 (N.J. 2000).

¹³⁴ *Id.*

The court went on to advise that the older sister's testimony would be admissible during the retrial of the case if the defendant specifically raised a "vendetta defense," accusing the victim of fabricating allegations due to her anger over her parents' divorce. The dissent disagreed that such a dispute raised by the defense would justify admission of the prior offense, arguing that the assault on the victim's older sister would undermine the victim's vendetta or bias only by suggesting the defendant's propensity to commit unlawful sexual assaults on his children.¹³⁵ The express requirement of a "material issue in dispute" has resulted in detailed analysis of trial disputes in evaluating admissibility of other acts evidence in New Jersey.

D. Inextricably Intertwined Provisions

As the Committee has previously seen, several federal courts have sought to restrict the admission of uncharged misconduct evidence by limiting or eliminating the use of the vague "inextricably intertwined" doctrine to circumvent Rule 404(b) analysis.¹³⁶ Although some states similarly have attempted to restrict this doctrine through judicial opinions, a few states have incorporated language into their evidence rules designed to distinguish "other" acts requiring Rule 404(b) analysis from related or inextricably intertwined acts that need not survive such scrutiny.¹³⁷

1. Kentucky

Kentucky Rule 404(b)(2) expressly provides for the admissibility of inextricably intertwined acts, as follows:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

¹³⁵ *Id.*

¹³⁶ See *United States v. Green*, 617 F.3d 233, 246-47 (3d Cir. 2010); *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010); *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000).

¹³⁷ Michigan has rejected a "*res gestae*" or inextricably intertwined exception to its Rule 404(b) through case law, as have several federal circuits. See *People v. Jackson*, 869 N.W.2d 253, 274 (Mich. 2015) ("As the plain language of the rule makes clear, MRE 404(b) applies to evidence of "crimes, wrongs, or acts" other than the "conduct at issue in the case" that may give rise to a character-to-conduct inference."). Many states, however, recognize something akin to the doctrine in their case law. For example, Minnesota allows admission of "immediate episode evidence" outside the strictures of its Rule 404(b) counterpart: "Immediate-episode evidence is admissible 'where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the [events at issue].'" *State v. Washington-Davis*, 867 N.W.2d 222 (Minn. Ct. App. 2015) (quoting *State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009)) (admitting evidence of violence and financial control over defendant's victims in prostitution scheme).

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

According to the Kentucky Supreme Court, “[t]he key to understanding this exception is the word inextricably. The exception relates only to evidence that must come in because it is so interwoven with the evidence of the crime charged that its introduction is unavoidable.”¹³⁸ This admonition notwithstanding, the Kentucky courts frequently admit uncharged acts of criminal defendants through the inextricably intertwined provision, noting that KRE 404(b)(2) is “intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background and perspective.”¹³⁹ The Kentucky Supreme Court has relied heavily on the federal precedent

¹³⁸ Major v. Commonwealth, 177 S.W.3d 700, 707 (Ky. 2005) (quoting Funk v. Commonwealth, 842 S.W.2d 476, 480 (Ky.1993)).

¹³⁹ Norton v. Commonwealth, 890 S.W.2d 632, 638 (Ky.App.1994) (citations omitted) (In trial for trafficking in LSD, admission of portions of audiotape concerning proposed sale of marijuana did not violate rule against admission of evidence of other crimes, wrongs, or acts; negotiations regarding marijuana were inextricably intertwined with negotiations regarding LSD because “[i]n this instance, separation of the evidence as contemplated by Norton, if not impossible in the first place, would have seriously and adversely affected the Commonwealth’s ability to present the case to the jury”); *see also* Keene v. Commonwealth, 2016 WL 7665438 (Ky. 2016) (defendant’s uncharged assaultive behavior was inextricably intertwined with the evidence of rape because it explained inconsistency in victim’s statements highlighted by defense); Johnson v. Commonwealth, 2014 WL 4160215 (Ky. 2014) (collateral crimes evidence of defendant’s conviction for trafficking in marijuana was admissible in case where defendant stood accused of manufacturing methamphetamine because it arose from the police search of a hotel room prior to the discovery of the methamphetamine manufacturing laboratory at his residence and was inextricably intertwined with instant case); Kerr v. Commonwealth, 400 S.W.3d 250 (Ky. 2013) (trial court did not abuse its discretion in admitting evidence that police had two arrest warrants for defendant that were unrelated to charged drug trafficking offenses because they were inextricably intertwined with police surveillance of defendant’s hotel room, which led to defendant being charged with drug trafficking offenses; “KRE 404(b)(2) allows the Commonwealth to present a complete, unfragmented picture of the crime and investigation[,]” including a “picture of the circumstances surrounding how the crime was discovered”); Clark v. Commonwealth, 267 S.W.3d 668 (Ky. 2008) (trial court did not err in permitting mother of minor victims in sexual offense prosecution to testify that she did not immediately confront defendant upon discovering the abuse because he had physically assaulted her in the past and she was afraid of him; the setting and context of the events surrounding the mother’s discovery of the sexual abuse, and her reasons for not contemporaneously confronting the defendant about it, were germane to the overall sequence of events surrounding the crimes and to the events which led to them being reported to authorities and were inextricably intertwined with other evidence critical to the case); Mackin v. Commonwealth, 2008 WL 4291605 (Ky. 2008) (pornographic books found in defendant’s home were inextricably intertwined with other evidence in rape prosecution where the defendant allegedly used the books as a vehicle to assuage the victim’s concerns about incest and as a springboard to further their sexual relationship); Major v. Commonwealth, 177 S.W.3d 700, 707 (Ky. 2005) (evidence that murder defendant was incarcerated at the time of his telephone confession to his father was admissible in murder prosecution as being “inextricably intertwined” with other evidence essential to the case; defendant’s incarceration provided the setting and context within which police investigation took place and within which defendant called his father and confessed); Furnish v. Commonwealth, 95 S.W.3d 34, 46 (Ky. 2002) (defendant’s use of crack cocaine following murder showed that he used victim’s ATM card to obtain money to purchase the drugs; clearly, such evidence is intertwined with the evidence pertaining to the other charges). *See also* Price v. Commonwealth, 31 S.W.3d 885 (Ky. 2000) (upholding trial court’s decision to try murder and rape charges jointly where evidence of the defendant’s prior and subsequent sexual abuse of his step-daughter was so inextricably connected with the issues concerning his motive and intent to kill his wife that the evidence would have been admissible even in a separate trial for murder).

admitting inextricably intertwined acts outside the strictures of Rule 404(b) to justify this approach.¹⁴⁰ In only a few cases have Kentucky courts rejected reliance on the inextricably intertwined provision and found error in the admission of uncharged acts admitted on that basis.¹⁴¹ The codification of the inextricably intertwined “exception” to the prohibition on other acts evidence, therefore, appears to have increased reliance on the doctrine in Kentucky.

2. Louisiana

Louisiana Rule 404(B) also expressly permits “integral” uncharged acts to be admitted through the Louisiana provision governing other crimes, wrongs, or acts, as follows:

B. Other crimes, wrongs or acts.

(1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, *or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.*¹⁴²

The Louisiana Supreme Court has explained that the additional basis for admitting uncharged acts was codified to replace the doctrine of *res gestae* that formerly governed admissibility of uncharged acts connected with the charged offense:

[U]nder La. C.E. art. 404(B)(1) evidence of other crimes, wrongs or acts may be introduced when it relates to conduct, formerly referred to as *res gestae*, that ‘constitutes an integral part of the act or transaction that is the subject of the present proceeding.’ *Res gestae* events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the state could not accurately present its case without reference to

¹⁴⁰ See *Kerr v. Commonwealth*, 400 S.W.3d 250 (Ky. 2013) (quoting federal cases and treatises supporting admissibility of inextricably intertwined acts).

¹⁴¹ See *Gonzalez v. Commonwealth*, No. 2011-SC-00466, 2013 WL 1188020 (Ky. 2013) (defendant’s inflammatory threats against police officer, who was not involved in investigating charged murder, during interview were not inextricably intertwined with proof of shooting and could have been redacted; error harmless); *Major v. Commonwealth*, 177 S.W.3d 700, 707 (Ky. 2005) (reversing defendant’s conviction for murder of his wife, due, in part, to testimony of his daughter as to her later sexual abuse; though terrible, it had no relevance to the issues involved in the murder; nor could it be said to be “inextricably intertwined” with the other evidence).

¹⁴² La. C.E. art. 404(B)(1)(emphasis added). Pretrial notice by the prosecution of its intention to use evidence forming part of the *res gestae* is not required. *State v. Catchings*, 440 So.2d 153 (La. App. 1983); *State v. Jackson*, 450 So.2d 621 (La. 1984).

them. A close proximity in time and location is required between the charged offense and the other crimes evidence “to insure that “the purpose served by admission of other crimes evidence is not to depict defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.”¹⁴³

Notwithstanding this language that suggests a cautious approach to the doctrine, the court has also characterized the doctrine in Louisiana as a “broad” one that covers “not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime if a continuous chain of events is evident under the circumstances.”¹⁴⁴ In *State v. Taylor*, the court found that the integral acts doctrine applied to allow evidence of a seven state crime spree, involving armed robbery and the shooting of a police officer, that followed the charged murder of a car salesman. Although the court acknowledged that there was not close proximity in time and location between the charged murder and the subsequent uncharged crime spree, the court found that defendant’s argument that he lacked the requisite intent to support his first degree murder charge required the prosecution to complete the story and demonstrate the full context in which the charged murder took place.¹⁴⁵

In the earlier case of *State v. Colomb*, the Louisiana Supreme Court reinstated a conviction reversed by the Louisiana Court of Appeals, finding that the appellate court had applied an “unduly restrictive” approach to integral acts evidence.¹⁴⁶ In that case, the trial court in a felon-in-possession prosecution permitted evidence regarding drugs possessed by the defendant at the time he was apprehended in a van in possession of the weapon. The appellate court reversed, holding that the evidence of drug possession did not relate to conduct forming an integral part of the charged offense, but that, even assuming defendant’s drug possession constituted part of the *res gestae* or an integral component of his firearms possession, it could discern “no relevant reason, other than prejudice for its admission into evidence.”¹⁴⁷ The Louisiana Supreme Court disagreed because the defendant claimed at trial that the van and the gun belonged to his wife, that he had borrowed the vehicle to run some morning errands, and that he had not realized she had placed the weapon in the glove compartment of the vehicle until he braked suddenly at the order of the officers. As a result of the defendant’s argument that he lacked dominion and control or knowledge of the weapon, the court held that evidence of the defendant’s marijuana possession at the time of his arrest allowed jurors to draw necessary inferences based upon the defendant’s contemporaneous conduct and reinstated the conviction.¹⁴⁸

¹⁴³ *State v. Taylor*, 838 So.2d 729, 741 (2003) (quoting *State v. Colomb*, 747 So.2d 1074, 1076 (La. 1999)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 743 (the evidence of defendant’s uncharged crime spree “placed the killing of the victim in its proper context, *i.e.*, as the starting point of grand scheme to rob the bank in Lamoni, Iowa, and then to make a run for the Mexican border, as if the entire episode were an out-take from defendant’s favorite movie, *Natural Born Killers*.”).

¹⁴⁶ *State v. Colomb*, 747 So.2d 1074, 1076 (La. 1999).

¹⁴⁷ *Id.* at 1075.

¹⁴⁸ *Id.* at 1077. The court also noted, without resolving, a conflict in the Louisiana cases concerning the applicability of the Rule 403 balancing test to integral acts evidence. *Id.*; *see also State v. Edwards*, 406 So.2d 1331, 1350–1351 (La.1981)(affirming trial court’s admission of testimony as part of the *res gestae* in defendant’s trial for murder that

Although many of the uncharged acts admitted through the Louisiana “integral acts” provision would likely fit within permissible purposes identified by the Rule, such as knowledge, intent, motive, common plan or scheme, some might not.¹⁴⁹

3. Texas

Texas Evidence Rule 404(b) exempts evidence of “extraneous acts” from its notice requirement where those acts arise “in the same transaction” as the charged offense, as follows:

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence--other than that arising in the same transaction--in its case-in-chief.*

In addition to being exempt from the Texas notice obligation, “same transaction” evidence is frequently admitted in criminal cases in Texas outside the limits of Rule 404(b). The “same transaction” doctrine is described by the Texas courts in this manner:

on the same night, the defendant suggested they “go make a hit;” that defendant stole wine from a grocery store; that they followed another woman to a college campus after the murder in an attempt to snatch her purse; and that they went to a convenience store looking for still another “hustle” until the appearance of a police officer terminated the night’s activities); *State v. Brewington*, 601 So.2d 656 (La. 1992)(reinstating murder conviction after appellate court reversed due to admission of “other bad acts” evidence; trial court did not err in allowing evidence that the accused possessed crack cocaine and a .357 caliber pistol (not used in the shooting) less than two hours before the victim’s death because the evidence, “formed an inseparable part of the state’s substantial circumstantial evidence linking him to the shooting,” and because evidence of cocaine possession was “an integral part of the act or transaction that was the subject of the present proceeding.”); *State v. Argo*, 476 So.2d 409, 412 (La. App. 1985) (evidence of assault and car thefts committed during seven or eight hours before attempted murder of police officer was admissible as *res gestae* when crimes were so closely related and intertwined that the state could not have presented complete story of the charged offense without them).

¹⁴⁹ See *State v. Sharp*, 810 So.2d 1179, 1196 (La. App. 2002) (arson of unoccupied residence hours before shooting and at a different location was admissible in homicide prosecution as integral part of events leading up to killing); *State v. Bilbo*, 719 So.2d 1134, 1139 (La. App. 1998) (La. App. 1998) (in defendant’s prosecution for kidnaping and rape of Louisiana woman, evidence that defendant had stolen a car from a Florida car dealership six days earlier by threatening car salesman and had driven the stolen car to California and was involved in an accident in Louisiana just before kidnaping victim who stopped to see if she could assist defendant and his companions with car trouble, was admissible conduct constituting an “integral part” of the charged kidnaping); *State v. Camp*, 580 So.2d 957, 960 (La.App. 5th Cir.1991)(in prosecution for simple burglary, reference to knife taken from defendant after his apprehension was admissible as “integral part” of burglary; even though carrying concealed weapon was not element of that offense).

extraneous offense evidence may also be admissible as same-transaction contextual evidence, where “several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction. In that situation, ‘the jury is entitled to know all [the] relevant surrounding facts and circumstances of the charged offense; an offense is not tried in a vacuum. Evidence admitted under the same transaction exception is considered general evidence to be used for all purposes and does not require a limiting instruction. “[S]ame-transaction contextual evidence is admissible only when the [charged] offense would make little or no sense without also bringing in [the same-transaction contextual] evidence.” In other words, same-transaction contextual evidence is admissible only “where such evidence is *necessary* to the jury’s understanding of the instant offense.”¹⁵⁰

Occasionally, extraneous acts evidence offered under a “same transaction” theory is rejected.¹⁵¹ Texas courts frequently admit other bad acts evidence under this doctrine without requiring notice or limiting instructions, however.¹⁵²

¹⁵⁰ Beltran v. State, 2017 WL 943437 (Tex. App. 2017) (quotations omitted).

¹⁵¹ Rogers v. State, 853 S.W.2d 29, 34 (Tex. Crim. App. 1993)(evidence of the defendant’s possession of marijuana was not admissible same transaction evidence in a case where defendant was prosecuted for two burglaries and for possession of methamphetamine; evidence of marijuana possession at the time of arrest was not *necessary* to the jury’s understanding).

¹⁵² See Moreno v. State, 721 S.W.2d 295, 301(Tex. Crim. App. 1986) (in defendant’s prosecution for murder of state trooper during traffic stop, permissible to introduce evidence that the defendant killed his brother and sister-in-law one-half hour prior to charged murder of trooper; “[i]t is well settled that where one offense or transaction is one continuous episode, or another offense or transaction is a part of the case on trial or blended or closely interwoven therewith, proof of all the facts is proper.”)(quoting Mitchell v. State, 650 S.W.2d 801, 811 (Tex.Cr.App.1983)); Prible v. State, 175 S.W.3d 724, 731-32 (Tex. Crim. App. 2005)(although defendant was charged only with causing the deaths of two adults, the trial court properly permitted the State to introduce evidence that their three children also died from smoke inhalation caused by a fire defendant set to conceal evidence; “the murders of Steve and Nilda and the deaths, by smoke inhalation, of their three children were so connected that they formed an indivisible criminal transaction.”); Devoe v. State, 354 S.W.3d 457, 470 (Tex. Crim. App. 2011)(where defendant was charged with murders of two teenage girls, evidence of his murder of three others, assault of another, theft of a weapon and multiple car thefts was all admissible same transaction evidence where the charged murders took place during a three-day crime spree and the defendant did not rest between incidents; the trial court was within its discretion in concluding that “[t]he evidence is so intermingled between all of the events that occurred it would just—it would be impossible to do so without leaving a hole, leaving a gaping hole in the State’s case.”); Beltran v. State, 2017 WL 943437 (Tex. App. 2017) (evidence that defendant was dealing drugs was admissible same-transaction evidence in prosecution for sexual assault of a minor where evidence was offered to show that victim’s mother allowed defendant to sexually assault victim in exchange for cocaine; “[e]xtraneous offense evidence may also be admissible as same-transaction contextual evidence, where several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction.”).

TAB 6C

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Case Law Digest on Rule 404(b)
Date: April 1, 2018

As part of the project on possible amendments to Rule 404(b), the Committee directed the Reporter to prepare a case law digest to help the Committee to determine whether Rule 404(b) was being carefully and rigorously applied.¹ The case law digest was included as part of the body of the Reporter's memo on Rule 404(b) at the last meeting. But it has grown to such an extent that I decided to break it off into a separate memo.

Rule 404(b) Case Law Digest

Note: This digest covers circuit court cases decided since April, 2017. It covers all the reported circuit court cases with any meaningful discussion.

As to district court cases, only a sample from the last year is included as there are just too many that are too alike.

Cases that are new --- not found in the memo for the last meeting ---are asterisked.

¹ In a prior memo, the Reporter provided a few examples of courts that by rote admitted bad acts on the ground that Rule 404(b) is a "rule of inclusion." The DOJ suggested that these examples were selective and essentially low-hanging fruit. So at the direction of the Committee the Reporter began to compile the recent case law. It should be said that it was never argued that all courts have treated Rule 404(b) as an open door to admissibility of bad acts. Indeed the Rule 404(b) project began as a response to the Seventh and Third Circuit cases that began to require a rigorous analysis under Rule 404(b). But there are dozens of cases in which bad acts are admitted with little or no attempt to determine whether they are really admissible for a proper purpose, or whether the acts are unduly prejudicial.

Circuit Court Opinions

1. Evidence Found Improperly Admitted

Not “background” but propensity: *United States v. Steiner*, 847 F.3d 103 (3rd Cir. 2017): In a felon-firearm prosecution, a prior arrest warrant was offered and admitted as “background” to the police investigation. The court found this to be error. Despite the government’s representations, the arrest warrant was not in fact what led the police to the defendant. “The only purpose the arrest warrant served was to improperly suggest that Steiner was predisposed to commit criminal acts.” The court “admonish[ed] the government to take greater care in its representations and not brandish Rule 404(b) so cavalierly.”

Prior drug conviction offered solely for propensity: *United States v. King*, 865 F.3d 848 (6th Cir. 2017): The defendant was charged with laundering what he thought was drug money (but was actually money provided by a confidential informant). On cross-examination of the defendant at trial, the prosecutor raised the defendant’s prior arrest and misdemeanor conviction for cocaine possession. The court found that there was no ground for introducing the evidence “other than to show that he had a propensity to commit crimes.” The government argued that the defendant opened the door to the drug evidence when he testified about his history of substance abuse to garner juror sympathy. But the court responded that the drug evidence was not contradictory of the defendant’s testimony but rather consistent with it. The court found the error to be harmless.

* **Court finds propensity use, even though the bad acts are responsive rebuttal to the defendant’s argument:** *United States v. Walter*, 870 F.3d 622 (7th Cir. 2017): The defendant was convicted for conspiracy to distribute heroin, after a two-year investigation known as “Operation Blue Knight.” At trial the defendant called two officers to the stand and elicited detailed testimony about the thoroughness (or lack thereof) of the operation, including the fact that several cooperating witnesses had been contacted. But the defendant’s examination steered away from the fact that Blue Knight had uncovered two instances in which the defendant had sold heroin. On cross-examination, the prosecution elicited the facts about the defendant’s drug activity. The court found this to be error, concluding that the defendant’s drug activity was probative only to show propensity for drug dealing. The government argued that the evidence was offered to clear up a misimpression about Operation Blue Knight that the defendant had created. The court responded that correcting a misimpression is a proper purpose under Rule 404(b); but it was “skeptical that this is the use to which the government intended to put the Operation Blue Knight evidence. The only reason to correct the record was to show that [defendant], contrary to his insinuation, had in fact been caught selling heroin. And the only reason *that* conclusion mattered was to invite the jury to infer that he was likely doing so again in the charged conspiracy.”

Comment: This seems to be one of the rare cases in which a court provides *more* protection than Rule 404(b) actually mandates. The bad act evidence was raised only in rebuttal and only to correct a misleading impression about the government investigation. That should be allowed under Rule 404(b).

* **Bad act insufficiently similar to the charged crime to be offered to prove intent:** *United States v. Preston*, 873 F.3d 829 (9th Cir. 2017): The defendant was charged with sexually abusing a boy who was the son of a friend. At trial the court allowed the defendant's wife to testify that five years after the alleged crime, she saw the defendant masturbating to a picture of their eight-year-old stepson with the son wearing only underwear. The trial court admitted the masturbation scenario for purposes of showing intent, but the court of appeals found this to be error. The court noted that when a bad act is offered to prove intent, it must be similar to the crime charged, otherwise "it does not tell the jury anything about what the defendant intended --- unless, of course, one argues (impermissibly) that the other act establishes that the defendant has criminal propensities." In this case the court found that the trial court erred in assuming that "the act of masturbating to a picture of a boy in underwear --- a non-criminal act --- is similar to the crime of real-life sex abuse of a child." The court also noted that the evidence should have been excluded under Rule 403, because the defendant "did not put intent at issue" and the evidence was highly prejudicial.

2. Questionable Application of "Inextricably Intertwined"

* **Background evidence is "intrinsic":** *United States v. Robles-Alvarez*, 874 F.3d 46 (1st Cir. 2017): In a drug conspiracy case, evidence of prior drug transactions was found properly offered as "intrinsic" because absent the evidence "the jury would have been left wondering how the various co-conspirators came together." In other words, it was offered for background, which is a Rule 404(b) purpose in most of the cases. It makes no sense to have the same kind of evidence found "intrinsic" in some courts and covered by Rule 404(b) in other courts.

"Background" is "intrinsic" evidence: *United States v. Lucas*, 849 F.3d 638 (5th Cir. 2017): The defendant was tried for wire fraud arising from a fraudulent real estate investment. The defendant had told investors that Watson was providing him information about the investment. The court found no error in admitting the fact that the defendant had met that man at a methadone clinic. Because that background explained the true nature of the relationship between the defendant and the man, it was "intrinsic" to the crime charged.

Comment: Where the defendant met Watson was not direct evidence of the crime, and would have been more usefully and fairly analyzed as background evidence under Rule 404(b).

"Contributing to the narrative": *United States v. Payne-Owens*, 845 F.3d 868 (8th Cir. 2017): The court affirmed the defendant's conviction for being a felon and an unlawful drug user in possession of a firearm. An ATF agent who investigated the defendant obtained a search warrant to access the defendant's Facebook account and found photos showing the defendant with ammunition and a handgun and holding up four fingers --- which was a sign associated with a gang. The court found no abuse of discretion in admission of the gang evidence. It reasoned that the evidence was admissible under Rule 404(b) because it tended to prove the defendant's motive to possess a real gun. But the court also stated that the Rule was inapplicable because the gang evidence was "intrinsic." The court found the evidence intrinsic because it "contributed to the narrative of the charged crime" and "it helped to provide a total picture." The court provided no

analysis that would explain how these descriptions made the evidence “intrinsic”; and it mentioned no limit on characterizing evidence as intrinsic.

* **Because evidence was “intrinsic” the government’s laundry list of proper purposes was not problematic, as the evidence was not covered by Rule 404(b): *United States. v. Kearn*, 863 F.3d 1299 (10th Cir. 2017):** The defendant was tried on child pornography charges based on taking and distributing sexual pictures of his 4 ½ year-old daughter. The government moved to admit evidence of other pictures, videos and search histories found on the defendant’s phone and laptop. The purposes asserted were “intent, knowledge, absence of mistake and lack of accident.” The court of appeals found that the list of proper purposes set forth by the government was overbroad, and stated that the government must “precisely articulate” the purpose of the Rule 404(b) evidence. There was no error here, however, because the evidence the government sought to admit was “intrinsic” to the crime charged. It stated that because the defendant was on trial for child pornography, “sexually explicit images on his phone and search terms indicating his mental state did not need to come into trial under 404(b). They were the very point of the trial.”

Comment: The requirement of specific articulation that the court imposed is salutary, but might have been harshly applied here. All of the specified purposes went to the defendant’s mental state, and the shading between “absence of mistake,” “lack of accident” and “intent” are fine indeed. It wasn’t as if the government threw in “plan, motive, opportunity, identity” etc.

So there probably was not an error under Rule 404(b), which makes it all the more unfortunate that the court resolved the case on the ground that the evidence was “intrinsic” to the crime. Because it was not. The defendant was charged with taking explicit pictures of his daughter and sharing them. The other pictures and search history went to possessing other child pornography. Simply because it was on the same computer does not make it intrinsic --- any more than evidence of a prior bank robbery is “intrinsic” when found in the same house as the evidence of a charged bank robbery.

* **Expansive and questionable application of inextricably intertwined: *United States v. Nerey*, 877 F.3d 956 (11th Cir. 2017):** The court affirmed the defendant’s convictions for paying and receiving health care kickbacks. It held that the trial judge did not abuse discretion in admitting evidence of the defendant’s fraudulent involvement with other home health care agencies. The court reasoned that this background evidence was probative of how he became involved with the home health care agencies giving rise to the charges and thus was inextricably intertwined with the charges. The court noted that this evidence provided “context” but context is also a non-character purpose often evaluated by courts under Rule 404(b). It is notable that the defendant argued that the evidence was not inextricably intertwined because the prior frauds were not part of the same series of transactions. The court agreed with that point but responded that “inextricably intertwined and same transaction are two separate exceptions to the same rule against impermissible extrinsic evidence.” That argument illustrates how formless and permissive the “inextricably intertwined” doctrine really is. In another part of its analysis the court refers to *three* separate doctrines --- “same transaction,” “necessary to complete the story,” and “inextricably intertwined.” It notes that the defendant had a “fundamental misunderstanding” of the doctrine.

“Plan” evidence is inextricably intertwined: *United States v. Horner*, 853 F.3d 1201 (11th Cir. 2017): The court affirmed convictions of a husband and wife for assisting in the preparation of a fraudulent tax return and filing a false individual income tax return. The couple failed to tell their tax preparer that they had deposited substantial amounts of cash into business and personal accounts, and none of the funds was included on their tax returns. The IRS determined that the cash amounted to diverted income. The court concluded that the government’s evidence of the cash deposits was admissible and references to them as “structuring” were permissible. The court reasoned that the deposits were inextricably linked to the tax charges because “the cash deposits formed the basis of the tax fraud itself.” The court also held that evidence of their taxes and finances for other years was also inextricably intertwined because it was part of the same plan. Alternatively, the court concluded that the evidence of conduct in other years was relevant to prove motive and intent.

Comment: The court seems right about the deposits that were the basis of the fraud because you couldn’t prove that there was tax fraud without proving the deposits. But the evidence of other years is not direct proof of the crime and should be analyzed under Rule 404(b).

3. Reasoned Application of “Inextricably Intertwined”

* **Evidence that the defendant took money from a coconspirator was “intrinsic” to the conspiracy charged:** *United States v. Monteiro*, 871 F.3d 99 (1st Cir. 2017): In a trial on charges of drug conspiracy, an informant testified that the defendant took DEA-supplied money from him and never provided the drugs that the informant was intending to purchase. The defendant argued that this testimony should have been barred under Rule 404(b). But the court found that Rule 404(b) was inapplicable, because the act was “intrinsic” to the conspiracy charged, as it involved a drug deal made during the conspiracy.

Comment: As stated in the Reporter’s memo, the most straightforward use of the “inextricably intertwined doctrine is in conspiracy cases, where the act proven is one in furtherance of the conspiracy.

* **In a sex trafficking case, evidence providing information about the defendant’s acts of coercion are not “other acts” and so are not covered by Rule 404(b):** *United States v. Carson*, 870 F.3d 584 (7th Cir. 2017): In a sex-trafficking prosecution, the government called witnesses to the defendant’s acts of coercion, abuse, and taking money away from victims. These witnesses were members (victims) of the sex-trafficking ring, but they were not named in the indictment. The witnesses testified to the defendant raping and taking away money from other victims. The court found that Rule 404(b) did not apply to this evidence, as it was direct evidence of the defendant’s criminal activity. The fact that other women were present for these acts was itself evidence of coercion. As the court put it, the presence of another “is not extraneous or evidence of other bad acts, it is a key part of the message from the defendant that ‘I control you and can do as I please and I have so much power that no one else will come to your aid, even if they are sitting right in the room.’”

Comment: The court’s “other act” analysis is based on a direct/indirect distinction and is a useful example for line-drawing.

* **Limiting “inextricably intertwined” to direct evidence of the charged crime: *United States v. Wells*, 877 F.3d 1099, as amended 879 F.3d 900 (9th Cir. 2017):** The defendant was convicted of two murders of fellow-workers at a Coast Guard facility. The government’s theory was that the defendant was a difficult employee who liked to do things his own way and thought he could do so because he was indispensable --- but during an illness the two fellow-workers stepped up and did his job competently; and when the defendant returned to work he received more supervision and perceived indignities. The trial admitted evidence of a number of instances over a ten-year period before the murders in which the defendant engaged in insubordination or had disagreements with co-workers. The trial court admitted all this evidence as “inextricably intertwined” but the court of appeals found this ruling to be error. The court stated that “[i]n determining whether particular evidence is necessary to the prosecution’s ‘coherent and comprehensible story’ we ask whether the evidence bears *directly* on the charged crime.” [Emphasis added; thus, following the direct/indirect distinction in the Committee’s working draft of an amendment to Rule 404(b).] It concluded that none of the events of insubordination or workplace difficulties bore “directly” on the charged crime, because all were offered to create the inference that his attitude and personality in the workplace led him to retaliate.

4. Questionable Applications of Intent or Knowledge

Intent in a drug case: *United States v. Henry*, 848 F.3d 1 (1st Cir. 2017): The defendant was convicted of possession of crack cocaine with intent to distribute. His defense was that the officers lied in claiming that they had found drugs on him. The court found no error in admitting the defendant’s prior drug conviction to prove intent. It stated that it had “repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute.” The court emphasized that the defendant’s failure to challenge intent did not remove the issue of intent from the case. The court did, however, step back from the government’s argument that “evidence of a prior drug distribution offense is *always* relevant under Rule 404(b) to show knowledge and intent in a prosecution for possession of a controlled substance with intent to distribute.” The court noted that “in many cases, impermissible propensity reasoning lurks as one of the links in the logical chain of relevance” and “encourage[d] district courts to carefully consider the proponent’s assertion of why a prior conviction has special relevance and examine whether, in the particular case-specific circumstances, the proponent is simply attempting to disguise propensity evidence by artificially affixing it with the label of a permitted Rule 404(b)(2) purpose.” It also noted that the defendant did in a way contest intent, by seeking a lesser included offense instruction for simple possession. [That said, it remains the case that the court found no abuse of discretion in admitting the conviction, even though the trial court did not establish that the conviction was probative of intent independent of a propensity inference.]

Two judges in *Henry* concurred, questioning the First Circuit case law establishing that evidence of prior drug crimes is properly admitted to prove intent to distribute drugs. The judges pointed out that the authority was “contrary to Rule 404(b)” because proof of intent in drug cases proceeds through a propensity inference: “that is, his propensity is to be a seller, rather than a buyer

or user.” The judges found that any error in admitting the bad act was harmless, but noted that “one can make a good argument for going en banc in a future case to reconsider our Rule 404(b)(1) jurisprudence.”

Intent and knowledge in a drug case: *United States v. Lyle*, 856 F.3d 191 (2nd Cir. 2017): The defendant was convicted of charges related to distribution of methamphetamine, including conspiracy. He was arrested in a car containing a large quantity of meth. His defense was that he was a user and not a distributor, and that he did not know that a large quantity of meth was in the car. The trial court admitted evidence that after that arrest, the defendant was found in a hotel room smoking meth, and weighing out baggies of meth on a scale. The court found no error. It stated first that the evidence was inextricably intertwined, because the defendant was charged with conspiracy, and the bad act was evidence in furtherance of the conspiracy --- during the time in which the conspiracy was operating. [This part of the ruling is discussed in Part Two, supra.] Second, the evidence was admissible to show knowledge and intent. The court noted that knowledge and intent was actively disputed by the defendant, and declared that “possession of 14-15 grams of methamphetamine and tools of the drug trade less than a month after he was arrested with the rental car is probative of his knowledge and intent regarding the contents of the rental car.”

Comment: The court’s ruling on intent seems justified because the defendant was actively contesting intent and the act was close in time and involved the same drug --- so its probative value was high. But the court is simply wrong on knowledge. That is because the bad act took place *after* the crime charged. A bad act is properly offered for knowledge when it shows that the defendant learned something from the prior experience --- you are more likely to know about something if it happened before. But by definition you can’t learn from a future experience. So the path of inference for knowledge derived from a future act is just a smokescreen for propensity --- because the bad act shows he was a drug dealer, he must have known he was dealing drugs before.

“Intent” but no explanation of why the bad act is probative: *United States v. Sterling*, 860 F.3d 233 (4th Cir. 2017): A former CIA agent was convicted of unauthorized retention and disclosure of classified information. He argued on appeal that the trial court erred in admitting evidence that he improperly kept four classified documents --- unrelated to the charges --- in his home. The court stated that a not guilty plea puts the defendant’s intent at issue; it specifically “declined to adopt the rule of some other circuits that evidence of other crimes may not be offered when the defendant unequivocally denies committing the acts charged in the indictment.” The court in conclusory fashion stated that “evidence showing that Sterling improperly retained four classified documents in the past encouraged the proper evidentiary inference that any subsequent retention of classified documents was, if proven, intentional.”

* **Evidence of threats to witnesses properly admitted to show consciousness of guilt, but not properly admitted to prove knowledge or intent:** *United States v. Jones*, 873 F.3d 482 (5th Cir. 2017): In a RICO prosecution, the court held that evidence of that a defendant had threatened and intimidated witnesses was properly admitted under Rule 404(b) to prove “knowledge, intent, and consciousness of guilt.”

Comment: It is hard to see how threatening a witness is evidence of “knowledge” of the crime alleged. It is evidence of knowledge of *guilt* but not that, for example, when he intimidated someone it gave him the necessary knowledge to commit the crime that has already occurred. Likewise, threats to witnesses say little if anything about the intent to commit a prior crime. The crime has already happened, and moreover even if a defendant didn’t intend to commit a crime he might have a motivation to threaten a witness who might testify against him. So while the court is surely correct about consciousness of guilt, the decision is indicative of the loose terminology that is often used when it comes to proper Rule 404(b) purposes.

But at least the court didn’t take the “out” of finding the evidence of intimidation to be “inextricably intertwined” with the charged crimes, as other courts have done.

“Intent” but really propensity: *United States v. Thomas*, 847 F.3d 193 (5th Cir. 2017): The court affirmed the defendant’s convictions for theft from a program receiving federal funds, money laundering and payment structuring, all arising from work the defendant did for the New Orleans Traffic Court. It found no plain error in the admission of evidence of the defendant’s actions prior to the crime charged, in which he submitted inflated and duplicate invoices to the traffic court. The court found that the evidence “was relevant to an issue other than Thomas’s character, as it lessened the likelihood that Thomas committed the charged offenses with innocent intent.” But the court did not explain how the bad act evidence raised an inference of intent to commit the charged crime in any other way than by a propensity inference.

***Bad act evidence offered to rebut absence of mistake was properly admitted in the case-in-chief because at that time it was possible that the defendant *might* defend on that basis:** *United States v. Victor*, 848 F.3d 428 (6th Cir. 2017): The defendant was charged with sexually assaulting his partner. In the case-in-chief, the trial court admitted evidence of physical assault of several former partners (none of these were sexual assaults, and so Rule 413 was not applicable). The government offered the prior assault to prove absence of mistake. The court first noted that under its precedent, Rule 404(b) is a rule of inclusion. [So we know where we are going from there.] The court explained that “while LaVictor ultimately did not assert a defense based on mistake, it was certainly reasonable at the time that the government sought to introduce the evidence that he would make an argument, however tenuous or unconvincing, that the assault was accidental or caused by a mistaken understanding that C.B. had consented to ‘rough sex.’” The court also found that the prior acts of abuse were admissible to prove intent, even though the defendant did not actively contest intent.

Comment: To say that a purpose is in dispute when the defendant *might* end up disputing it, even though tenuous or unconvincing, is essentially to reject any active dispute limitation to Rule 404(b). If the court had been serious about requiring issues to be actively disputed before bad acts can be admissible to prove them, then it would have required the government to wait to the defendant’s case --- and then to allow rebuttal if the defendant actively disputed the issue.

As to intent, there would appear to be no difference between intent and propensity when a bad act is offered to prove intent and the defendant is not even arguing the matter. It is also notable that the court found the prior acts to be similar --- but while they were acts of violence, they were not sexual assaults. Indeed, the government *also* admitted a prior act of sexual assault under Rule 413 --- making the other acts of assault less probative of intent.

* **Prior drug convictions admitted to show knowledge and intent even though these elements were not contested:** *United States v. Wright*, 866 F.3d 899 (8th Cir. 2107): Prior drug convictions were properly admitted to prove intent and knowledge even though the defendant, in his case, specifically admitted those elements. The court found that “by pleading not guilty, Wright put the government to its proof of all elements of the charged crime” and that “it is settled in this circuit that a prior conviction for distributing drugs is relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs.” *See also United States v. LeBeau*, 867 F.3d 960 (8th Cir. 2017) (prior drug conviction essentially automatically admissible to prove intent to enter into a conspiracy to distribute drugs, “even if the defendant has not asserted a defense that puts his statement of mind at issue.”).

* **Prior acts of simple possession were essentially automatically admissible on charges of distribution:** *United States v. Davis*, 867 F.3d 1021 (8th Cir. 2017): The defendant was charged with distribution of methamphetamine and objected to the admission of his eight-year-old conviction of simple possession of meth. The court found no error. Essentially relying on knee jerk precedent, the court stated that “[i]t is settled in this circuit that a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to prove knowledge and intent to commit a current charge of conspiracy to distribute drugs.” The court found that the eight-year time span between the conviction and the crime charged was “sufficiently close” under the court’s precedents.

Prior acts of drug sales and drug use admissible to show intent to distribute: *United States v. Jackson*, 856 F.3d 1187 (8th Cir. 2017): In a case charging heroin distribution, the court found no error in the admission of: 1. Evidence that a search of the defendant’s home at an unrelated time showed that the defendant was involved in drug-dealing, and 2. Testimony of a witness that he and the defendant did heroin together. The court held that 1) Rule 404(b) is a rule of inclusion; 2) pleading not guilty places intent in issue; 3. Prior acts of drug distribution are probative of intent to distribute; and 4. Prior acts of drug *use* are probative of intent to distribute. [So this is as automatic as it gets.]

“Intent” but really propensity: *United States v. LaFontaine*, 847 F.3d 974 (8th Cir. 2017): The court affirmed the defendant’s conviction for making a threat in a 2015 call to the Department of Justice and held that the trial judge did not abuse discretion in admitting a 2013 call by the defendant to a federal court employee. It concluded that the earlier call was relevant to intent, which was the key issue in the case. The court did not explain, however, why a prior threat was relevant to an intent to make a later threat, other than by way of a propensity inference. The court stated that Rule 404(b) is “one of inclusion, such that evidence offered for permissible purposes is presumed admissible absent a contrary determination.”

“Rule of inclusion”, etc.: *United States v. Johnson*, 860 F.3d 1133 (8th Cir. 2017): In a trial on charges of rape and assault, the court admitted the defendant’s prior assault convictions. The court found no error, applying its basic template: 1. Rule 404(b) is a rule of inclusion; 2. By pleading not guilty, the defendant put intent in issue; and 3. Prior acts of assault were probative of intent to commit the charged assault.

“Rule of inclusion,” etc.: *United States v. Riepe*, 858 F.3d 552 (8th Cir. 2017): The defendant was charged with attempted enticement of a minor. The government offered evidence that he had approached other minors previously. The court found no error in the admission of the bad act evidence. It stated that Rule 404(b) is a rule of inclusion; and that the prior acts were probative of intent to entice.

Conclusory application of knowledge and intent: *United States v. Rembert*, 851 F.3d 836 (8th Cir. 2017): The court affirmed the defendant’s firearm and drug convictions and held that the trial judge did not abuse discretion in admitting a video posted on a media website that showed the defendant holding a firearm and smoking what appeared to be marijuana. The court stated that “evidence that a defendant possessed a firearm on a previous occasion is relevant to show knowledge and intent.” The court gave no explanation that this was so absent reliance on a propensity inference.

No explanation of a non-propensity inference: *United States v. Ubaldo*, 859 F.3d 690 (9th Cir. 2017): Affirming the defendant’s conviction for illegally smuggling weapons, the court held that the trial judge did not abuse discretion in admitting evidence of a previous attempt to smuggle weapons, as it was relevant to intent, knowledge and absence of mistake. But it gave no explanation of how this was so absent reliance on a propensity inference.

* **Knowledge in dispute, but prior act not very similar: *United States v. Rodriguez***, 880 F.3d 1151 (9th Cir. 2018): The defendant was convicted of transporting an illegal alien for financial gain. Her defense was that she didn’t know the person transported was an illegal alien --- the person who she transported showed her a border crossing card that was not him, but the defendant presented evidence that she had visual disabilities. The trial court admitted evidence of the defendant’s prior conviction involving fraudulent use of immigration stamps. The court of appeals found no error, reasoning that the conviction established the defendant’s knowledge that aliens use false or fraudulent documents. The court recognized that “[s]omeone’s use of fraudulent immigration stamps is admittedly different in some respects from an impostor’s use of another person’s border crossing card.” But the court concluded nonetheless that the “prior offense was sufficiently similar to provide a logical connection between knowledge that aliens enter the United States using false documents and knowledge that the alien’s border crossing card might not be real or might not belong to him.”

Comment: It is a stretch to say that if when you engage in immigration fraud, you learn all aspects of immigration fraud. But at least the mental state was actively disputed.

5. Questionable Applications of Other Purposes

* **Fuzzy analysis under *modus operandi*; proper purposes rely on propensity inferences:** *United States v. Torrez*, 869 F.3d 291 (4th Cir. 2017): The court affirmed the defendant's first-degree murder conviction and death sentence. The victim was found dead in her room on a military base. The trial judge admitted evidence concerning the defendant's abduction and sexual offenses against two female graduate students a year after the murder, along with evidence that the defendant's electronic media contained violent pornography. The court of appeals found no abuse of discretion. It reasoned that the evidence was relevant and necessary to demonstrate the defendant's *modus operandi*, motive and intent. The pornography showed violence against women who were sleeping, unconscious or restrained. The prior acts involved assaults on women the defendant did not know, took place in the early morning hours, and the motive appeared to be sexual. The court stated that although the crimes were not identical, they need only be "similar enough to be probative of intent."

Comment: The court throws around proper purposes and ends up mixing things up quite a bit. *Modus operandi* is not admitted to prove intent, it is admitted to prove identity --- that the defendant does things in such a unique way that it sets him apart from all other perpetrators in a way that doesn't depend on propensity. Moreover, the court's conclusion that the bad acts are offered to prove motive amounts to the fact that because his motive was to commit a sexually violent act because he had a propensity to do so.

Motive: *United States v. Williston*, 862 F.3d 1023 (10th Cir. 2017): The defendant was charged with murdering the two-year-old daughter of his girlfriend. The trial court admitted evidence that the defendant had previously spanked the girl, often lashed out at her, disciplined her by hitting her, and threw a cup at her. The court found no error and affirmed. It noted first that "Rule 404(b) is a rule of inclusion, and we regularly affirm the admission of other-acts evidence unless it tends to prove *only* a criminal propensity." (emphasis added). The court stated that the bad act evidence proved motive --- that the defendant's history with the girl showed his resentment and thus the "reason" that the defendant would beat her to death.

Comment: Surely the listing of "motive" as a proper purpose must mean more than "he had the same motive to do the bad act as he had to do the charged act." That is just propensity. The most sensible meaning of "motive" is that the bad act gives the defendant the motive to do the charged act --- such as if the victim was going to report the defendant for having done a previous bad act.

* **Intent and knowledge properly applied but questionable as to motive:** *United States v. Rios-Morales*, 878 F.3d 978 (10th Cir. 2017): The defendant was convicted of being part of a drug conspiracy with his brother Omar and Sifuentes. The evidence indicated that drugs were shipped in a car that was transported by truck to the defendant's house. The defendant apparently contended that he didn't know that the car contained drugs and he didn't intend to distribute drugs. The trial court admitted extensive evidence about a prior conspiracy, in which the defendant and Sifuentes made three trips to California to pick up methamphetamine, then sold it in Kansas. This evidence was admitted over a Rule 404(b) objection for purposes of "proving Defendant's

knowledge, motive, and opportunity in the charged conspiracy.” The court found no error in admitting the evidence, but its list of proper purposes differed from that of the trial court: the evidence was properly admitted for “motive, knowledge and intent.” As to the latter two purposes, the court explained that “Mr. Sifuentes’s testimony that defendant had knowingly accompanied and assisted him on prior drug-procurement trips to California was relevant to the highly disputed questions of whether the defendant knew that the car that his brother and Mr. Sifuentes had arranged to leave at his apartment contained drugs and whether he intended to possess those drugs.” The explanation of motive was less convincing. The court explained that the prior conspiracy ended when Sifuentes ran out of money, so the prior conspiracy was relevant to prove “Defendant’s motive to initiate this conspiracy with his brother as a new source of supply for Mr. Sifuentes.” It is difficult to see how this analysis could survive Rule 403. It would not seem necessary to prove that parties entered into a conspiracy because they needed and wanted money --- that’s pretty much why almost everyone enters into a conspiracy. And significant trial time was taken up proving the uncharged conspiracy – apparently about as much time as was taken to prove the conspiracy that was charged. Thus, a good argument can be made that confusion, delay and prejudice substantially outweighed the minimal probative value as to motive.

Comment: Note that the trial court also held that the evidence was admissible to prove “opportunity.” What does that mean? How did the prior conspiracy prove anything about the defendant’s opportunity to enter a new conspiracy? Certainly the defendant was not arguing that he lacked the opportunity, so it could be argued that the trial judge added “opportunity” as part of a laundry list. Interestingly, the court of appeals did not mention opportunity at all.

6. Careful Explanations/Applications of Non-Propensity Inferences, and Active Dispute

* **Similar acts offered to show knowledge where knowledge was in dispute:** *United States v. Parker*, 872 F.3d 1 (1st Cir. 2017): In a prosecution involving interstate transportation of a firearm without a license, the trial court admitted similar gun transactions involving the defendant. These acts were properly offered to show that “Parker was a knowledgeable scheme member and not simply an unknowing innocent.” The court noted that the parties actively disputed knowledge.

* **Similar bad acts properly admitted where the defendant claims mere presence:** *United States v. Blanchard*, 867 F.3d 1 (1st Cir. 2017): In a case involving interstate transportation for purposes of prostitution, the defendant testified that he was merely present when two women engaged in acts of prostitution and was a mere passenger in their trip from Maine to Boston. He also denied posting ads on Backpage advertising the two women. During his cross-examination, the government asked about other acts that occurred after the acts charged --- posting Backpage ads for other women, and prostituting other women. The court of appeals found that these questions were proper, because the defendant’s “ongoing engagement and contact with individuals engaging in prostitution [demonstrated] that it was unlikely that his presence [during the charged events] was mere coincidence.”

* **“Inclusionary approach” but defendants do contest the nature of their relationship:** *United States v. Dupree*, 870 F.3d 62 (2nd Cir. 2017): Defendants were brothers charged with committing and conspiring to commit a drug-related murder. The government offered evidence that two of the brothers had been in a conspiracy to distribute drugs in another state, and in that conspiracy, they often carried guns and protected their turf. The court found that the evidence of an unrelated conspiracy was admissible --- under the circuit’s “inclusionary approach” --- “as probative evidence of defendants’ knowledge of the charged drug-and-murder-related acts, their intent to engage in these acts, and the development of their relationships with each other.”

Comment: The court gives no explanation of how the evidence was probative to show knowledge other than through propensity; the defendants made no argument at trial that they didn’t know what they were doing. So the invocation of knowledge is problematic. Intent is problematic as well if the inference to be derived is that the prior conspiracy establishes intent to commit future drug activity --- and even more problematic because the charge was murder. However, the court is probably justified in finding a different kind of intent --- the intent to engage in drug activity (and defend turf where necessary) *with each other*. The court points out that the defendants disputed the nature of their relationship, arguing that they were simply brothers. Given that defense, the probative value of proving the nature of their relationship does not appear to proceed through a propensity inference.

Requiring an explanation of probative value independent of a propensity inference: *United States v. Repak*, 852 F.3d 230 (3rd Cir. 2017): The defendant was charged with public corruption --- conditioning the issuance of redevelopment grants on personal favors. He challenged the admission of evidence of other solicitations and items he received that were unrelated to those charged. The trial court found the bad act evidence admissible to prove knowledge and intent. The court, after noting that Rule 404(b) was a rule of *exclusion*, found that the trial court had erred in not specifically finding that the evidence was probative of these purposes without involving a propensity inference. The court recognized that the defendant actively contested his mental state. But it also “reiterated the importance of concretely connecting the proffered evidence to a non-propensity purpose.” It found that the government’s proffer and the trial court’s ruling “fell short, failing to explain how evidence of uncharged solicitations would have a tendency to make Repak’s knowledge and intent more probative in the mind of a juror.” The government never explained “how the proffered evidence should work in the mind of a juror to establish knowledge and intent” and the trial court’s analysis was “inexact and fails to adequately link the other-acts evidence to a non-propensity purpose with careful precision.”

Nonetheless the court affirmed because it was itself able to discern a chain of inferences that did not rely on propensity: 1. The prior solicitations showed that the defendant had knowledge that his arrangements did not involve unilateral favors by the grantees; therefore they tended to establish that he knew he was getting favors in the charged transactions as a condition of giving the grants; 2. They also showed intent because they made it more likely “that Repak did not unwittingly solicit and receive [services] without knowing or intending that the services were meant to influence him in his role as . . . Executive Director.” The court also found that the trial court erred in its Rule 403 balancing because all it did was conclude that Rule 403 was satisfied. But the court found that it was apparent that the probative value of the evidence was significant –

because the defendant actively contested his mental state. And the prejudicial effect was diminished by the trial court's limiting instruction and by the fact that the bad-act evidence did not involve criminal convictions (only acts).

Fourth Circuit panel adopts the *Gomez-Caldwell* approach: *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017): The defendant was charged with possession of marijuana with intent to distribute, as well a firearms offense. Six kilograms of marijuana and three firearms were found in a house in which the defendant resided with others. The drugs and guns were found in a locked bedroom and the government had no direct evidence linking the defendant to the bedroom. To establish constructive possession, the government offered and the trial court admitted the defendant's four prior convictions --- one for possession of marijuana and three for possession with intent to distribute. The court found error under Rule 404(b). The bad act evidence was ostensibly offered for purposes of knowledge and intent, but the court found that the relevance for those purposes mostly proceeded through a propensity inference, and where it did not the probative value was nonetheless substantially outweighed by the prejudicial effect. The court made the following points:

1. Following *Caldwell*, the court stated that Rule 404(b) is a rule of *exclusion* --- the references to it as a rule of inclusion are intended to mean only that the list of proper purposes is not exclusive.

2. Possession offenses generally are not relevant to intent to distribute (other than for propensity) because "the *mens rea* requirements for possession and distribution offenses are fundamentally different" --- so because the prior possession offenses did not require specific intent, "the only relevance that conviction could have to his intent to distribute marijuana on a later, unrelated occasion is that it tends to suggest that Defendant is, in general, more likely to distribute drugs because he was involved with drugs in the past."

3. Possession offenses are not always relevant to establish knowledge of the drug for purposes of distribution. That is because "distribution quantities of a drug are often packaged differently than quantities possessed for personal use, rendering a defendant's knowledge of the packaging of a personal use amount of a drug irrelevant to his knowledge of how a distribution amount of the same drug might be packaged." Also, a drug may be distributed in a number of forms, so that possession of one form might not be probative of knowledge of possession of another form.

4. But possession offenses may be relevant to knowledge "if the particular characteristic of the drug used to establish knowledge does not materially vary based on quantity, form, or packaging, for example." Applied to this case, the court found the prior convictions probative of knowledge of the smell of unburnt marijuana. But that probative value did not substantially outweigh the prejudice, because the defendant did not contest that he knew the smell of marijuana. He just claimed he had no access to the marijuana in the locked bedroom. That is, knowledge was not actively contested --- meaning that the probative value of the bad act to prove knowledge was diminished. The court rejected the government's argument that by pleading not guilty, the defendant automatically placed his intent and knowledge at issue for Rule 404(b)

purposes --- if that were so, it would “swallow up the general rule against admission of prior bad acts.”

5. As to the intent-based convictions, they were not sufficiently probative of intent as to the charged crime because of their “lack of factual similarity and temporal proximity.” Given the lack of linkage, the only probative value of the intent-based convictions was through the criminal propensity inference.

6. As to the intent-based convictions, they were probative of knowledge because “past experience with distribution amounts of marijuana makes it more likely that Defendant knew, based on the pervasive smell of marijuana, that there was marijuana inside the residence.” But that probative value was minimal because the defendant did not contest his knowledge of marijuana or the smell --- he contested access.

Comment: The *Hall* majority took pains to establish that its *Gomez/Caldwell*-type analysis was supported by existing Fourth Circuit precedent. It devoted six pages to a rebuttal of the dissenter’s claim that Fourth Circuit precedent allowed virtually automatic admissibility of uncharged drug activity to show intent and knowledge in a drug case. It’s fair to state that the majority’s adoption of a stricter approach for Rule 404(b) evidence is, unfortunately, on shaky ground in terms of Fourth Circuit authority.

* **Similar acts offered to prove mental state where the defendant actively disputed the mental state: *United States v. Cowden*, 882 F.3d 464 (4th Cir. 2018):** The defendant, a police officer was convicted of violating civil rights when he injured an arrestee. He argued that he thought the arrestee posed a threat and he never intended to beat or punish him. The court allowed evidence of two instances, both within two months of the arrest at issue, when the defendant attacked citizens even though they posed no threat. The court found that the bad acts were properly admitted, because they were very similar to the acts charged, and proof of these acts was “necessary” because the defendant actively contested his mental state.

* **Similar conspiracies admissible where defendant claims that he did not know that he was dealing with drug dealers: *United States v. Juarez*, 866 F.3d 622 (5th Cir. 2017):** The defendant, a police officer, was charged with providing assistance to drug dealers. He claimed he did not know they were drug dealers. The trial court admitted evidence that the defendant had provided similar assistance to drug dealers in the past. The court found no error in admitting the evidence. The probative value was high because it provided a strong rebuttal to the defendant’s defense that he didn’t know what was going on.

Absence of mistake: *United States v. Jimenez-Elvirez*, 862 F.3d 527 (5th Cir. 2017): The defendant was convicted of transporting undocumented aliens into the U.S. The trial court admitted his previous conviction for illegally transporting aliens. The court found no error. The government argued that it was “intrinsic” because the same tractor-trailer was used in the prior event. But the court was “skeptical” that there was enough evidence to link the two acts for purposes of finding the prior act to be “intrinsic” to the charged crime. The court found, however, that the prior smuggling event was properly admitted to prove absence of mistake. The defendant

argued that he was in the wrong place at the wrong time, thus actively contesting the mental element. And the prior event involved the same tractor trailer and the two events were only three months apart --- making it less likely that the defendant was clueless as to what was going on.

* **Prior act of violence offered to explain counterintuitive conduct of a victim: *United States v. Mandoka*, 869 F.3d 448 (6th Cir. 2017):** The defendant was charged with sexually abusing his nieces, who lived in his home. The government offered evidence that the defendant abused his wife in front of the children. The court found the evidence to be properly admitted, because it helped to explain why the children delayed in reporting the acts of sexual abuse. The court stated that without the evidence, the jury might have “an incomplete or erroneous understanding of the victims’ behavior.” The court noted that the evidence would not be admissible unless the government could establish a foundation that the victims witnessed or were aware of the abuse. The court’s analysis is careful and thorough.

* **Background and context, and the salutary effect of *Gomez*: *United States v. Mabie*, 862 F.3d 624 (7th Cir. 2017):** The court affirmed the defendant’s convictions for sending threatening letters through the mail and assaulting a deputy U.S. Marshal. The defendant became angry with police officers after they were unable to solve a burglary in which \$25,000 of his equipment was stolen. The defendant became threatening, was convicted in 2008 of mailing threatening communications and interstate communication of a threat, and received an 88-month sentence. He kept sending threatening letters from prison and was charged with mailing threatening communications. The trial judge admitted evidence of the earlier conviction to prove background and provide context that would show the letters at issue were true threats. The court of appeals agreed, noting that the letters contained details and references that could not be understood without knowing about the prior disputes --- accordingly, the probative value for background did not depend on a propensity inference.

Comment: The court’s description of the lower court’s consideration and ruling shows the salutary effect that the Seventh Circuit’s approach to Rule 404(b) evidence can have. The court’s description is as follows:

The government * * * filed a detailed, 32-page memorandum explaining that the purpose of the evidence was to provide background and context and to prove knowledge and motive. Regarding background and context, the government asserted that the evidence was necessary to explain why Mabie’s letters to Sheriff Brown and Deborah Deeba constituted true threats: as shown above, without this evidence—which showed Mabie’s frustration over the failed burglary investigation and his animosity toward Deeba and many others—the letters for which the government charged Mabie would lack meaning. Regarding knowledge, the evidence showed that Deeba knew Reisch, which was necessary for Mabie to draw the conclusion that Deeba and other police officers were incentivized not to investigate the burglary. And regarding motive,

the evidence revealed that Mabie sent letters as an attempt to get his tools back.

The government’s memorandum also rejected the notion that the evidence was offered for propensity purposes—essentially, that Mabie has a knack for threatening people. But insofar as one could draw that propensity inference, the government argued that, under Rule 403, the resulting prejudice did not substantially outweigh the evidence’s probative value—which, as noted above, was extremely high. The government contends that its memorandum linked all of the evidence to a proper, nonpropensity purpose, which complies with *Gomez*’s “chain of reasoning” language. We agree and hold that the government met its burden under *Gomez*.

For its part, the court too complied with *Gomez*. During a pretrial conference, the court instructed Mabie to read *Gomez*, which had issued the week before. The court then called for a hearing on the admissibility of the evidence in light of *Gomez*. At that hearing, the court indicated that, irrespective of the government’s detailed memorandum on admissibility, *Gomez* still required the court to conduct a Rule 403 balancing test, weighing probative value and resulting prejudice against each other.

The court then invited Mabie to respond. Mabie objected to the evidence on relevancy grounds. He also claimed that “the sheer volume” of the evidence would confuse the jury. But at no point did he argue that harm of admitting the evidence would substantially outweigh its probative value.

The court decided to admit the Rule 404(b) evidence. In so doing, the court acknowledged that it looks upon Rule 404(b) evidence “with a jaundiced eye,” but sometimes, such evidence is appropriate. * * *

At trial, the court imposed a limiting instruction applicable to each witness offering Rule 404(b) testimony. Specifically, the court instructed the jury that it could not infer from the government’s evidence that Mabie is a bad person or has the propensity to commit crimes; instead, to the extent that the jury was to consider this evidence, it could do so only for a proper purpose, like background, context, knowledge, and motive.

Finally, at the end of the government’s case, the court gave the jury an evidence-rules “tutorial.” Regarding Rule 403, the court explained that, “even though some evidence can be relevant, I can still exclude it if the probative value is substantially outweighed by the prejudicial effect. In other words, even though it might be relevant, it is just too prejudicial and you might not be able to get past it.”

* **Bad act properly offered to prove intent where the defendant actively disputed intent:** *United States v. Al-Awadi*, 873 F.3d 592 (7th Cir. 2017): The defendant was charged with producing child pornography. He worked in a day-care center, and took a child’s pants down and

photographed her. His defense was that he thought she might have been hurt in an earlier incident while at play, and he was just trying to document any injury. In response to this defense, the trial court admitted evidence that after taking the pictures, the defendant digitally penetrated the child. The court found that this evidence was properly admitted under Rule 404(b) as proof of intent. The court noted that at the trial, the defendant's explanation that he lacked intent was the principal issue in dispute --- he did not contest that he took the pictures. The molestation evidence was, in this context, highly probative to prove that he took the pictures with the intent to make child pornography.

Comment: *Al-Awadi* is a Seventh Circuit case and it shows that the limitations on Rule 404(b) established by that Circuit do not make Rule 404(b) a dead letter by any means. If the government really needs the evidence for a purpose other than propensity, it is likely to be successful.

Note also that many courts would have probably found that the molestation evidence was not covered by Rule 404(b), on the ground that it is "intrinsic" or "completes the story" or is "part of the same criminal episode." But these kinds of limitations on Rule 404(b) are not necessary --- the bad act is easily processed through Rule 404(b) and there is no need to set up a complicated doctrine of "inextricably intertwined" back acts.

* **Prior shooting of a firearm is admissible to show possession of a firearm at the time charged, where the defendant claims mere presence: *United v. Buckner*, 868 F.3d 684 (8th Cir. 2017):** In a felon-firearm prosecution, the trial court admitted evidence of a previous conviction for reckless use of a firearm. The court stated broadly, and without analysis, that prior knowing possession of a firearm is probative of knowledge that a firearm is present on a subsequent occasion. But the court also noted that the defendant's defense was that he didn't know a gun was present. Thus, he was actively disputing knowledge.

* **Carefully considered ruling on motive --- in the Court of Appeals: *United States v. Wells*, 877 F.3d 1099, as amended 879 F.3d 900 (9th Cir. 2017):** The defendant was convicted of two murders of fellow-workers at a Coast Guard facility. The government's theory was that the defendant was a difficult employee who liked to do things his own way and thought he could do so because he was indispensable --- but a change in command in 2011 placed pressure on him to conform, and then when he was ill the two fellow-workers stepped up and did his job competently; and when the defendant returned to work he received more supervision and perceived indignities. The trial admitted evidence of a number of instances over a ten-year period before the murders in which the defendant engaged in insubordination or had disagreements with co-workers. The trial court found that all of the incidents after 2011 were properly admitted to prove motive, but that it was error to admit an incident of subordination that occurred in 2003, as it involved a different manager, was remote in time, and was not related to either of the victims. It concluded that the only possible purpose of the evidence of the 2003 incident was to show propensity. The court also emphasized that the trial court was in error because it failed to conduct a Rule 403 balancing as to any of this evidence.

Absence of Accident: *United States v. Henthorn*, 864 F.3d 1241 (10th Cir. 2017): The defendant was charged with murder, by pushing his wife off a cliff in Rocky Mountain National Park. He claimed it was an accident, she slipped and fell. The circumstances were suspicious --- including the fact that the defendant had taken out a large life insurance policy on his wife shortly before the incident. The trial court admitted evidence of two other incidents, one in which his prior wife died when she was crushed by the family car while the defendant was changing a tire in a remote location (just after the defendant had purchased life insurance on her), and one in which his second wife was injured at a remote cabin when hit with a large wooden beam that the defendant dropped from the roof. The court of appeals found no error in admitting these incidents. It reasoned that the government was not relying on a propensity inference, but rather that “the use of the prior incidents here rests on a logic of improbability that recognizes that prior incidents involving similar circumstances decrease the likelihood that Henthorn lacked the requisite intent, motive, and plan in committing the charged offense. Indeed, the prior incidents make it more likely that the charged offense was the product of design, rather than an accident.”

Comment: The court essentially relied on the “doctrine of chances.” That reliance seems very sound. How many similar tragic accidents can one guy be around ---especially after having bought life insurance? The *Henthorn* court was certainly not engaged in a “knee-jerk” resolution. The entire 17-page opinion is devoted to a careful analysis of Rule 404(b) and 403.

Knowledge: *United States v. Gaskins*, 849 F.3d 1345 (11th Cir. 2017): The court affirmed the defendant’s conviction for sex trafficking of a minor. It held that the trial judge did not abuse discretion in admitting evidence that the defendant drove two other minors to meet clients for prostitution and only later discovered that they were minors. The evidence was offered to prove that the defendant was on notice not to rely on the age listed on a website. The evidence tended to show defendant’s knowledge that the victim in the instant case was a minor.

7. Reverse 404(b) --- Evidence Offered by the Defendant

Not relevant: *United States v. Canales*, 857 F.3d 963 (8th Cir. 2017): In a prosecution for distributing methamphetamine, the defendant claimed that he had been entrapped by the confidential informant. He offered evidence that the CI shot at him because the CI believed the defendant robbed his friend. But the trial court excluded the evidence, and the Court of Appeals found no error. The shooting occurred after the distribution charged in the case and moreover was unrelated to drug trafficking; so it was not relevant to any entrapment defense.

Not admissible to prove identity: *United States v. Plume*, 847 F.3d 624 (8th Cir. 2017): Affirming the defendant’s convictions for assault resulting in serious bodily injury and child abuse involving his wife’s infant grandson, the court held that evidence that the wife had previously committed child abuse not involving the grandson was inadmissible propensity evidence. The court noted that the prior abuse involved “different victims, different injuries, and different degrees of severity” and so could not be admitted to prove identity.

8. Cases on Notice

One week's notice is sufficient: *United States v. White*, 819 F.3d 976 (8th Cir. 2017): The defendant argued that the Rule 404(b) notice requirement was violated because he did not receive notice until one week before the trial. The court found that one week was sufficient time to reply and the defendant was not prejudiced. The court stated that "Rule 404(b)'s notice standard is flexible" and that what constitutes a reasonable disclosure "will depend largely on the circumstances of each case."

District Court Opinions

1. Cases that admit bad act evidence without much of a bother -- especially for intent or knowledge

United States v. Meeker, 2017 WL 5892195, at *1 (D. Conn.): The Government sought to admit evidence of an aborted carjacking on the same night as the completed carjacking that was charged. Here, three people agreed to carjack an intended victim. While pursuing that victim by car, the three people ran out of gas. They aborted the plan to get gas, and they found new victims at the gas station who they ultimately carjacked. The government sought to admit the aborted carjacking to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, [and] lack of accident," and the court allowed it. The court found that the first attempt was "part and parcel" of the charged offense, even though there was a different victim.

Comment: The earlier attempt might well have been admissible for background. But it was definitely not admissible to prove each of the laundry list set forth by the government. For one thing, there was no showing that any mental element was in dispute.

* *United States v. Pringle*, 2017 WL 5000244, at *3 (M.D. Fla.): The defendant was charged with tax evasion from 2002-2010. The defendant objected to the government's introduction of evidence of unpaid taxes from 1993-1996, and 1998-2001. The court admitted the evidence, finding the prior unpaid taxes to be intrinsic to the charged crime. (It provided context).

United States v. Steele, 2016 WL 4036843 (N.D. Ga.): The defendant was charged with a Hobbs Act Robbery. The government sought to admit evidence of a previous Hobbs Act Robbery. The court wrote that "the evidence of the September 27, 2007 Hobbs Act robbery conviction is relevant to an issue other than the defendant's character. Given that the prior conviction is for Hobbs Act robbery, the very same crime with which the defendant is charged in this case, the evidence of the 2007 conviction is relevant to showing the defendant's intent." The court did not explain how the prior robbery was probative of intent in any way other than through the propensity inference.

* ***United States v. North***, 2017 WL 5185270, at *2 (N.D. Ga.): The defendant was charged with discharging a firearm during a federal crime of violence, and felon-firearm possession. The government sought to admit three prior convictions for firearms violations. The court found that three of the prior convictions involving possessing a firearm were admissible. It stated that by pleading not guilty, the defendant put knowledge at issue, and cited a number of 11th Circuit cases.

* ***United States v. Franklin***, 2016 WL 4033105 (D. Idaho): The defendant was charged with wire fraud. He was accused of creating fake credit cards and licenses to purchase a large quantity of goods from various retail stores. These events took place in Idaho, but the government wanted to introduce a similar spending spree involving the defendant that occurred in Colorado a few months earlier. The court permitted the government to do so. The court stated that the Colorado evidence “tends to prove issues clearly material to this case – the defendant’s knowledge, intent, modus operandi, pattern of behavior and the absence of any mistake.” The court does not go into detail about *how* the previous spree fits into any of the laundry list of permitted uses. Moreover, it does not discuss whether knowledge or intent were contested by the defendant.

* ***United States v. Pritchard***, 2017 WL 6377957, at *3 (W.D. Ky.): The defendant was charged with arson and mail fraud in connection with an insurance claim. The government wanted to admit three prior instances in which the defendant intentionally burned property and submitted insurance claims. The court allowed these prior bad acts to be admitted first as “res gestae” evidence (presumably meaning inextricably intertwined, which they weren’t). The court also held alternatively that the evidence was admissible to prove intent and common plan or scheme. The court did not explain whether intent was in dispute, nor why “common plan or scheme” was anything more than the propensity to burn property and get the insurance.

* ***United States v. Ackies***, 2017 WL 5632910, at *1 (D. Me.): The defendant was charged with drug smuggling for a distinct drug transaction that occurred on January 18, 2016. The government sought to admit testimony from two witnesses that described their involvement in a drug conspiracy with the defendant dating back to April 2015. The defendant objected under Rule 404(b), arguing that the testimony did not describe events intrinsic to the crime, nor did the government articulate a proper purpose for the evidence under Rule 404(b). The court found that the evidence was “intrinsic” because it provided a full story for the jury. But this is an overbroad use of intrinsic, because background evidence is not direct evidence of the crime and is most logically covered by Rule 404(b).

United States v. Escobar, 2016 WL 3676176 (D. Minn.): In a narcotics case, the government sought to admit three prior drug-related convictions, each against a separate defendant. After quoting Rule 404(b), this is the entirety of the court’s analysis:

Such evidence is generally admissible unless it is offered only to prove a defendant’s character. Evidence of other acts is especially probative when intent is an issue, if those other acts are material to the defendant’s intent.

The prior convictions listed above are relevant and probative in this matter to establish motive, intent, and knowledge, among other matters. All of these convictions are therefore admissible.

United States v. Jones, 2017 WL 2124084 (S.D. Miss.): In a narcotics case, the court heard post-trial motions regarding admission of unrelated drug activity. In three sentences, the court determined there was a “sufficient nexus” between the defendant and the evidence, and that the evidence was “relevant to the issue of intent.” It did not note whether the defendant actively contested intent, nor did it explain how it proceeded through a non-propensity chain of reasoning to admit the evidence.

United States v. Cotton, 2016 WL 6666943 (D. Nev.): The defendant was charged with marijuana and firearms offenses. The defendant was stopped for a traffic violation and officers found a gun and a bag of pre-packaged marijuana. In an in limine ruling, the court found that three convictions would be admissible under Rule 404(b). The convictions were for: 1. maintaining a place for the purpose of selling a controlled substance; 2. possession of a controlled substance for the purpose of sale (cocaine); and 3. trafficking in a controlled substance (ecstasy). All three prior convictions were admitted as probative of the defendant’s intent. The defendant argued that if he put on a defense that the bag with the marijuana was not his, none of his prior convictions would be probative except to prove propensity. The court rejected this argument by explaining that the defendant put intent at issue by pleading not guilty.

United States v. Jacobs, 194 F. Supp. 3d 216 (E.D.N.Y. 2016): The defendant was indicted on 27 counts of aiding in the preparation of false returns. The government filed a motion in limine to admit evidence of additional uncharged false tax returns prepared by the defendant for the same clients. The false tax returns were for a previous year and could not be charged due to the statute of limitations. The court found the prior returns were probative of motive. But the court did not explain how filing false tax returns in one year would give the defendant a motive to file false tax returns in a subsequent year. In the absence of any probative value to prove motive, it would appear that the prior filing is being offered to show propensity --- though if the defendant were contending that he didn’t know that the later returns were fraudulent, the prior returns would be admissible to prove knowledge.

* ***United States v. Fisher***, 2017 WL 6047705, at *1 (W.D.N.Y.): The defendant was charged with using money orders to avert regulatory reporting requirements. The government sought to admit transactions initiated by defendant that occurred in the 10 months leading up to the charged

offense. The court found these acts admissible to prove intent and knowledge. The court emphasized that the Second Circuit takes an inclusive approach to intrinsic evidence. The court stated that “evidence that [the defendant] engaged in similar conduct over a ten-month period makes it more probable” she committed the crime charged.

United States v. Harris, 2017 WL 2118284 (E.D. Tex.): The defendant was charged with conspiracy to use, carry, or possess firearms during a crime of violence (home invasions). The defendant moved in limine to exclude six prior bad acts involving home invasions. The court stated that a not guilty plea puts intent at issue, and that similar acts are admissible to show intent.

United States v. Hayes, 2016 WL 7046747 (D. Utah): The defendant was charged with participating in a conspiracy to distribute methamphetamine. The prior bad act evidence that the court admitted was the defendant’s admission to smoking methamphetamine on the day of his arrest and evidence that he previously used methamphetamine. The court found that “Defendant’s prior use of methamphetamine may be used to show knowledge, plan, motive or intent to participate in the alleged crimes. Therefore, the evidence is probative of a material issue other than character and is admissible.” The court did not explain any chain of inference by which uncharged drug activity would be probative for *four* separate proper purposes in a drug case.

United States v. Cowden, 2016 WL 5794763 (N.D.W. Va.): The defendant was charged with use of excessive force. He filed a motion in limine to exclude allegations of his use of excessive force on an unrelated occasion, where the defendant allegedly subdued a man in a domestic violence situation. The government claimed that the prior act (the domestic violence incident) was “relevant, necessary, and reliable” because it proved the defendant’s willfulness. The court found Rule 404(b) to be a rule of inclusion. Then it simply stated that “the evidence is relevant to the element of willfulness in Count One and the defendant’s state of mind.” No further explanation or analysis was provided.

2. Cases where the probative value appears to proceed through a propensity inference to get to the “proper” purpose

United States v. Minnick, 2016 WL 7131470 (D. Md.): The defendant filed a post-trial motion challenging his conviction for distributing heroin. He argued that it was error to admit a recorded conversation in which the defendant discussed selling cocaine, while using drug slang. The court first noted the recorded conversation about cocaine was not intrinsic to the crime because the defendant was charged with distributing heroin. Still, it admitted the evidence “as probative of [Defendant’s] knowledge of coded language relating to drugs and his intent to engage in drug trafficking.” The court explained as follows:

Here, the Government’s case centered on recorded conversations in which Minnick and others used language that the Government argued constituted coded language relating to drug dealing. The defense countered, through expert testimony, that the language used was typical of ordinary conversation among individuals from a

particular community or social circle. In the context of this case, therefore, the conversation in question was relevant to establish that Minnick had knowledge of drug slang and coded language and that when he used such language, he had the intent to engage in drug dealing. It was particularly probative because it occurred in September 2014, within the period of the charged conspiracy, and was captured on the same telephone that Minnick had used for other conversations in which he allegedly used coded language to discuss drug dealing.

Comment: There is a good argument that the evidence of the other transaction is offered for propensity. That argument relies on the difference between drug “slang” --- like “a quarter” --- and coded conversation, like “chimneys.” The conversation regarding the uncharged conversation was not coded, it was slang. So it really shows little to nothing about the defendant’s knowledge of coded language.

United States v. Bigham, 2016 WL 4944138 (E.D. Mich.): The defendant was charged with three counts of possession with intent to distribute a controlled substance. One of the counts of possession was based on a traffic stop where the defendant didn’t have his license and fled the scene in a black 1998 Lexus and evaded the police. An eyewitness, however, called 911 and said that someone driving rapidly in a black Lexus dropped a bag out of their window. When the police investigated, they found drugs on the ground, packaged in a manner that indicated narcotics trafficking. To tie the drugs to the defendant, law enforcement tried to introduce several other instances where the defendant was pulled over, had either no license or a suspended license, fled the scene, and threw drugs out of his car window. The defendant claimed this was inadmissible under Rule 404(b). The court concluded that the other incidents were indicative of a modus operandi -- the defendant was pulled over, didn’t have a valid license, fled, and threw the drugs out of his car, which was registered to someone else (twice to his mother). The court found this to be a “distinctive pattern of behavior,” showing the defendant’s M.O. As such, it admitted the prior bad acts to prove identity.

Comment: The most compelling portion of the prior bad acts in this instance was that the cars were registered to the defendant’s mother in two of the events. But this was not always the case. The other factors the court said helped to prove identity -- fleeing from the cops and throwing the drugs out of the window -- seem to be normal reactions to being chased by the police while carrying drugs, not an indication of one’s M.O. The more generic a so-called modus operandi, the more likely it is that the evidence is probative only to show propensity.

United States v. Dumire, 2016 WL 4507390 (W.D. Va.): The defendant was charged with two counts of being a felon in possession of a firearm. The government sought to introduce evidence of the defendant possessing guns on other occasions. This evidence was admitted. The

court held that the other possessions tended to prove that the defendant knowingly and intentionally possessed the firearms on the times charged. *See also United States v. Payne*, 2016 WL 5794810 (W.D. Va.) (prior gun possession admitted to prove knowledge; knowledge placed in question by the plea of not guilty).

Comment: These cases are very similar to *Caldwell* but reach the opposite result. The defendant in each case was denying he had firearms. He wasn't contending lack of knowledge or intent. So the only path of inference is that he had a firearm because he had a firearm on other occasions. It is notable that in each of these cases the court cites a bevy of Fourth Circuit cases holding that prior possession is admissible to show intent and knowledge in firearms cases. So there is a clear split of authority in the circuits on this issue (and indeed within the Fourth Circuit itself, *see Hall, supra*).

3. Cases where the trial court conducts a rigorous 404(b) analysis and admits the evidence under Rule 404(b)

United States v. Shayota, 2016 WL 5791376 (N.D. Cal.): The defendants were charged with conspiring “to manufacture and distribute counterfeit bottles of a liquid dietary supplement known as 5-Hour ENERGY.” They filed motions to exclude evidence showing they previously engaged in schemes similar to the one charged. The government sought to admit the evidence to prove “the defendants’ knowledge, intent, preparation, plan, and absence of mistake or accident.” The court looked at four factors (materiality, remoteness in time, sufficiency of the evidence, and similarity between the alleged acts and charged acts) outlined by the 9th Circuit and determined that the previous acts were all admissible to show that the defendants were sophisticated and knew what they were doing when they sold the counterfeit 5-Hour ENERGY. The court declared that “the defendants’ past history of working together on similar schemes indicates that they understood their roles as well as the objects of the conspiracy, and demonstrates how they gained knowledge, skills, and networks necessary to carry out the alleged 5-Hour ENERGY conspiracy.”

United States v. Hassanshahi, 195 F. Supp. 3d 35 (D.D.C. 2016): The defendant was charged with conspiracy to violate the International Economic Emergency Powers Act and the Iranian Transactions and Sanctions Regulations, commonly referred to as the United States’ trade embargo against Iran. The government intended to elicit evidence that the defendant had knowledge that a license from OFAC was required to do business in Iran. In a prior lawsuit, documented with a court opinion, the defendant was advised of the rules regarding doing business in Iran. The court found that the prior conduct was not being used to show that the defendant had a particular character and acted in conformity with that character; instead, it was used to show an absence of mistake, which is permissible under Rule 404(b). The court did an extremely thorough job of dealing with all of the defendant’s arguments, explaining why the evidence at issue was admissible.

United States v. Laskowski, 2016 WL 4011230 (N.D. Ill.): The defendant sought to exclude evidence that he encouraged a witness to not answer her front door to accept a grand jury subpoena, where the grand jury was investigating the criminal conduct that the defendant was

eventually charged with. The court found the evidence was supported by a propensity-free chain of reasoning --- not that the defendant had a propensity to commit crime, but rather that he was conscious of his guilt on the crime charged. Citing *Gomez*, the court declared that “[c]onnecting Defendant’s attempt to prevent someone from aiding the government’s investigation to his consciousness of guilt requires no propensity inference.”

United States v. Hodge, 2017 WL 2312238 (D.V.I.): The defendant was one of six defendants who were charged with conspiracy to possess controlled substances (cocaine powder and marijuana) and related offenses. The defendant sought to exclude evidence of his violating drug laws during the time period of the alleged drug conspiracy. The court explained Rule 404(b) in a detailed manner and concluded that the two specific drug trafficking events the defendant sought to exclude “constitute[d] intrinsic evidence, and [were] not subject to the requirements of Rule 404(b).” The court, nevertheless, properly examined the evidence under Rule 403, too, and it concluded that, although the evidence was certainly damaging to the defendant, it was not unfairly prejudicial.

4. Cases where the trial court conducts a rigorous analysis and excludes the evidence offered under Rules 404(b)/403

* *United States v. Johnson*, 2017 WL 5135355, at *3 (M.D. Pa.): The defendant was charged with a firearms violation. Defendant was found with a firearm in the car in two separate traffic stops, one month apart from each other. The government charged him with the gun from the first stop, and sought to use evidence of the second stop to prove knowledge. The court was not persuaded that knowledge was in dispute because the defendant was merely arguing he did not possess the firearm found. (Moreover, knowledge does not work backward). The court also rejected the government’s attempt to use the evidence to show intent, because this was a case involving dispute over actual possession, not the intent to possess. The court applied the Third Circuit *Caldwell* precedent and noted that simply pleading guilty is not enough to put intent at issue. As the government did not identify a not-for-propensity purpose, the Rule 404(b) evidence was inadmissible.

* *United States v. Thornton*, 2017 WL 5157779, at *3 (S.D. Ill.): The defendant was charged with two bank robberies. The government sought to introduce evidence from a previous bank robbery where the defendant used the phrase “thanks have a great day” while exiting the bank. The government contended that bank tellers would testify that the defendant uttered a similar iteration of this phrase when allegedly robbing the two banks he was set to go on trial for, thus showing this was the defendant’s modus operandi. The defendant protested under 404(b). The court remarked that “[h]ere, as is often the case with 404(b) evidence, it is a close call.” The court carefully analyzed the issue. It agreed with the defendant that the phrase “have a great day” is common in American parlance, but it found that saying this while robbing a bank made it unique. Despite this, the court properly went through the last step, and found that the prior robbery should be excluded under Rule 403, largely because there was a good deal of other evidence on the charged crimes.

United States v. Hitesman, 2016 WL 3523854 (N.D. Cal.): The defendant was charged with committing attempted bank robbery. The government sought to admit evidence of the defendant's six prior bank robbery convictions under Rule 404(b). The government's theory was that this evidence demonstrated the defendant's modus operandi. After a thorough analysis, the court refused to admit the evidence. The government noted that there were a few characteristics from the prior crimes that were found in the charged crime: the perpetrator was alone, did not wear a mask, used a demand note, and said he had a gun without showing the gun. The court cited an array of circuit court decisions where similar evidence was found insufficiently unique to prove identity. The court recognized that if the circumstances are not sufficiently unusual, the evidence ostensibly offered for identity is actually being used to show propensity.

United States v. Shirley, 214 F. Supp. 3d 1124 (D.N.M. 2016): The defendant was indicted for unlawfully killing a person within Indian country with a knife with malice aforethought, and related offenses. The defendant objected to admission of evidence of many knives owned by the defendant, including one he was clutching when arrested. The court rigorously went through the case law, and it accurately laid out how to evaluate bad act evidence. (Judge Browning's opinions on evidence are extraordinarily thorough and detailed). The government argued that the knives would show the defendant's "access to, familiarity with, and use of" the type of weapon used in the crime, but the court found that sort of "propensity inference is impermissible." The court concluded that "such evidence suggests that Maynard Shirley is a person who possesses and is predisposed to use knives, and that therefore, he must have been the person who used 'sharp objects' to stab the victims in this case." The court also noted that under Rule 403 this evidence would be minimally probative, because showing familiarity with a particular weapon is not the same as showing intent or knowledge. Finally, the court held that evidence that the defendant was found fleeing prosecution with a knife *would* be admissible, for the non-propensity purpose of consciousness of guilt. See also Judge Browning's opinion in ***Sec. & Exch. Comm'n v. Goldstone***, 2016 WL 3996384 (D.N.M. June 27, 2016) for a remarkably thorough Rule 404(b) analysis.

United States v. Williams, 2016 WL 4536864 (E.D.N.Y.): The defendant was charged with conspiracy to distribute narcotics and a firearm violation. While the court ruled on two motions and several pieces of evidence (and admitted some 404(b) evidence), it also excluded evidence that the police recovered firearms and marijuana as a result of a traffic stop of the defendant. The government sought to admit evidence of the guns and marijuana on the theory that this demonstrated the defendant's modus operandi --- specifically that the defendant kept these in a trap (i.e., a hidden compartment). The court, however, was unpersuaded. It required that evidence offered for identity under a theory of modus operandi must be such that has "unusual characteristics." The court found that using a secret compartment was hardly unique. The court, however, did allow the government to introduce the fact that the defendant was involved in the traffic stop (though not what the fruits of that stop were) because he was stopped while driving with three of his co-conspirators, which allowed the government to demonstrate there was a longstanding relationship between the co-conspirators. The court did a very careful job of parsing the evidence and assuring that it was probative of a proper purpose.

United States v. Bey, 2017 WL 1547006 (E.D. Pa.): The defendant was charged with being a felon in possession of a firearm. He moved to exclude his 2002 conviction for a firearms offense and 2002 arrest for a separate firearms offense. The court noted that the first step in the Rule 404(b) analysis is to demonstrate a non-propensity purpose for admitting the evidence. The government argued the evidence was probative to show “knowledge and absence of mistake in possessing a firearm.” But the court, relying on *Caldwell*, responded that because the case involved actual possession (as opposed to constructive possession), the issues of knowledge and absence of mistake were not being contested. Here, the defendant claimed the police planted the gun on him. The court concluded that “the only purpose of introducing this evidence is to demonstrate that if [the defendant] knowingly possessed firearms in the past, he is more likely to have knowingly possessed the firearm on [the date at issue]. This is exactly the type of evidence that Rule 404(b) prohibits.”

United States v. Sneed, 2016 WL 4191683 (M.D. Tenn.): The defendant was charged with conspiracy to possess and distribute cocaine and possession and distribution of cocaine within 1,000 feet of an elementary school. The defendant argued for exclusion of a YouTube rap video entitled “4ThARightPrice,” which depicted the defendant and other individuals performing a rap song containing lyrics about drug sales and gang activity. The government argued that the video was probative of the defendant’s participation in the charged conspiracy and his intent to distribute cocaine. The court, in a thorough analysis, concluded that “[t]he Government’s argument has a fatal flaw; rapping about selling drugs does not make it more likely that the defendant did, in fact, sell drugs.” The court stated that “the video will suggest to the jury that because the defendant rapped about selling drugs on one occasion, he acted in accordance with the behavior described in the rap on another occasion, the definition of prohibited propensity evidence.” The court noted that the statements in the video were general, and nothing in them tied in any way to the details of the charged crime.

United States v. Glenn, 2017 WL 5260782, at *2 (M.D. La.): The defendants were charged with counterfeiting offenses after they were stopped in a car that had materials used to create fake checks. The Government charged them with a conspiracy that started in 2014, but it wanted to introduce evidence that one of the defendants was involved in a bad check scheme in 2010 (though he was never convicted). The court found that prior act inadmissible. The court first reasoned that because the charged conspiracy began in 2014, the 2010 acts were not intrinsic to the charged offense. As such, it moved to its Rule 404(b) analysis. While the court could have done a better job of explaining the permissible purpose the government was admitting the evidence for (it merely accepted the not guilty plea as putting intent at issue), it nonetheless excluded the evidence. The court found the 2010 act to be old and proof of it would be required as there was no conviction, so the risks of prejudice and undue delay substantially outweighed the probative value.

TAB 7

TAB 7A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Amendment to Rule 106
Date: April 1, 2018

At its last meeting, the Committee began reviewing a request from Judge Paul Grimm to consider possible amendments to Rule 106. The suggestions for change were set forth in Judge Grimm's opinion in *United States v. Bailey*, which is attached to this memorandum.¹

Rule 106, known as the rule of completeness, currently provides as follows:

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

The problems raised by Judge Grimm arise mostly in criminal cases, and in a relatively common scenario. The defendant has made a hearsay statement that implicates him in the crime, but the statement also contains assertions that would be beneficial to the defendant's case. The government successfully seeks to admit the inculpatory part of the statement as a statement of a party-opponent under Rule 801(d)(2)(A). But then the defendant seeks to admit the exculpatory part of the statement, and the government lodges a hearsay objection. Rule 801(d)(2)(A) is not applicable, as that exemption covers only the statements made by him that the *prosecution* seeks to offer.² The question then becomes whether the rule of completeness can be invoked to require

¹ It was attached to the memorandum for the previous meeting as well, but because it sets forth the case law better than I ever could, I am attaching it again.

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.”

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admission of the defendant's exculpatory statements. This assumes, of course, that the trigger of completeness is met – meaning that the statement offered by the government is misleading, and the completing portion would provide a more accurate indication of what the defendant said.

As Judge Grimm notes, the courts are in dispute on whether the rule of completeness can be helpful to the defendant to overcome the hearsay objection. And there are further complications if the statement is oral rather than written or recorded, because Rule 106 does not appear by its terms to apply to oral unrecorded statements; the courts are in dispute about how the rule of completeness applies to such statements. A further dispute is whether the common-law rule of completeness (which applied to oral statements and allowed admission of fairly completing statements even if they were hearsay) remains applicable, given the Supreme Court's recognition that Rule 106 is only a "partial codification" of the common-law rule. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988).

At the Fall, 2017 meeting, the Committee reviewed and discussed Judge Grimm's proposals, which are: 1) to amend Rule 106 to allow a party to admit the party's statements over a hearsay objection, when they are necessary to complete a misleading presentation of the party's statements; and 2) to extend Rule 106 to cover oral unrecorded statements. At the previous meeting, a number of arguments were made, which can be summarized as follows:

- Concern was expressed that an amendment would lead to arguments over redacted email chains and lengthy interrogations. The response provided was that nothing in Rule 106 allows wholesale admission of an entire email chain, or indeed any kind of lengthy exchange. Rule 106 applies only if the initial submission is misleading, and completion will correct the misimpression. Nothing in the amendment changes the standard of when a statement may be offered to complete, thus nothing in the amendment would change the court's analysis of email strings. And as to recordings, the existing rule of completeness already covers recordings, and so the challenges for courts are imposed under the existing Rule.

- Committee members showed interest in considering an amendment that would allow use of completing statements for the non-hearsay purpose of providing context.

- The DOJ representative opined that only a few circuits are allowing the government to prevent completion of misleading statements by invoking the hearsay rule, so the conflict in the courts on Rule 106 was not a reason for amending the rule.

- Committee members expressed some concern over coverage of oral statements, when there was a dispute as to what the statement actually was or whether it was made. Judge Grimm noted that courts would continue to enjoy discretion to require an opponent to wait until its case in chief to present evidence of completing oral statements in circumstances where there is a significant dispute about the content of the oral statements, so as to minimize the interruption of the proponent's case. Moreover if there was significant doubt about what the

statement was or whether it was even made, the court could invoke Rule 403 to exclude evidence of the statement.

- One theory expressed was that Rule 106 protection might not be necessary, because a party would not risk misleading the jury with a portion of a statement, due to the possibility of having the distortion revealed to the jury later in the case. The Reporter responded, however, that completing statements made by a criminal defendant would never be revealed to the jury if the court holds that they are inadmissible hearsay and the defendant does not testify. The Reporter was asked to see if the case law actually allows the government to admit a misleading statement without any rebuttal.

- At the conclusion of the discussion, the Committee members determined that the issue of Rule 106 deserved further consideration and resolved to continue discussion of a potential amendment to Rule 106 at the next meeting. The Reporter was asked to prepare a draft amendment that would allow for completion, but only for a nonhearsay contextual purpose and not for the truth of the completing statements.

This memo is in five parts. Part One provides the legal background, and is substantially the same as the prior memo, but with a few additional points made based on historical research. Part Two sets forth state variations, and is slightly changed from the section included in the prior memo. Part Three discusses the advantages and disadvantages of an amendment, which has been expanded after a deeper dive into the case law and legislative history. Part Four is new – it addresses some arguments and concerns that were raised at the previous meeting. Part Five provides drafting alternatives.

I. Two Problems in Applying Rule 106, as Discussed by Judge Grimm in *Bailey*

A. *Can Hearsay Be Admitted When Necessary to Complete Under Rule 106?*

The most important problem – and dispute among the courts – raised by Judge Grimm is whether Rule 106 requires the court to admit a completing statement over the government’s hearsay objection. It is important to narrow the inquiry, as Judge Grimm does. Nobody credibly argues that Rule 106 allows the defendant to admit all relevant exculpatory hearsay simply because the government offered a portion of the defendant’s statement. Rather, the important condition assumed in this memo is that the fairness requirement of Rule 106 has kicked in. And that means two things: 1) that the government has introduced a portion of a statement that is *misleading*; and 2) the defendant’s completing statement is necessary to correct the misleading impression. *See, e.g., United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996) (the defendant’s exculpatory statement was not admissible under Rule 106 where the portion admitted by the government was not misleading but rather was a complete confession to the crime charged); *United States v. Lesniewski*, 2013 WL 3776235 (S.D.N.Y.) (mere proximity of the omitted portion to the statements introduced does not justify completion; nor are the defendant’s statements necessary

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for completion when they are just “self-serving attempts to shoehorn after-the-fact justifications for his actions into description of his actions”).

Judge Grimm gives a good example of a case in which the narrow conditions of Rule 106 completion are met: the defendant admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The question is whether the government can successfully object on hearsay grounds to the defendant’s statement that he sold the gun.³

As Judge Grimm notes, many courts have held that even in this narrow situation, a defendant cannot invoke Rule 106 to correct the government’s misleading presentation of the evidence. The rationale given is that Rule 106 is simply a timing mechanism; it cannot operate as a hearsay exception because, for one thing, it is not in Article VIII. But as Judge Grimm notes, a number of courts have reasoned that in order to do its job of correcting unfairness, Rule 106 *has to* operate as a rule that will admit completing evidence over a hearsay objection.

Because Committee members at the last meeting expressed concern about the scope of a court’s obligations under Rule 106, it might be useful to provide more perspective on the scope of the rule. As stated above it contains an important threshold requirement that provides substantial limitation on the consequences of the amendment 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. What follows are some example of the applications of the fairness requirement of Rule 106.

Here are some examples of completion required:

- *United States v. Castro-Cabrera*, 534 F.Supp.2d 1156 (C.D.Cal. 2008): The defendant was charged with reentering the United States after being deported. During a previous deportation hearing, the defendant was asked twice in a row to which country he claimed citizenship; the first time, he answered, “Hopefully United States through my mother,” while the second time, he answered, “I guess Mexico until my mother files a petition.” After the government

³ See also *Commonwealth v. Crayton*, 470 Mass. 228, 247 (2014), where the defendant was charged with using a library computer to download child pornography. A police officer asked the defendant if he had used the library computer on the day of the download. The defendant said that he had used the computer but not to download the child pornography. The government admitted only the inculpatory part of the statement. The court found that the rule of “verbal completeness” required the admission of the defendant’s denial over a hearsay objection: “By excluding the defendant’s denial, the judge might have left the jury with the false impression that the defendant had not denied viewing the child pornography where an innocent person would have denied it, and therefore, there was a significant risk that a reasonable jury might have understood the other statements the defendant made to the detectives as an implied admission to having viewed the child pornography.”

offered only the second answer into evidence, the court found that the first answer was admissible as a completing statement, because it gave a fairer understanding of the defendant's answer. Without the remainder, the portion was a clear admission of Mexican citizenship, whereas both answers together suggested that the defendant was unsure or thought he had dual citizenship.

- *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1983): In a felon-gun possession case, the defendant admitted to the police that he was aware of drugs found under a bed, but knew nothing about the gun that was found near it. The government redacted the statement to the admission that the defendant was aware of drugs. The relevance of that portion was that if the defendant had drugs, he was likely to have a gun. But that was an unfair inference because the defendant explicitly denied having a gun. The Seventh Circuit held that once the prosecution elicited testimony that the defendant admitted knowing about the drugs, the defendant should have been allowed to elicit the part about not knowing the gun was there. Otherwise the jury would use the statement as if the defendant implicitly admitted to having a gun, when that was not the case.

Here are some examples of completion not required:

- *United States v. Doxy*, 225 Fed. Appx. 400 (7th Cir. 2007): In a drug prosecution, the defendant admitted to smoking marijuana but claimed not to know about crack cocaine hidden in the car. The court found no error in excluding the exculpatory evidence. The fact that the defendant smoked marijuana raised no inference about knowledge of hidden cocaine. The court distinguished *Haddad* as a case in which the very point of admitting the redacted portion was to raise an inference that was denied by the completing portion.

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

- *United States v. Dotson*, 715 F.3d 576, 581 (6th Cir. 2013): In a trial on charges of child pornography and exploitation of a minor, the trial judge admitted portions of a written statement given by the defendant to authorities following his arrest in which he stated that he made

videos and photos of the victim; but the court rejected the defendant's request to admit the entire statement. The court held that the portions admitted were not misleading and the portions omitted were not necessary to place the admitted statements in proper context; the omitted portions illustrated that Dotson had a rough upbringing and had been sexually abused as a child, and that he was concerned that the victim knew he was exploiting her. These portions "did not in any way inform his admission that he photographed the victim, made videos of her, and downloaded sexually explicit images of other children from the internet."

- *United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996): After the disaster at the Waco compound, Castillo was charged with using or carrying a firearm during a crime of violence. He confessed to donning battle dress and picking up guns when he saw ATF agents approaching. He also stated that he never fired a gun during the raid. The court found that the exculpatory statement was not necessary for completion – the "cold fact" that Castillo had retrieved several guns during the day was neither qualified nor explained by the fact that he never fired them. Castillo was charged with using or carrying a gun during a crime of violence, and this charge did not require a finding that he shot a gun. The court concluded: "We do not doubt the exculpatory nature of the excluded statement, but that does not require its admission under Rule 106." The court concluded as follows:

We acknowledge the danger inherent in the selective admission of post-arrest statements. Neither the Constitution nor Rule 106, however, requires the admission of the entire statement once any portion is admitted in a criminal prosecution. We do no violence to criminal defendants' constitutional rights by applying Rule 106 as written and requiring that a defendant demonstrate with particularity the unfairness in the selective admission of his post-arrest statement.

These cases show that Rule 106 is a narrow rule. It does not send the trial court on a quest through mounds of evidence to try to find something that exculpates a defendant. *See, e.g., United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986) (where portion of tape is introduced, Rule 106 does not require the introduction of an entirely separate conversation, on a different subject matter, that also happened to be on the tape). The portion proffered by the proponent must first be found misleading – if the answer is that it is not, then that is the end of that. If the answer is that the portion is misleading, then the proponent of the completing portion must point to specific statements that correct the unfairness.

Finally, it should be noted that the rule of completeness is not a one-way street. The government has an interest in being allowed to complete misleading portions of a statement proffered by the defendant. Thus, in *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988), it was the prosecutor who offered prior statements on redirect examination to complete what had been adduced on cross-examination. 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.

B. Applying the Rule of Completeness to Oral, Unrecorded Statements

Rule 106 does not, by its terms, apply to oral statements that have not been recorded. The Advisory Committee Note cryptically states that the limitation to written and recorded statements was implemented for “practical reasons.” Judge Grimm plausibly concludes that the “practical” reason that persuaded the Advisory Committee to narrow the traditional rule of completeness was a concern over disputes about what was said in an oral statement – similar to the concern that the Committee has discussed the last few years regarding prior inconsistent statements under Rule 801(d)(1)(A).⁴ But as Judge Grimm notes, the problems involved in proving what was said probably do not justify a blanket rule that leaves these statements out of any completeness principle.

The exclusion of unrecorded oral statements from Rule 106 has not, however, stopped most courts from applying the completeness principle to those statements. As Judge Grimm recounts, the Supreme Court has intimated that the common-law rule of completeness—which does cover oral statements – retains vitality. *See United States v. Sanjar*, 853 F.3d 190, 204 (5th Cir. 2017) (common law rule of completeness “is just a corollary of the principle that relevant evidence is generally admissible”). Like Rule 106, the common law rule comes into play only when necessary to correct a misleading impression created by the portion of the oral statement already admitted. And as recognized by Judge Grimm, the common-law rule of completeness as to oral statements has been implemented by a number of courts through an invocation of Rule 611(a), which grants courts the authority to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth.”

The end result is that in most courts oral statements are subject to the rule of completeness in the same measure as written statements, just under a different rule. While that is disorganized and can cause confusion it might not be cause for amending Rule 106 to cover oral statements. But the courts holding that Rule 106 does not allow admission of hearsay as to written and recorded statements have – as Judge Grimm sets forth at page 13 of *Bailey* – extended that limitation to the common-law rule to treatment of unrecorded oral statements under Rule 611(a). So the major

⁴ The Florida Advisory Committee, commenting on the Florida counterpart to Federal Rule 106, explains the exclusion of oral statements this way:

This section does not apply to conversations but is limited to writings and recorded statements because of the practical problem involved in determining the contents of a conversation and whether the remainder of it is on the same subject matter. These questions are often not readily answered without undue consumption of time. Therefore, remaining portions of conversations are best left to be developed on cross-examination or as a part of a party's own case.

problem is the one discussed above – whether a party is to be allowed to correct a misleading portion through their own statements that are hearsay.

Moreover, there are a number of decisions in which a court, confronting a completeness argument as to oral unrecorded statements, simply says that Rule 106 does not apply, and so that is that – they do *not* evaluate the statement under Rule 611(a) or the common-law rule of completeness. For example, in *United States v. Gibson*, 875 F.3d 179 (5th Cir. 2017), the defendant complained that the trial court erred in preventing defense counsel from cross-examining a former employee about a statement that the defendant made to him. The trial judge prevented the question on the ground that the defendant’s statement was hearsay. The defendant contended that the government had on direct inquired into other statements that the defendant had made to the employee, and that the defendant had a right under Rule 106 to introduce the other statement. The court disagreed, stating that “Rule 106 applies only to written and recorded statements.”⁵ It may be that counsel never raised the common-law rule of completeness, or Rule 611(a). But that in itself might indicate a reason to treat both oral and written statements under a single rule – in order to avoid a trap for the unwary. In fairness to the unlearned, Rule 611(a) does not refer to completion at all; and resorting to common law rules is not exactly the first thing that a lawyer would think of when he can’t find a Federal Rule of Evidence exactly on point. The Supreme Court in *Abel v. United States*, 469 U.S. 45 (1984), quoted with approval Professor Cleary’s statement that in principle “under the Federal Rules no common law of evidence remains.” While there are exceptions to that principle (as recognized in *Abel*) it seems obviously less than ideal to have three separate rules covering completeness: one explicitly in the Rules, one inexpressly in the rules, and one in the common law.

II. State Court Variations

In this section, only variations that might be pertinent to the matters at hand are discussed. For example, Alabama Rule 106 allows completing but only if the completing portion is from the same writing or recording as the admitted portion. The Federal Rule allows completing with “any other writing or recorded statement” – but there has been no call to narrow that language. Also a few states, such as Louisiana, do not have a rule of completeness in their evidence rules – but that is not a situation to be replicated at the federal level at this point, if it ever was.

⁵ See also, *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007) (refusing to consider completion with oral unrecorded statements because Rule 106 does not apply); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (finding no relief as to oral unrecorded statements because Rule 106 does not apply); *United States v. 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)

1. California Evidence Code § 356:

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.

Comment: The California rule specifically covers oral statements. It doesn't specifically say that the completing evidence is admissible even if it is hearsay. But the California courts *do* treat the rule as a hearsay exception. See Kochert, *The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story*, 46 Ind. L. Rev. 499 (2013) (noting that the Advisory Committee “modeled the Federal Rules of Evidence using the California Evidence Code – which consistently has included a trumping function under its codification of the doctrine of completeness.”); Weinstein's Evidence, at 106-20 (discussing Section 356).

2. Connecticut Rule of Evidence §1-5:

(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.

Comment: Use of the word “statement” is intended to and does cover unrecorded oral as well as written statements. Connecticut case law provides that completing evidence can be admitted over a hearsay objection: See *State v. Tropiano*, 158 Conn. 412, 420, 262 A.2d 147 (1969) (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.). This is because the Connecticut rule explicitly provides for substantive admissibility of the completing statement (“whether or not otherwise admissible”).

3. Georgia Rule of Evidence § 24-8-822:

Entire conversation admissible when admission given in evidence

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.

Comment: This rule is placed in Article 8 and so is recognized as creating a hearsay exception. What's more, it is not dependent on a misleading presentation by the adversary. It is a broad rule limited only by relevance principles. *See, e.g., Bowe v. State*, 288 Ga.App. 376, 654 S.E.2d 196 (2007) ("Where a part of a conversation, which amounts to an incriminatory admission, is admitted in evidence, it is the right of the accused to bring out other portions of the same conversation, even though it is self-serving in its nature, or exculpatory, in that it justifies, excuses, or mitigates the act.").

4. Iowa Rule of Evidence Rule 5.106:

Remainder of related acts, declarations, conversations, writings, or recorded statements

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).

Comment: The Iowa rule specifically covers unrecorded oral statements. It is unclear what Iowa is trying to do with the two separate subdivisions. The first sentence of subdivision (b) seems simply to duplicate subdivision (a). And as to the last sentence, it wouldn't seem necessary to state that cross-examination should be allowed regarding the completing parts.

5. *Maine Rule of Evidence 106:*

If a party utilizes in court 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 time.

Comment: The Maine Advisory Committee explains the difference from the Federal Rule:

The words “utilized in court” are designed to permit the same procedure when a writing is silent on a point as when it is contrary to the testimony of a witness on the stand. A concession drawn from a witness that his written statement does not include a certain thing may be just as misleading as introduction of a part of a statement contrary to his testimony. The Federal Rule uses “introduced” instead of “utilized in court” and thus does not protect against the misleading effect which may result from the use of a statement without its introduction in evidence.

6. *Montana Rule of Evidence 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) his 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.

Comment: This rule specifically covers unrecorded oral statements. The relationship between the two subdivisions is that the federal principle in (1) allows contemporaneous completion for fairness, while subdivision (2), which tracks pre-existing Montana law, provides for a broader completion at some later point in the trial.

7. *Nebraska Rule of Evidence 27-106:*

(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.

Comment: This is a broad rule of completion, akin to Georgia's – although not as clearly allowing hearsay because it is not included in the hearsay chapter. Discretion is given to the judge to complete for fairness contemporaneously or to have everything brought it at a later time.

8. *New Hampshire Rule of Evidence 106:*

(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.

Comment: Like Nebraska, the New Hampshire rule allows a broad right of reply, apparently (though not explicitly) overcoming any hearsay exception, and a more limited right to complete contemporaneously, akin to the federal rule.

9. *Oregon Rule of Evidence 106:*

40.040. Rule 106. When part of transaction proved, whole admissible

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.

Comment: The rule seems broad as it applies to oral statements and even actions, and it is not dependent on responding to a misleading representation. Yet it has an important limit – the completing evidence must be “otherwise admissible.”

The legislative history indicates that the Federal Rule was not adopted because it applies only to a writing or recorded statement, and so “would exclude the possibility of admitting the remainder of any contemporaneous act, declaration or conversation. This limitation is inconsistent with the broad purpose of the rule, which is one of fairness.” But the limitation in the rule that the completing evidence must be otherwise admissible does not at all comport with a broad view of fairness.

10. Texas Rule of Evidence 106:

Texas Rule 106 is virtually identical to the Federal Rule. But Texas adds a Rule 107, called a rule of “optional completeness” which tracks New Hampshire Rule 106(b) – allowing completeness at a later point, including oral statements and actions, and apparently operating to allow hearsay at that later point:

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.

Comment: It seems that what Texas and other states like New Hampshire are doing is tracking the federal rule in one rule (for contemporaneous completion) and tracking the common-law rule of completeness in a separate rule or subdivision (for completion at some time in the trial).

Conclusion on State Variations

A number of states cover unrecorded oral statements, so the practicalities that the Federal Advisory Committee was concerned about did not deter those states. One state, Georgia, specifically provides for a hearsay exception, and one state, Connecticut, specifically says that the completing evidence is admissible without regard to other rules. A hearsay exception is implicit in many other state variations, and in those states the courts use Rule 106 to trump a hearsay objection if completion is necessary to correct a misimpression from a portion of the statement. And several states have codified the common-law exception, either in tandem with or in substitution of the Federal model. All of these options are possible alternatives for Federal Rule 106 and may serve to alleviate some of the problems currently encountered in Federal courts, as discussed by Judge Grimm.

III. The Merits of Amending Rule 106

There are three amendments that might be made to address the conflicts in the courts regarding Rule 106, and to improve the rule as Judge Grimm suggests. The first is to provide that

a statement that completes in accordance with the fairness standards of Rule 106 is admissible over a hearsay objection. The second 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. And the third possibility – which can be combined with option one or option two, is to expand the coverage of Rule 106 to include unrecorded oral statements.⁶ These will be discussed in turn.

A. *Overcoming the Hearsay Problem*

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

This is a conflict in the courts about an important and oft-recurring matter, and Judge Grimm makes a strong case that it needs to be resolved. There is further a strong case that it should be resolved by an amendment to the Rule, because this conflict is one of long-standing.⁷ One of the strongest reasons for amending an Evidence Rule has traditionally been that to do so will

⁶ Some of the states allow completion evidence for “acts” as well as statements. Because the rule is about contemporaneous completion, it can be argued that allowing contemporaneous completion for acts should be approached with caution. For example, if the government provides an eyewitness to state that he saw the defendant entering the bank that was robbed, does the defendant, at that point, get to introduce evidence that he saw the defendant leave the bank without any money? A completeness rule as to acts could threaten to upset the order of proof in many cases. This memo proceeds under the assumption that including “acts” in Rule 106 would be problematic.

⁷ The conflict was previously raised to the Evidence Rules Committee by the Reporter on two prior occasions – once in 2002 and then again in 2006. In both cases, the conflict was discussed as part of a complete review of the Evidence Rules to determine whether there were conflicts in the rules that warranted amendment. In 2002, the Committee was not convinced that the problem arose often enough to warrant an amendment. In 2006, the Committee focused on conflicts in other rules that it found more pressing – Rules 408, 606(b) and 609. In the eleven years since the problem was last visited, the conflict in the courts shows no sign of resolution.

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resolve a longstanding conflict – resolving such a conflict is at the heart of codification of a uniform set of Federal Rules of Evidence.⁸

It seems pretty unlikely that the Supreme Court will resolve the conflict. The conflict has existed for about 30 years. The Supreme Court has only reviewed Rule 106 once – in *Beech Aircraft* – and in that case the Court could have resolved the conflict in the rule, but pointedly refused to do so: it stated that “[w]hile much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106.” 488 U.S. at 175.

If the conflict on Rule 106 is to be resolved, it would seem apparent that it must be resolved in favor of admissibility of the completing evidence – again assuming that the strict requirements for completion under Rule 106 are established. Judge Grimm makes the case as well as it can be made. It seems simply wrong to hold that the adverse party can introduce a misleading portion of a statement, and yet evidence that would fairly be offered to complete would be excluded as hearsay. Professor Wright and Graham opine that construing Rule 106 to allow 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.

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 testify to the completing statement. So for example, the argument is that Haddad could simply take the stand and say, “when I told the officer I knew about the drugs, I also told him that I didn’t know about the gun.”⁹

⁸ The subject of rectifying conflicts will be discussed further in Part Four, in response to the DOJ representative’s statement at the last meeting that the Rule 106 conflict was only with a few circuits and so an amendment was not justified.

⁹ See *United States v. Holifield*, 2010 U.S. Dist. LEXIS 147815 (C.D.Cal.) (“The court orders that Defendant Jordan may not introduce any exculpatory statements, not previously introduced by the government, that constitute inadmissible hearsay” and that if the defendant wants to admit such statements

But there are a number of reasons why the defendant's testimony is not a great solution to the unfairness problem. First, the defendant, by testifying, might be subject to impeachment under the liberal tests employed by the courts under Rule 609 (as discussed in another memo in this agenda book); impeachment with a prior conviction is a pretty heavy cost to pay for restoring fairness after the government has engineered a misleading impression. Second, the testimony remedy ignores the *timing* aspects of Rule 106 – that rule recognizes that contemporaneous completion is required due to “the inadequacy of repair work when delayed to a later point in the trial.” (Rule 106 Advisory Committee Note). Third, while it probably can't be said that the need to complete *compels* the defendant to testify, there is certainly a tension between the defendant's right not to testify and creating a situation in which the defendant would need to testify to correct a misleading statement offered by the prosecution. The Seventh Circuit recognized the unfairness of the testimony alternative in *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981):

In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no “repair work” which could remedy the unfairness of a selective presentation later in the trial of such a case. While certainly not as egregious, the situation at hand does bear similarity to “[f]orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of [a] confession [which] is a denial of his right against self-incrimination.”¹⁰

Finally, and probably most importantly, even if the defendant testifies, he will most likely *not* be able to testify to his prior statement. Thus, Haddad would not be able to testify that “I told the officer that I didn't know anything about the gun.” That is because that testimony would constitute a prior consistent statement, which would only be admissible if Haddad'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 Haddad's credibility – the attack would be that Haddad 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

“he must do so by taking the stand and testifying himself” because “Federal Rule of Evidence 106 does not influence the admissibility of such hearsay statements.”).

¹⁰ See also *United States v. Marin*, 669 F.2d 73, 85 n.6 (2d Cir. 1982) (“when the government offers in evidence a defendant's confession and in confessing the defendant has also made exculpatory statements that the government seeks to omit, the defendant's Fifth Amendment rights may be implicated”).

under the Rule”). So the best that Haddad could do is to testify that “I didn’t know the gun was there” – which is not the same as “I told the officer that I didn’t know the gun was there.”

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.

Legislative History and the Original Wording of Rule 106

Providing language in Rule 106 that would overcome a hearsay objection appears to be consistent with legislative intent and the original rule as approved by Congress. This argument is based on three 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.¹¹

3. Most importantly, the original Rule 106, as approved by Congress, contained language that appeared to solve the problem of exculpatory statements being inadmissible because they were offered by the defendant. The original rule states that the party who offered the misleading portion would itself be required to offer the completing portion. Specifically, the original Rule 106 provided as follows:

When a writing or recorded statement or part thereof is introduced by a party, *an adverse party may require him at that time to introduce* any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. (Emphasis added).

So in a case in which the government is misleadingly presenting the defendant’s statements, the original rule provides that the defendant may require the *government* to introduce the defendant’s exculpatory statements that are necessary to correct the misimpression. If that is so, then the government’s hearsay objection – to evidence the government itself is proffering – must be overruled. The completing statement is admissible as a statement by the government’s party-opponent. While Rule 801(d)(2)(A) does not allow a party to offer their own statements, it

¹¹ Letter from Rakestraw to Senate Jud. Comm., 93rd Congress, 121-23.

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definitely allows the adversary to introduce such statements. So there is a strong argument that the original rule was written to foreclose a hearsay objection for a defendant's completing statements.

What happened to the original rule? It was gender-neutralized in 1987. While no substantive changes were intended (and the Committee Note says so), the change made to Rule 106 to take the "his" out of it arguably did make a substantive change. The gender-neutralized rule is as follows:

“[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

It no longer says that the party who introduced the misleading portion is required to offer the evidence. But because the gender-neutralizing amendments are not supposed to be substantive, one can argue that it is appropriate to return to the meaning of the original rule, thus requiring the government to offer the completing evidence.

This does not mean, however, that the solution is simply to amend the rule to require the offending party to introduce the completing evidence – that seems too subtle to be a remedy at this point, given the conflict in the courts.

B. Context

One argument against adding a hearsay exception to Rule 106 is that it is not needed to remedy the unfairness, because the statement, if necessary to complete, is admissible as non-hearsay. That would mean that the courts that do exclude completing evidence on hearsay grounds are simply wrong about the hearsay question itself. As Judge Grimm observes, when the proponent offers evidence out of its necessary context, any out-of-court statement that is clearly necessary to place the evidence in proper context is not hearsay at all; rather it is admissible for the not-for-truth purpose of providing context.¹²

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. While that is the correct result under existing law, the amendment

¹² See Michael Hardin, *This Space Intentionally Left Blank: What to do When Hearsay and Rule 106 Completeness Collide*, 82 Ford. L. Rev. 1283 (2013) (Remainder that is otherwise hearsay should be admitted whenever its probative value in providing necessary context is not substantially outweighed by its prejudicial effect).

could be justified as sending a signal to the courts that they should be doing what they haven't been doing. A "context" solution is, of course, less aggressive than providing that the completing statement is admissible for its truth; as such it might be more palatable to the courts that currently do not allow completion with hearsay.

There are some problems with a "context" solution, however:

1. It means that the completing statement could not be used as proof of a fact, and this results in an evidentiary imbalance – the party who created the whole problem by offering a misleading portion is entitled to have that portion considered as proof of a fact, while the party simply seeking fairness is not allowed to argue that the completing portion can be used as proof of a fact. So the "wrongdoer" ends up with a comparative advantage.

2. A second problem between differentiating a substantive initial portion and a "not-for-truth" remainder is that it results in a most complicated situation for the jury to figure out. Take *Haddad*, for example, where the defendant says "the drugs are mine, but not the gun." The government can argue that drug use has been proved by the defendant's own statement "the drugs are mine"– and of course the jury will draw the inference that because he had drugs, he had a motivation to have a gun. The defendant, for his part, can't argue that the evidence indicates that he does not have a gun. He is limited to the argument that the completing statement may be considered only for "context." If the jury follows that instruction – a big if – it would probably mean that the inferences that the jury would otherwise draw from the misleading portion should not be drawn because of the context of the statement. Apparently, that would mean that there is no evidence one way or the other about Haddad's knowledge of the gun. That all seems a very complicated resolution. And there is good reason to think that the jury will not be able to follow a context instruction in this instance. That is because the evidence of drug ownership was offered precisely for the inference that it provided a motive to possess a gun – that is the only reason it could be admissible. So in the end a "context" instruction in a case like *Haddad* is like a roundabout instruction to strike the evidence.

3. The "context" solution can be thought confusing because in order to provide context, the statement will often have to be true. Take 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 was true? If it is false, it doesn't correct any misimpression at all. It doesn't change the meaning regardless of the content. The only way it changes the meaning is if it is true. And if that is the case – as it seems to be in many of the cases – then it makes little sense to take the difficult, instruction-laden context route.¹³ It is much more direct to just say that the statement is admitted for its truth.

¹³ *Haddad* appears to be another case in which the completing evidence must be true to be useful for context. If Haddad did know about the gun, then it doesn't correct a misimpression – the jury should be

4. Another concern about the “context” solution is that it will change the law not only in the circuits that bar hearsay to complete, but also in most of the circuits that *allow* hearsay to complete. Currently there are two predominant views on hearsay statements offered for completion: one is that they are admissible as proof of a fact, and the other is that they are not admissible at all. There are only a few decisions that allow completion on the non-hearsay basis of context.¹⁴ It would seem that the Committee would need to be very convinced that the “context” solution is the right result before it rectifies a conflict by changing the law in almost all federal courts.

In the end, there is something to be said for a solution that would allow the completing portion to be admissible *to prove a fact*. It puts the parties on an even playing field; it avoids a confusing limiting instruction; and it would appear to be the just result – because the party who introduced the misleading portion should have lost any right to complain.¹⁵ Waiver by presenting a misleading presentation – also called opening the door – is a well-established doctrine in evidence. It has been held, for example, that a defendant who selectively reveals helpful parts of a testimonial statement waives the right to complain that the remainder is testimonial hearsay that violates the right to confrontation. The New York Court of Appeals, in *People v. Reid*, 19 N.Y.3d 382, 948 N.Y.S.2d 223, 227 (2012), put it this way:

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

permitted to draw inferences from drug possession to gun ownership. Those inferences are only barred if Haddad is truthfully relating a lack of knowledge.

¹⁴ See, e.g., *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010) (the fact that completing statement is hearsay “does not block its use when it is needed to provide context for a statement already admitted”); *United States v. Allums*, 2009 WL 1010854 (D.Utah) (“the court will require admission” of the defendant’s statement “because it provides context that the defendant is not admitting ownership of the coat.”).

¹⁵ See, e.g., *United States v. Lopez-Medina*, 596 F.3d 716, 733 (10th Cir. 2010) (holding that opening the door to otherwise inadmissible evidence operates as a waiver of objections to that evidence).

If the open door principle is enough to answer a constitutional objection, it certainly should be enough to answer a hearsay objection.

It is notable that Evidence Rule 502(a), governing subject matter waiver of privilege, lifted the language of Rule 106 as the standard for determining subject matter waiver. See Advisory Committee Note to Rule 502(a) (noting that the animating principle of Rule 106 and 502(a) are the same). Under Rule 502(a), a party that makes a “selective, misleading presentation [of privileged communications] that is unfair to the adversary opens itself to a more complete and accurate presentation” through undisclosed privileged communications on the same subject matter. *Id.* If a selective, misleading presentation results in a *subject matter waiver of privilege*, it is hard to see how it cannot result in a waiver of a hearsay objection under Rule 106. Indeed, in the circuits that exclude completing evidence on hearsay grounds, there is an inconsistency between Rules 106 and 502(a), given the legislative intent of 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.¹⁶

For all these reasons, the “hearsay exception” solution seems more justified and substantially less complicated than the “context” solution. But that is for the Committee to decide, and at least it can be said that while the context solution is in some senses problematic, it is better than doing nothing at all.

C. Unrecorded Oral Statements

As Judge Grimm compellingly argues, there is no good reason to exclude categorically all unrecorded oral statements from a rule of completeness. While there might be a dispute about the content or existence of some oral statements in some cases, surely the difficulty of proof is a matter that should be handled on a case-by-case basis under Rule 403. That is, the fairness rationale should apply equally to completing unrecorded oral statements, unless the court finds that the probative value of the completion is substantially outweighed by the difficulties and uncertainties of proving whether and what was said.

So it would seem at first glance that there is a compelling reason to amend Rule 106 to cover unrecorded oral statements, as a number of the states have done. A complicating factor is that, as Judge Grimm describes, many courts have found a way to apply the rule of completeness to unrecorded oral statements by relying either on Rule 611(a) or on the common-law rule of completeness. Yet as discussed above, there are a fair number of opinions where courts simply

¹⁶ Other rules with similar results are Rule 410(b)(1) (allowing admission of protected plea statements in which a selective and misleading impression can be corrected by those statements – again using the “ought in fairness” standard); and Rule 804(b)(6) (hearsay objection forfeited for wrongdoing that did and was intended to keep the declarant from testifying). It makes no sense that a waiver of evidentiary protections is found in these rules but not in Rule 106.

hold that Rule 106 does not cover oral statements, and that is the end of the analysis – those courts do not consider admissibility under Rule 611(a) or the common-law rule.

But even if the unrecorded oral statement question is not in itself a reason to amend Rule 106, the question becomes different if the decision is made to amend Rule 106 to provide that completing evidence is admissible over a hearsay objection or for context. Many rule-based problems are not serious enough to warrant an amendment on their own but are usefully addressed as part of an amendment that is going to be proposed.¹⁷

What would be the advantage of amending Rule 106 to cover unrecorded oral statements? Basically it could bring an organized approach to a chaotic area. One advantage of good codification is that an unseasoned litigator can just look at the rule and figure out what to do. But that is not possible with unrecorded oral completing statements, because looking at the rule one would think that there would be no way to admit the completing statement. As stated above it is unlikely that Rule 611(a), or the common-law rule of completeness, would come readily to mind. So adding coverage of oral statements to Rule 611(a) would be part of the good housekeeping and user-friendliness that is an important part of rulemaking. And it would change the practice of those courts that simply stop at Rule 106 and refuse to deal with unrecorded oral statements.

IV. Addressing Some Points Made at and Since the Prior Meeting

A. Not Much of a Conflict

At the last meeting the DOJ representative argued against an amendment to Rule 106 on the ground that only a few circuits barred completing hearsay, so it wasn't a conflict worth rectifying. With respect, that statement misstates the nature of the conflict. Here is the tally of conflicting courts:

Seven circuits have held at various times that a remainder necessary to complete is admissible under Rule 106 even if it is hearsay. These are the D.C., First, Second, Third, Fourth, Seventh, and Tenth Circuits.¹⁸ At least five circuits have at times endorsed the opposite

¹⁷ An example is the Rule 408 amendment in 2006. The major reason for the amendment was to resolve a conflict over whether a civil settlement was admissible in a subsequent criminal case. Another problem was whether a statement made in a settlement conference could be admitted to impeach a party at trial as an inconsistent statement. That problem was not considered serious enough to warrant an amendment on its own, but it was added to the amendment package once the Committee determined it was going forth with the rule on criminal cases.

¹⁸ *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986); *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008); *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

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proposition, holding that a remainder must otherwise be admissible or else be excluded. These are the Second, Fourth, Sixth, Seventh, and Ninth Circuits.¹⁹ That seems like a pretty big conflict. Perhaps it can be argued that the split is not 7-5, but rather 4-2, because three of the circuits are subject to *intra-circuit panel* conflicts. (Though one would think that intra-circuit conflicts are just as troubling, if not moreso, because the Federal Rules of Evidence are supposed to be uniform and it could be seen to be especially problematic that they are not even uniform in a particular circuit.)

But even at 4-2, this is not some trivial conflict. One major reason for *having* an Advisory Committee is to monitor and rectify conflicts, because the major benefit of having the Federal Rules is that they are uniform throughout the country. The history of the Evidence Rules Advisory Committee is replete with rectifying conflicts, many of which were not as pronounced as that involving Rule 106. To take some examples:

- Rule 103 was amended in 2000 because the Fifth Circuit, contrary to others, required parties to renew an in limine objection even if the court had ruled definitively on the matter.
- In 2003, the Committee directed the Reporter to submit a memo of all the circuit splits involving the Evidence Rules. That memo resulted in amendments to Rules 408, 606(b), and 609. As to each of those rules, the circuit splits ranged from 6-5 to 8-2.
- In 2010, Rule 804(b)(3) was amended to rectify a circuit split over whether the government was required to provide corroborating evidence for a declaration against penal interest. That split was 7-4.

jury, or to ensure fair and impartial understanding of the admitted portion”); *United States v. Green*, 694 F. Supp. 107, 110 (E.D. Pa. 1988), *aff’d*, 875 F.2d 312 (3d Cir. 1989); *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988); *United States v. Haddad*, (7th Cir.), *supra*; *United States v. Lopez-Medina*, 596 F.3d 716 (10th Cir. 2010).

¹⁹ *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) (“Rule 106 does not render admissible evidence that is otherwise inadmissible.”); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (“[E]ven if, as Wilkerson claims, Rule 106 had applied to this testimony, it would not render admissible the evidence which is otherwise inadmissible under the hearsay rules.”); *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982) (“The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded.”); *United States v. 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. Ortega*, 203 F.3d 675 (9th Cir. 2000). In the Eighth Circuit there is district court case law holding that Rule 106 does not allow completion through hearsay. *United States v. Bentley*, 2007 WL 576523 (D. Iowa).

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- In 2014, Rules 803(6)-(8) were amended to clarify that the opponent had the burden of showing untrustworthy circumstances after the proponent had established the other admissibility requirements of the exception. That amendment was largely in response to the fact that the Ninth Circuit, contrary to all the others, had put the burden on the proponent.
- One of the animating reasons for amending Rule 807 was to rectify the conflict in the courts over whether there is a good cause exception for the pretrial notice requirement. All circuits but two have found that exception.

Finally, it is important to note that in 2016, Judge Sutton (then the chair of the Standing Committee) directed his Rules clerk to provide a memo on circuit splits on *all* the national rules. The obvious premise of that memo is that circuit splits provide a reason to propose amendments that rectify those splits. The Rule 106 conflict discussed in this memo is on that list.

In sum, there is no basis for arguing that an amendment is not necessary because the conflict over Rule 106 is insufficiently widespread.

B. Parties Wouldn't Risk Being Rebutted by Completing Evidence

At the last meeting, the thought was raised that the problem of admitting misleading portions of a statement would be self-regulating, because the party would be worried that the remainder would be admitted somewhere down the line. Let's call that the "deterrence" argument. 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.

More importantly, if the "repair" would come from a hearsay statement, then *there will be no rectification down the line*. That is the point of the cases holding that Rule 106 does not allow admission of hearsay – the misleading statement is admitted, without ever being rebutted.

Is it really possible that a court would allow the government to admit a misleading portion of the statement, but then prevent a completion even though fairness would require it? For most decisions that espouse a "no hearsay" view of Rule 106, it is fair to state that the case might be resolved on other grounds – for example, by holding that the initial portion is not in fact misleading, or the completing portion is not in fact completing. And indeed in some of the cases excluding hearsay offered by the defendant to complete, the court makes an alternative holding that it wasn't necessary to complete anyway. *See, e.g., United States v. Bentley*, 2007 WL 576523 (D. Iowa) (finding that a statement offered to complete was inadmissible because it was hearsay, but also finding that there was "minimal danger of incompleteness").

Yet there are, in fact, decided cases in which the court recognizes that the initial portion is misleading, yet admissible – and un rebuttable because the defendant seeks to complete with hearsay. The leading example of this troubling result is *United States v. Adams*, 722 F.3d 788, 827 (6th Cir. 2013). Defendant Maricle, a state court judge, was accused of conspiring to buy votes and to help appoint corrupt members of the Clay County Board of Elections. The government was allowed to present portions of a phone recording in which a cooperating witness (White) told Maricle about questions she had been asked during her grand jury testimony. White told Maricle that she had been asked at the grand jury whether Maricle had appointed her as an election officer. Maricle responded, “Did I appoint you? (Laugh),” and White said “Yeah.” Maricle then said, “But I don’t really have any authority to appoint anybody.” That last statement was redacted from the government’s presentation. That meant that the portion indicated that Maricle had essentially adopted the accusation that he had appointed White. When Maricle sought to complete with his statement that he didn’t even have authority to make the appointment, the court excluded it as hearsay.

Remarkably, the Sixth Circuit found that the government had unfairly presented the evidence, but that nothing could be done about it:

Defendants claim that “by severely cropping the transcripts, the government significantly altered the meaning of what [defendants] actually said.” Maricle Br. at 35. *Although we agree that these examples highlight the government’s unfair presentation of the evidence, this court’s bar against admitting hearsay under Rule 106 leaves defendants without redress.* (emphasis added).

In a footnote in *Adams*, the court stated that “should this court sitting en banc address whether Rule 106 requires that the other evidence be otherwise admissible, it might consider” all the authorities that have criticized the rule that allows the government to admit a misleading portion and then object on hearsay grounds to a necessary completion.²⁰ It should be noted that *Adams* was written five years ago; the Sixth Circuit has not sat en banc on the Rule 106 question.

²⁰ 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

C. *Third Party Statements*

Judge Schroeder, in a letter to the Chair and Reporter, raises a problem regarding the application of Rule 106 that has not yet been discussed by the Committee. He notes that the rule change being discussed is focused on a portion of the defendant's statement that is completed by another portion of the defendant's statement. But the rule provides that a completion can occur with *any other* statement. Judge Schroeder noted that the reference to "any other" "appears to permit hearsay by other speakers or possibly in unreliable formats, such as statements contained in newspapers." He suggests a fix that will be set out in the next section of drafting alternatives. The point of the fix is to make sure that the initial portion and the completing statement are made *by the same person*.

My research of the case law has not found a case in which a court allowed a completion with a statement by a person different from the one who made the initial portion. I have found one case in which a court refused to allow completion because it would require the admission of portions "wherein individuals other than the Defendant are recorded." *United States v. Allums*, 2009 WL 1010854 (D.Utah). The infrequency does not mean that the question of third party statements shouldn't be treated as part of an amendment to the rule. Allowing completion with third party statements does appear to be a bridge too far and could lead to disruptions at the trial. Therefore, in the drafting alternatives set forth below, Judge Schroeder's suggested limitation on third party statements has been implemented.

V. *Drafting Alternatives*

Below are four drafts of a possible amendment to Rule 106. Draft one provides a hearsay exception. Draft two provides that the remainder is admissible for context. Drafts three and four simply add a change that would cover unrecorded oral statements to the prior two drafts.²¹

(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.").

²¹ I ran these drafting alternatives by the Style Subcommittee and they had no changes. They even provided a thumbs-up emoji.

A. *Draft One – Admissibility of Completing Statement, Even if Hearsay, to Prove a Fact*

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement by the same person—that in fairness ought to be considered at the same time, even if it would otherwise be inadmissible under the rule against hearsay.

Draft Committee Note

The Rule has been amended to provide that if evidence is found necessary to complete under the strict terms of the rule, then that completing evidence is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates the misimpression can object to the completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The adverse party, who has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain un rebutted. The adverse party can fairly be said to have waived its right to object to hearsay that would be necessary to correct a misleading impression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person's statement is misleading it will rarely if ever be sufficiently clarified by statements or writings of other persons.

The amendment does not give a green light of admissibility to all excised portions of writings and recordings. It does not change the basic rule, which limits admissibility on completeness grounds to those statements that are necessary in fairness to correct otherwise misleading presentations.

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Reporter's Comment: The Committee might think more broadly about allowing completion that is otherwise barred by *any* rule of admissibility, not just hearsay. Theoretically, it could be possible that completion might be necessary with evidence that is otherwise barred by, say, Rule 407 or the Best Evidence Rule. (Not by Rule 403, though, because that rule has an opening-the-door principle so that the probative value of completion of a misleading statement would never be substantially outweighed by the risk of prejudice).

The case against going more broadly to other grounds of exclusion is that there appears to be no reported case in which completion otherwise required under Rule 106 was prevented on any grounds other than hearsay. Because hearsay is *the* problem, it would seem more focused and more instructive to address that problem.

But if the Committee thinks that the rule should be broader, it can be changed as follows:

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement by the same person—that in fairness ought to be considered at the same time, even if it would otherwise be inadmissible under the rule against hearsay.

There would also need to be changes to the Note to accommodate this broader language.

B. Draft Two: Admissibility for Context Only

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement by the same person— that in fairness ought to be considered at the same time—in which event the completing evidence is admissible for the non-hearsay purpose of providing context.

Draft Committee Note

The Rule has been amended to clarify that if evidence is found necessary to complete under the strict terms 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 the rule of completeness, grounded in fairness, cannot fulfill its function if the court excludes properly completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership

is misleading. The remainder of the statement places the misleading portion in proper context. As such, a hearsay objection should be overruled [because the completing portion is not offered for its truth.]

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person's statement is misleading it will rarely if ever be placed in proper context by statements or writings of other persons.

The amendment does not give a green light of admissibility to all excised portions of writings and recordings. It does not change the basic rule, which limits admissibility on completeness grounds to those statements that are necessary in fairness to correct otherwise misleading presentations.

C. Draft Three: Admissibility to Prove a Fact, and Coverage of Unrecorded Oral Statements

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

If a party introduces all or part of a an oral or written ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part—or any other oral or written ~~writing or recorded~~ statement by the same person— that in fairness ought to be considered at the same time, even if it would otherwise be inadmissible under the rule against hearsay.

Draft Committee Note

The Rule has been amended to provide that if a party offers evidence that is necessary to correct a misleading impression created by an adverse party, then that completing evidence is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates the misimpression can object to the completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The adverse party, who has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain un rebutted. The adverse party can fairly be said to have waived its right to object to hearsay that would be necessary to correct a

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misleading impression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The Rule has also been amended to cover oral statements that have not been recorded. The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. The trial judge, under Rule 403, can take into account the nature and difficulty of the dispute over the content or existence of the completing statement in deciding whether it should be admitted. In any case, courts have found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. The amendment brings all rule of completeness questions under one rule. The phrase “oral or written” is intended to include electronic recordings of oral and written statements. See Rule 101(b)(6).

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person’s statement is misleading it will rarely if ever be sufficiently clarified by statements or writings of other persons.

The amendment does not give a green light of admissibility to all excised portions of writings, recordings and statements. It does not change the basic rule, which limits admissibility on completeness grounds to those statements that are necessary in fairness to correct otherwise misleading presentations.

D. Draft Four – Context and Unrecorded Oral Statements Included.

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

If a party introduces all or part of an oral or written ~~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~~ oral or written statement by the same person—that in fairness ought to be considered at the same time—in which event the completing evidence is admissible for the non-hearsay purpose of providing context.

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Draft Committee Note

The Rule has been amended to clarify that if evidence is found necessary to complete under the strict terms 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 the rule of completeness, grounded in fairness, cannot fulfill its function if the court excludes properly completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The remainder of the statement places the misleading portion in proper context. As such, a hearsay objection should be overruled [because the completing portion is not offered for its truth.]

The Rule has also been amended to cover oral statements that have not been recorded. The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. The trial judge, under Rule 403, can take into account the nature and difficulty of the dispute over the content or existence of the completing statement in deciding whether it should be admitted. In any case, courts have found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. The amendment brings all rule of completeness questions under one rule. The phrase “oral or written” is intended to include electronic recordings of oral and written statements. See Rule 101(b)(6).

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover if one person’s statement is misleading it will rarely if ever be placed in proper context by statements or writings of other persons.

The amendment does not give a green light of admissibility to all excised portions of writings and recordings. It does not change the basic rule, which limits admissibility on completeness grounds to those statements that are necessary in fairness to correct otherwise misleading presentations.

TAB 7B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**
Southern Division

UNITED STATES OF AMERICA,

v.

Criminal No.: PWG-16-0246

CALEB ANDREW BAILEY,

Defendant.

* * * * *

MEMORANDUM OPINION

Defendant Caleb Andrew Bailey was charged with multiple counts including illegal possession of machine guns, receipt and possession of unregistered short-barrel rifles, receipt and possession of unregistered destructive devices, production and attempted production of child pornography, possession of child pornography, and witness tampering. Revised Second Superseding Indictment, ECF No. 88-2. Prior to trial, the Government filed a motion *in limine*, in which it sought a pretrial ruling precluding Bailey from “eliciting on cross-examination of law enforcement agents certain potentially exculpatory statements Bailey made during his [recorded] interviews with law enforcement on May 5, 2016.” Gov. Mot. 1, ECF No. 62. In a nutshell, the Government argued that anything Bailey told the agents during his recorded interview¹ that it intended to introduce during its case in chief would be admissible non-hearsay (as an admission by a party opponent under Fed. R. Evid. 801(d)(2)(A)), but that anything exculpatory that Bailey

¹ I previously denied Bailey’s Motions to Suppress, ECF No. 52, the two Mirandized statements that he gave to Government agents on May 5, 2015, the day a search and seizure warrant was executed at his residence, which led to the discovery of the evidence that led to the charges pending against him. The guidance in this opinion assumes that the statements given by the Defendant are not inadmissible under the Fourth or Fifth Amendments. Put differently, the focus of this opinion is the law of evidence, and it takes as given that there are no Fourth or Fifth Amendment grounds for suppressing the defendant’s statement.

told them that he intended to elicit under cross examination or otherwise would be inadmissible hearsay, unless he was prepared to testify about it and be subject to cross examination. Gov. Mot. 2. Bailey filed an opposition. Def.'s Opp'n, ECF No. 91.

On May 12, 2017, I held a telephonic hearing with counsel during which I advised that without knowing the specific portions of Bailey's statements that the Government intended to introduce, I was not able to issue a definitive pretrial ruling on the record pursuant to Fed. R. Evid. 103(b), but I nonetheless gave them guidance regarding the approach I would take at trial. I also told them that I planned to issue a written opinion to memorialize my thinking because the issues raised by the Government are recurring in nature, and there is a scarcity of helpful decisional authority in this circuit to guide courts and counsel in resolving the sometimes complicated issues the Government's Motion raises. This Memorandum Opinion provides that guidance.

Whether the defendant in a criminal trial may compel the Government to introduce his exculpatory statements at the same time that it introduces his inculpatory ones implicates a number of evidentiary rules, including Rules 102 (which instructs judges to interpret the rules of evidence in order to insure fairness, ascertain the truth, and to secure a just determination), 106 (the so-called "rule of completeness"), 401 (relevance), 403 (probative value versus danger of unfair prejudice or confusion); 611(a) (court control over the examination of witnesses and presentation of evidence); and 802 (the rule against admissibility of hearsay, and its exceptions). But where the inculpatory statements given by the defendant to the government were not written or recorded, common-law principles of evidence also apply. As will be seen, although there is no shortage of case law and treatise analysis on this subject, the law is far from settled, and

courts and commentators have reached starkly different results by applying a variety of approaches, resulting in an evidentiary landscape that is unclear.

It is not my aim in this opinion to untangle the many nuances of the Gordian knot raised by the Government’s Motion, but rather to identify the key elements that a court should examine to make an appropriate ruling, consistent with the Rules of Evidence and the still-viable common law.² The starting place is the common law evidentiary principle known as the “doctrine of completeness” (which is partially codified as Fed. R. Evid. 106), and its impact on the adversary system.

I. Common-Law Origins of Rule 106

The relationship between Rule 106 and the common-law doctrine of completeness has been explained by one respected evidence treatise this way:

Rule 106 arises from the common law completeness doctrine. Both the common law and Rule 106 presume two tenets of the adversary system. First, under the principle of party presentation of evidence, parties—not the court—bear the responsibility to produce evidence of their respective factual claims. An important corollary of party presentation holds that neither party has any obligation to produce evidence that favors the adversary. Second, a principal of sequential procedure, sometimes called “stage preclusion”, provides that the trial of an issue of fact follows a sequence of proof and counterproof whereby at each stage the parties alternate roles in presenting and challenging evidence. . . . The two tenets that give rise to Rule 106 are also embodied in Rule 611.

21A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5072 (2d ed. 2005) (footnotes omitted).

² Following my telephone hearing with counsel but before the entry of this Memorandum Opinion providing the written rationale for my oral ruling, the Defendant entered a guilty plea to certain of the charges. For this reason, there will be no trial. Nonetheless, because I informed counsel that I would memorialize in writing the ruling that I previously made, and because the issues discussed have occurred in past cases where, without the full consideration of the issues that I have given in this case, I reached contrary results, I am filing this Memorandum Opinion. Had the case proceeded to trial, I would have adopted the analysis set out above. It is my hope that the discussion may be helpful to other judges of this court, and counsel, in future cases.

The back-and-forth presentation of evidence in a criminal case usually works fairly smoothly, but problems arise when one party's artful phrasing of a question calls for a response that is technically accurate, but incomplete, altering the meaning of the original statement. A classic example is when the prosecutor elicits from a law-enforcement witness that, when the defendant was interviewed in connection with a homicide investigation, he admitted that he owned the gun used to commit the murder but omits that the defendant also said that he sold the gun three months before the shooting. Quoting the defendant out of context presents a misleading picture for the jury. In such circumstances, if the defendant is required to wait until his case in chief, or even until cross examination, to put his statement to the government witness in its proper context, it might be too late to counteract the impression left with the jury that the defendant, having admitted to owning the murder weapon, was the one who shot the victim.

A. Common-Law Doctrine

“The common law responded to these abuses of the adversary system by a limited restriction on party control of the cases that . . . [is called] ‘the completeness doctrine.’ ” 21A Wright & Graham, *supra*, § 5072. Wigmore’s description of the rule of completeness was that “[i]n evidencing the tenor of an utterance material or relevant, made in words, whether written or oral in original or in copy, the whole of the utterance on a single topic or transaction must be taken together.” *Id.* (quoting John Henry Wigmore, *Code of Evidence* 371 (3d ed. 1941)). The influential Field Code codified the common law rule of completeness in this manner:

When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence.

Id. (quoting N.Y. Commissioners on Practice and Pleading, *Code of Civil Procedure* § 1687, at 704–05 (1850)).

A careful reader will notice straightaway that in its common-law and early-code-law expression, the doctrine of completeness encompassed conversations and other spoken utterances (as well as acts) that had not been memorialized in writing or recorded. Another important feature of the common-law doctrine of completeness was that it allowed the introduction of otherwise inadmissible evidence to give proper context to the incomplete and misleading evidence offered by the original proponent. *Id.* § 5072 (“Thus, the opponent can introduce what would otherwise be hearsay to complete a truncated statement offered by the proponent.” (citing *Crawford v. United States*, 212 U.S. 183, 201 (1909))). Less clear was whether the party seeking to complete the record regarding what was said in a writing or conversation could require the proponent to include the content necessary for completeness at the time the incomplete version was presented to the jury or had to wait until his case in chief or cross examination to do so. Most common-law courts would not allow this “acceleration of completeness,” but some courts, including the Supreme Court, did. *Id.* (citing *Crawford*, 212 U.S. at 201).

B. Rule 106

The common-law doctrine of completeness has been partially codified by Fed. R. Evid. 106. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (“The Federal Rules of Evidence have partially codified the doctrine of completeness in Rule 106.”); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (“The common-law doctrine of completeness has been partially codified in Rule 106 of the Federal Rules of Evidence.”). Rule 106 states:

If a party introduces all or part of a *writing* or *recorded statement*, an adverse party may require the introduction, *at that time*, of any other part—or any other writing or recorded statement—that *in fairness ought to be considered at the same time*.

Fed. R. Evid. 106 (emphasis added). The italicized words highlight several important features of Rule 106. First, it applies only to writings and recorded statements, not to conversations or other oral statements that have not been memorialized in some written or recorded form (hence, Rule 106 only *partially* incorporates the common law rule). Second, when the Rule applies, it permits the party against whom the incomplete information has been introduced to require the introduction of completing information at the same time (the so called “acceleration clause”). Third, the rule only requires the introduction of the completing information when fairness requires that it be considered at the same time as the incomplete information.

The Advisory Committee Note to Rule 106 states:

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

Fed. R. Evid. 106 advisory committee’s note to 1972 proposed rules (citation omitted). Conspicuously absent from the Rule or the Advisory Note is any indication of whether completing information can be admitted under Rule 106 even if otherwise inadmissible (for example, because it is hearsay).³ Nor does the Rule or Note give any guidance as to what must be shown to satisfy the “fairness” requirement in order to require the introduction of the

³ In 2002–03, the Advisory Committee considered whether to amend Rule 106 to extend its scope to oral statements and acts, and whether to amend the rule to state that evidence that met the fairness requirement of Rule 106 was admissible even if it would be inadmissible if offered on its own. It ultimately “voted unanimously not to amend Rule 106 on the ground that the costs exceeded the benefits because ‘any problems under the current rule were being well-handled by the courts.’ ” 21A Wright & Graham, *supra*, § 5071 (quoting Advisory Comm. on Evidence Rules, *Minutes of Meeting of April 25, 2003*, at 9).

completing information at the same time as the incomplete information. And, although the Advisory Note states that the rule only applies to writings and recorded statements (and not to conversations) for “practical reasons,” it does not explain what those practical reasons are, or how courts should deal with the problem created when one party introduces a misleadingly incomplete portion of an oral statement or conversation.

II. Application of Rule 106

A. Independent Admissibility

1. Split of Authority

In the absence of guidance from the Rule or the Committee, courts and commentators have been left to answer these questions on their own, with conflicting results. For example, some courts have held that evidence that would be inadmissible if offered independently cannot be used for completeness purposes under Rule 106. *See, e.g., United States v. Hassan*, 742 F.3d 104, 134–35 (4th Cir. 2014) (holding that district court did not abuse its discretion by excluding defendant’s exculpatory statements under Rule 106 because they were inadmissible hearsay); *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007) (“Rule 106 applies only to written and recorded statements, not unrecorded oral confessions, and Rule 106 does not render admissible otherwise inadmissible hearsay.”); *United States v. Guevara*, 277 F.3d 111, 127 (2d Cir. 2001) (“Rule 106 does not ‘render admissible evidence that is otherwise inadmissible.’ ” (quoting *United States v. Terry*, 702 F.2d 299, 315 (2d Cir. 1983))), *overruled on other grounds as recognized in United States v. Doe*, 297 F.3d 76, 90 n.16 (2d Cir. 2002); *United States v. Ortega*, 203 F.3d 675, 682–83 (9th Cir. 2000) (holding that Rule 106 would not allow defendant’s exculpatory statements because they were inadmissible hearsay); *United States Football League v. Nat’l Football League*, 842 F.2d 1335, 1375–76 (2d Cir. 1998) (“The

doctrine of completeness does not compel admission of otherwise inadmissible hearsay evidence.” (citation omitted)); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (holding that the government was entitled to introduce the defendant’s inculpatory statements as admissions under Rule 801(d)(2)(A), but that the defendant could not introduce exculpatory portions under Rule 106 because they would be inadmissible hearsay).

What is concerning about many of the cases that have restricted Rule 106 to evidence that is independently admissible is the ease with which they have done so without any real consideration of the common-law history of the doctrine of completeness (which did not limit completing evidence to that which was independently admissible), its purpose to guard against abuses of the adversary system, or the harm that can result from letting one party (for example, the government in a criminal case) have an unfair advantage over another by creating a misleading impression in the minds of the jury that is, as a practical matter, uncorrectable. This hardly lives up to the aspirations of Rule 102 that the rules of evidence should be construed to the “end of ascertaining the truth and securing a just determination.”

But not all courts have been so quick to restrict Rule 106 to independently admissible evidence, even at the expense of fairness. In *United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986), the court rejected the notion that only admissible evidence could be used to complete the record under Rule 106. Its analysis is worth quoting at length:

Rule 106 explicitly changes the normal order of proof in requiring that . . . evidence [within the scope of the Rule] must be “considered contemporaneously” with the evidence already admitted. Whether Rule 106 concerns the substance of evidence, however, is a more difficult matter. The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof. Rule 106 is found not in Rule 611, which governs the “Mode and Order of Interrogation and Presentation,” but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules. *See* C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (1977 & 1986 Supp.). Moreover, every major rule of exclusion in the Federal Rules of

Evidence contains the proviso, “except as otherwise provided by these rules,” which indicates “that the draftsmen knew of the need to provide for relationships between rules and were familiar with a techniques for doing this.” *Id.* There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed. *See id.*

Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.

The most sensible course is to allow the prosecution to introduce the inculpatory statements. The defense can then argue to the court that the statements are misleading because of a lack of context, after which the court can, in its discretion, permit such limited portions to be contemporaneously introduced as will remove the distortion that otherwise would accompany the prosecution’s evidence. Such a result is more efficient and comprehensible, and is consonant with the requirement that the “rules shall be constructed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. Federal Rule of Evidence 102.

Id. at 1368–69 (footnotes omitted); *see also United States v. Harvey*, 653 F.3d 388, 394–95 (6th Cir. 2011) (affirming decision of district court to admit under the rule of completeness recordings that the court previously had ruled inadmissible on their own); *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008) (“[O]ur case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.”); *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988) (“The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. Fed. R. Evid. 106 allows an adverse party to introduce any other part of a writing or recorded statement which ought in fairness be considered contemporaneously. The rule simply speaks the obvious notion that parties should not be able to lift selected portions out of context.”); *United States v. LeFevour*, 798 F.2d 977, 980–82 (7th Cir. 1986) (“If otherwise inadmissible evidence is necessary to correct a misleading impression, then

either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible . . . the misleading evidence must be excluded too.”); *United States v. Green*, 694 F. Supp. 107, 110 (E.D. Pa. 1988) (noting with approval the D.C. Circuit’s holding that Rule 106 permits introduction of evidence that is otherwise inadmissible), *aff’d*, 875 F.2d 312 (3d Cir. 1989).

2. *Concerns Animating Split of Authority Are Mitigated by Proper Application of Rule 106’s “Fairness” Clause*

Perhaps courts’ willingness to restrict the use of Rule 106 to admissible evidence reflects the same concern expressed by the Department of Justice when it objected to the revision of the rule in 2002 to permit the use of inadmissible evidence. DOJ “prosecutors argued that amending the Rule would allow defense counsel to make bogus claims that the evidence was taken out of context so that they could get inadmissible evidence before the jury.” 21A Wright & Graham, *supra*, § 5071. Fair enough. But it is just as much of an abuse of the adversary system for the prosecution to paint a misleading picture to the jury by introducing out-of-context inculpatory statements by the defendant as it is for a defense attorney to assert “bogus” claims that prosecution evidence was taken out of context as a pretext to “correct” the record by introducing otherwise inadmissible evidence. And it does not answer to prevent the later abuse but permit the former. Moreover, proper application of the “fairness” requirement of Rule 106 should prevent the abuses that the Department of Justice feared because judges should restrict application of Rule 106 to those situations where misleading information actually was introduced by the prosecution and allow only such correcting evidence as is necessary to counteract it. In this regard, courts and commentators have identified various factors that go a long way towards preventing any abuse of Rule 106 that might occur if inadmissible evidence is allowed to complete the record.

To begin with, Rule 106 should never come into play unless misleading evidence has been introduced that requires clarification or explanation—otherwise there is no unfairness that needs correction. *Wilkerson*, 84 F.3d at 696 (“Thus, the rule of completeness . . . would not appl[y] . . . where there was no partially introduced conversation that needed clarification or explanation.”). And, judges need not take at face value exaggerated claims that a partially introduced statement requires completion unless it can be shown with some precision just how the incomplete evidence is taken out of context. The Seventh Circuit has identified a four-part test to determine when this has happened:

Our case law interpreting Rule 106 requires that the evidence the proponent seeks to admit must be relevant to the issues in the case. Even then, a trial judge need admit only that evidence which qualifies or explains the evidence offered by the opponent. The test is conjunctive. Once relevance has been established, the trial court then must address the second half of the test, and should do so by asking (1) does it explain the admitted evidence, (2) does it place the admitted evidence in context, (3) will admitting it avoid misleading the trier of fact, and (4) will admitting it insure a fair and impartial understanding of all the evidence.

United States v. Velasco, 953 F.2d 1467, 1474–75 (7th Cir. 1992) (citations omitted).

A respected evidence treatise also has identified a series of factors that help courts identify when the fairness requirement of Rule 106 has been met. They include: (1) Is the proffered evidence taken out of context (does what is missing change the meaning of what was introduced)? (2) Does the lack of context make the evidence misleading (does the admitted evidence “invite” or “permit” a false premise)? (3) Can the misleading impression be dispelled by other means (for example, by instructing the jury not to draw the misleading inference, or by permitting introduction of completing evidence at a later time, such as during cross examination or the defense case, so as not to interrupt the presentation of the prosecution’s case)? (4) How much evidence is needed to dispel misleading effects (lawyers should be precise in identifying the information actually needed to correct the misleading impression created by the incomplete

evidence, and judges should be skeptical about allowing expansive introduction of lengthy excerpts from writings or recordings under the guise of “correcting” a misimpression)? (5) How strong is the evidence admitted and omitted (how does the strength of the admitted evidence compare to the strength of the omitted evidence—a minor discrepancy does not require “correction” with a massive introduction of information of little probative value)? (6) How long will repair be delayed if not accelerated (if the completing information is not introduced during the prosecution’s case, can the defendant effectively dispel any misleading impression during cross examination or during his case in chief, or will the damage, once done, be irremediable if not immediately addresses)? (7) What is the consequential fact to be proved (if the misimpression goes to an essential element of the prosecution’s case—such as the defendant’s motive or intent—then there is a more exigent need to insure immediate correction than exists if the incomplete information is primarily relevant to a less critical issue, such as an assessment of a witness’s credibility)? (8) How much will completion disrupt or prejudice the proponent (the more disruptive the immediate completion will be of the proponent’s case, the more cautious the court should be before allowing it at that time)? And (9) does truncation or completion implicate constitutional rights (if the prosecution introduces incomplete portions of a defendant’s confession that, if not completed by introducing other parts of the confession, would require the defendant to waive his Fifth Amendment right not to testify)? 21A Wright & Graham, *supra*, § 5077.2.

Consideration of these factors should be sufficient for any careful judge to determine whether (and if so, how much) completeness is required by Rule 106, and eliminate much of the concern expressed by those who resist the idea of permitting inadmissible evidence to complete the record when fairness legitimately requires it. Unfortunately, to date few cases (especially

those that hold that inadmissible information may not be used for completion purposes) have taken the opportunity to do so.

B. Oral Statements

A final vexing issue raised (but not answered) by Rule 106 and the enigmatic language of the Advisory Committee Note is what courts should do with regard to oral statements or conversations that have not been memorialized by a writing or recording—particularly when the unwritten or unrecorded statement is the defendant’s confession to a law-enforcement officer. On its face, Rule 106 is limited to “writings” and “recorded statements,” and the Advisory Committee Note states that for (unnamed) “practical reasons” the rule does not apply to conversations. Fed. R. Civ. P. 106 & advisory committee’s note to 1972 proposed rules. Many courts have taken this to mean that in a criminal case, the prosecution may elicit a law-enforcement officer’s testimony about inculpatory statements made by the defendant because they are admissible under Rule 801(d)(2)(A) as admissions. But they have also held that, during cross examination of the officer, the defendant may not elicit non-inculpatory statements the defendant made during the same interview because (a) Rule 106 does not apply to oral statements and (b) even if it did, the defendant’s exculpatory statements (even if necessary to dispel the misleading, out-of-context impression left by the officer’s direct examination) are inadmissible hearsay. *See, e.g., Ortega*, 203 F.3d at 682–83 (“Even if the rule of completeness did apply, exclusion of Ortega’s exculpatory statements was proper because these statements would still have constituted inadmissible hearsay.”); *Wilkerson*, 84 F.3d at 696 (holding that Rule 106 did not apply to unrecorded conversation between defendant and FBI agent, and defendant’s exculpatory statements to the agents were not admissible under the hearsay rules).

While the “practical reasons” why oral conversations are excluded from Rule 106 undoubtedly include the need to avoid “he said, she said” disputes about the content of an unrecorded or unwritten statement, those concerns do not justify creating an environment in which the prosecution may be able to introduce the defendant’s out-of-context inculpatory oral statements, but where the defendant is powerless to do anything at that time because Rule 106 does not reach oral statements. And if there is legitimate concern about the difficulty in establishing what was said in oral conversations, the factors described above provide a judge with the analytical tools to determine whether to allow the evidence during the proponent’s case or thereafter during cross examination or during the adversary’s case in chief on a case by case basis. A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized (for example, in a FBI agent’s form 302 summary of the defendant’s confession), or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.

1. *Residual Common-Law Completeness Doctrine*

But there is an even more fundamental reason why court decisions that hold that Rule 106 does not apply to oral statements or conversations should not prevent a party from completing the record (at the time the misleading evidence is introduced or thereafter during cross examination or the opposing party’s own case) to prevent abuse of the adversary system when a proponent introduces a misleadingly incomplete part of a conversation or oral confession. The reason is that, as the Supreme Court itself appears to have recognized, Rule 106 only *partially* codifies the common law doctrine of completeness, and for situations beyond the reach

of Rule 106, the common law still applies.⁴ *Beech Aircraft*, 488 U.S. at 170–72; 1 Kenneth S. Broun, *McCormick on Evidence* § 56, at 392 n.5 (7th ed. 2013) (“*In Beech Aircraft Corp. v. Rainey*, the Court indicated that Rule 106 ‘partially codified’ the completeness doctrine. The implication is that the uncodified aspect of the doctrine is still in effect in federal court.”); 21A Wright & Graham, *supra*, § 5072.1 (stating that *Beech Aircraft* “impliedly held that Rule 106 does not repeal the common law completeness doctrine”).

Further, to the extent that the common-law doctrine of completeness (which allowed even inadmissible evidence to be introduced to dispel misleading evidence of written, recorded and oral statements) applies to oral statements or conversations, commentators have recognized that, when necessary to avoid the prejudice created by introduction of misleading characterization of oral statements, inadmissible evidence should be permitted for completion purposes. One has observed:

With respect to other parts of writings and recorded statements or related writings and recorded statements, counsel may eschew Rule 106 and develop the matter on cross-examination or as part of his own case. Similarly, the remainder of oral statements and related oral statements may be introduced by an opposing party on his next examination of the same witness, whether cross or redirect. Of course, as with written or recorded statements, it is sometimes stated that the additional oral statements may be admitted only if otherwise admissible. Clearly, the principle of completeness does not give an adverse party an unqualified right to introduce an omitted part of a conversation or related conversation otherwise inadmissible merely on the ground that the opponent has “opened the door.” To the extent however that such evidence, otherwise inadmissible, tends to deny, explain, modify, qualify, counteract, repel, disprove or shed light on the evidence

⁴ The Court resorted to the common-law rule of completeness to reverse the trial court’s exclusion of evidence necessary to dispel a “distorted and prejudicial impression” of a witness’s letter brought about by a law-enforcement officer’s testimony. *Beech Aircraft*, 488 U.S. at 170. The Court noted that Rule 106 only “partially codified” the doctrine of completeness and brushed away arguments that completion was not required because Rule 106 did not apply: “While much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106.” *Id.* at 172.

offered by the opponent, the evidence may be admitted provided its explanatory value is not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, or waste of time, Rule 403.

2 Michael H. Graham, *Handbook of Federal Evidence* § 106:2 (7th ed. 2012) (footnotes omitted); *see also* Broun, *supra*, § 56 (“It is sometimes stated that the additional material may be introduced only if it is otherwise admissible. However, as a categorical rule, that statement is unsound. In particular, the statement is sometimes inaccurate as applied to hearsay law. At least when the other passage of the writing or *statement* is so closely connected to the part the proponent contemplates introducing that it furnishes essential context for that party, the passage becomes admissible on a nonhearsay theory.” (emphasis added) (footnotes omitted)); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 1:43 (4th ed. 2013) (“Rule 106 does not say whether additional statements (or parts) may be admitted when necessary to provide context if they would otherwise be excludable under other rules, such as the hearsay doctrine. . . . It seems that hearsay objections should not block use of a related statement . . . when it is needed to provide context for statements already admitted. Thus a statement should be admissible if it is needed to provide context under Rule 106 and to prevent misleading use of related statements even if the statement would otherwise be excludable hearsay”); 1 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* §106.02[3] (11th ed. 2015) (“[Rule 106] does not on its face state that hearsay is admissible. This has led some courts to hold that Rule 106 operates solely as a timing device, affecting the order of proof—it does not make admissible what would otherwise be excluded. We believe these rulings are misguided and contrary to the completeness principle embodied in Rule 106. A party should not be able to admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify the unfairness.”).

2. Rule 611's Connection to Rule 106

Courts, too, have found the means to rectify abuses of the adversary system caused by incomplete or misleading renditions of oral statements by resorting to Fed. R. Evid. 611(a), which provides, in relevant part:

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth.

In *United States v. Pacquette*, 557 F. App'x 933 (11th Cir. 2015), the court held “Rule 106 does not apply to oral statements. However, we have extended the fairness standard in Rule 106 to oral statements ‘in light of Rule 611(a)’s requirements that the district court exercise reasonable control over witness interrogation and the presentation of evidence to make them effective vehicles for the ascertainment of truth.’ ” *Id.* at 936 (internal quotation marks and citation omitted) (quoting *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005)); *see also United States v. Verdugo*, 617 F.3d 565, 579 (1st Cir. 2010) (noting that the district court “retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements”); *United States v. Collicott*, 92 F.3d 973, 983 n.12 (9th Cir. 1996) (noting, without disagreement, that other circuits have held that Rule 611(a) gives district courts the same authority regarding oral statements that Rule 106 gives regarding to recorded statements); *United States v. Branch*, 91 F.3d 699, 727–28 (5th Cir. 1996) (noting, without disagreement, that “[o]ther circuits have held that Rule 611(a) imposes an obligation for conversations similar to what rule 106 does for writings”); *United States v. Li*, 55 F.3d 325, 329 (7th Cir. 1995) (holding that Rule 106 does not apply to oral statements, but observing “we . . . have held that Fed. R. Evid. 611(a) grants district courts the same authority regarding oral statements which Fed. R. Evid. 106 grants regarding written and recorded statements”); *United States v. Haddad*, 10 F.3d

1252, 1258 (7th Cir. 1993) (“[Rule 106] refers to written or recorded statements. However, Rule 611(a) gives the district courts the same authority with respect to oral statements and testimonial proof.”); *Alvarado*, 882 F.2d at 650 n.5 (holding that Rule 106 applies to writings, but Rule 611(a) “renders it substantially applicable to oral testimony as well”).

The evidence commentators agree. 1 Broun, *supra*, § 56, at 394 n.7 (observing that while Rule 106 only applies to writings and recordings, “[n]evertheless, the trial judge appears to have the same power to require the introduction of [the] remainder of oral conversations under Federal and Revised Uniform Rule of Evidence (1974) 611(a)”; 2 Graham, *supra*, § 106:2 (“Under unusual circumstances, the court may require the proponent to introduce contemporaneously other parts of oral conversation pursuant to the general authority of the court to control the mode and order of interrogating witnesses and presentation of evidence [Rule 611(a)].”); 1 Mueller & Kirkpatrick, *supra*, § 1:43 (“It seems that basic notions of relevancy embodied in Rule 401, coupled with the principle in Rule 403 that evidence can be excluded if it is misleading or overly prejudicial, both complemented by the power of trial judges acknowledged in Rule 611 to exercise reasonable control’ of the presentation of evidence in order to aid in ‘determining the truth,’ provide ample basis to apply the completeness principle more broadly. Hence courts can indeed apply essentially the same principle to proof of oral statements, even if they were not recorded or written down, and in cases where they are recorded or written down but the proponent has chosen to prove them by other means, such as testimonial accounts.”); Saltzburg et al., *supra*, § 106.02[2] (“While Rule 106 by its terms applies only to writings and recordings, the principle of completeness embodied in the rule has been applied to testimony about oral statements as well (such as a police officer’s selective rendition of a defendant’s oral statement). Whether this is mandated by Rule 106 or by Rule 611 is unimportant. The important point is

that where a party introduces a portion of an oral statement, the adversary is entitled to have omitted portions introduced at the same time, insofar as that is necessary to correct any misimpression that the initially preferred portion would create.” (footnote omitted)); 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 106.02[3] (Joseph M. McLaughlin, ed., 2d ed. 2015) (“[T]he trial court does have an essentially equivalent control [as in Rule 106] over testimonial proof, as part of a judge’s general power to control the mode and order of interrogating witnesses and presenting evidence [referencing Rule 611(a)].”); 21A Wright & Graham, *supra*, § 5072.2 (“Rule 611 is another rule that must be considered along with Rule 106. Indeed, it is frequently said that Rule 106 is a ‘specialized application’ of Rule 611. . . . Perhaps the most expansive use of Rule 611 to supplement Rule 106 is the courts who used Rule 611 to justify continuation of the common law completeness doctrine.” (footnotes omitted)).

3. Rule 403

Finally, Fed. R. Evid. 403 should not be overlooked when considering the implications of the rule of completeness as it relates to writings, recordings, and oral statements. Rule 403 states:

The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusion the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Even in circuits (such as the Fourth Circuit) that seem to limit Rule 106 to written or recorded statements and that do not appear to allow the introduction of evidence under the rule of completeness to rectify the unfairness caused by the introduction of a misleadingly incomplete description of the content of a writing, recording, or oral statement unless it is independently admissible, *Hassan*, 742 F.3d at 134–35; *Wilkerson*, 84 F.3d at 696, a trial court is not powerless

to address an abuse of the adversary system. If allowing a government witness to testify only to a defendant's inculpatory statements, without being subject to cross examination about the exculpatory portions of the same statement (because they are not independently admissible) would leave the jury with a misleading understanding of the defendant's statement to the extent that it would cause unfair prejudice, the court may give the government a choice: either allow cross examination to provide a complete picture of what the defendant said; or exclude the testimony of the incomplete portion of the statement.

Rule 403 should not be used in this manner, however, unless the testimony regarding the defendant's statement is unfairly incomplete, when measured by the factors discussed above. And, if a defendant seeks to introduce excluded portions of his statement (either during cross examination or in his own case) in order to complete the record, the same factors should be used by the court to ensure that only what is actually necessary to dispel the misleading impression is permitted.

Conclusion

So, what lessons may be drawn from this discussion? First, the rule of completeness, like its common-law predecessor, is more than just an obscure procedural rule governing the timing of the introduction of writings and recordings. It is tied to the very purpose of the adversary system, which allows the parties to strike blows that are hard but not unfair. The adversary system finds its most important application in the trial of a criminal case. The government has nearly unlimited resources to investigate and bring charges. With that power comes the obligation to prove the charges beyond a reasonable doubt. We take pains to instruct criminal juries that the government bears the entire burden of proof. The defendant is presumed to be innocent, and is not required to prove anything, or even testify. We admonish juries to draw no

adverse inference when a defendant elects not to testify in his case. We also esteem the defendant's right not to be compelled to incriminate himself and take precautions to avoid the chilling effect that comes with any comment in front of the jury that suggests that they should take note of the fact that he chose not to testify.

If a prosecutor introduces an incomplete version of the defendant's written or oral statement to the investigating officers by eliciting only the inculpatory portions, while leaving out exculpatory ones that, in fairness, would paint a more complete picture and dispel a misleading impression that the jury may have reached having heard only the incomplete portions, then the defendant is at a serious disadvantage. If he is unable to introduce the parts of his statement that the government omitted at the same time that the incomplete version is presented to the jury (or instead very shortly thereafter on cross examination, or even later during his own case) because the court rules that the omitted parts are inadmissible hearsay or (if the statement was an oral one) that Rule 106 is inapplicable to oral statements, then he has only two remaining options: (1) allow the misleading version to stand unchallenged; or (2) waive his rights against self-incrimination and testify—but only after the government has completed its case. This is a high price to pay to correct misleading information. If one accepts, as the language of the Rule requires, that Rule 106 may only be invoked in the first place to correct an unfair presentation of incomplete information, then construing Rule 106 the way that many courts have done countenances an abuse of the adversary system that the common-law rule of completeness was designed to prevent. That is why the better-reasoned cases have held that, where necessary to redress an unfairly incomplete rendition of a written, recorded or oral statement, evidence that would otherwise be inadmissible may be introduced.

Second, the goal of Rule 106 and the common-law rule of completeness is to level the playing field, not tilt it in favor of the defendant. For that reason, it should only come into play when it is clear that the incomplete version of a written, recorded or oral statement is unfairly misleading. And only information that is essential to dispel the misleading impression should be admitted. This is especially true if, as the better-reasoned cases have concluded, inadmissible evidence may be used for this purpose. For this reason, judges have an obligation to carefully examine both the assertedly misleading information and the proffered completing information to insure that the evidence that was introduced requires clarification or explanation, and the proffered evidence is essential to clarify or explain. Careful consideration of the factors that courts and commentators have developed will allow a judge to strike the right balance, and offset any concern about the use of inadmissible evidence where necessary to correct unfairly incomplete evidence. *See supra*, § II.A.2.

Third, there is little persuasive justification for not applying the same principles to oral statements that Rule 106 applies to written or recorded ones. A misleading oral statement is no less unfair than a written one. And the cases that have allowed the use of Rule 611(a) to achieve this result seem better reasoned than the ones that have not. *See supra*, § II.B.2. Similarly, it seems ill-advised to conclude, as some courts have done, that only admissible evidence may be used under Rule 106 or the common law rule of completeness without first considering the underlying purpose of the rule, which is to prevent an abuse of the adversary system. *See supra*, § II.A.1. One can hardly claim the moral high ground through a willingness to accept an unfair result in the name of evidentiary purity. As the D.C. Circuit noted in *Sutton*, “Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the offered evidence should be considered

contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.” 801 F.2d at 1368–69.

Finally, if a trial court is compelled by reason of the governing circuit authority to restrict Rule 106 to writings and recorded statements (and precluded from using Rule 611(a) to adopt the protections of Rule 106 for oral statements), or is prevented from admitting inadmissible evidence when necessary to dispel an unfairly misleading version of a written or oral statement introduced by the prosecutor, the court should carefully consider Rule 403. *See supra*, § II.B.3. If the incomplete version offered by the government would cause unfair prejudice to the defendant, or tend to mislead the jury, then the court—unable because of restrictions imposed by circuit authority to redress the prejudice—should prevent the government from introducing the unfairly misleading evidence to the jury.

The ultimate conclusions that I reach in light of the foregoing discussion are:

- (1) Rule 106 only covers writings or recordings, but its codification does not preempt the application of the common-law rule of completeness for oral statements and conversations. If the common-law rule is applied to oral statements and conversations, the court should consider the factors discussed at § II.A.2 to determine whether the completing information is required at the same time that the incomplete information is introduced or whether it should be admitted at cross examination or later.
- (2) As an alternative means of dealing with oral statements or conversations, Rule 611(a) allows the trial judge to apply the same underlying logic of Rule 106.
- (3) Neither Rule 106 nor the common-law rule of completeness is triggered unless some clearly identifiable unfairness would exist without allowing the party that would be prejudiced the opportunity to offer information that would clarify or explain. The trial

judge must carefully examine both the incomplete and completing information to insure that fairness does require the correction, and limit the correcting information to that actually needed to eliminate the unfairness. The factors discussed in § II.A.2 should be used by the judge in conducting this analysis.

- (4) When the fairness principles that underlie Rule 106 and the common-law rule of completeness require application of the doctrine, both admissible and inadmissible information should be available to set the record straight. While there is Fourth Circuit authority holding that inadmissible evidence may not be used, *Hassan*, 742 F.3d at 134–35; *Wilkerson*, 84 F.3d at 696, there also is authority holding that it may, *Gravelly*, 840 F.2d at 1163, and until this split in authority has been resolved, a court may allow inadmissible evidence under the completeness doctrine, subject to the restrictions mentioned in my third conclusion above.
- (5) If the Fourth Circuit should clarify that inadmissible evidence is not available to complete the record under Rule 106, the common law, or Rule 611(a), then the trial court should carefully consider Rule 403, and if the unfairness that would result from the proponent’s introduction of the incomplete information cannot adequately be addressed by other means, exclude the misleading information pursuant to Rule 403.

Date: May 24, 2017

/S/
Paul W. Grimm
United States District Judge

TAB 8

TAB 8A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendments to Rule 609(a)(1)
Date: April 1, 2018

At its last meeting, the Committee considered a proposal by Magistrate Judge Timothy Rice to abrogate Rule 609(a)(1).¹ Rule 609 covers the use of prior convictions to impeach a witness's character for truthfulness. Rule 609(a) covers recent convictions – less than ten years between the date of trial and the witness's release from confinement. Rule 609(a) divides recent convictions into two types – those that are grounded in dishonesty and those that are not. Rule 609(a)(1) covers the latter.

Rule 609(a) currently provides as follows:

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

- (1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
 - (B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
- (2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the

¹ Judge Rice's article advocating abrogation of Rule 609(a)(1) was included in the agenda book for the Fall, 2017 meeting, and can be found at 89 Temple L.Rev. 683 (2017).

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elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.

Note that no proposal has been made to the Committee regarding Rule 609(a)(2), the rule providing for automatic admissibility of prior convictions based on dishonesty or false statement. Judge Rice’s attack is on the provision that allows impeachment of a witness’s character for truthfulness even though the conviction did not require proof of dishonesty or false statement.

Judge Rice’s argument for abrogating Rule 609(a)(1) is grounded in what he recognizes as a movement in America toward restorative justice. As applied here, the concept is that criminals who serve their time should be restored as full members of society and should not be saddled with disabilities that are unrelated to societal security or some other valid social policy.

Judge Rice further propounds the more traditional argument of many scholars: that the probative value of a prior conviction to impeach a witness’s character for truthfulness is minimal if the conviction is not based on dishonesty or false statement. Judge Rice notes that “[n]umerous scholars cite the absence of a direct correlation between a witness’s non-dishonesty felony convictions and propensity to lie.” Judge Rice’s reference to “numerous” scholars is no joke. It is fair to say that more scholars have taken aim at Rule 609 than any other Evidence Rule, especially in the last ten years.

The Committee at its last meeting also briefly reviewed a more limited proposal, by Professor Jeffrey Bellin, that would retain Rule 609(a)(1) but would require courts in their balancing to specifically consider the facts that 1) a criminal defendant is already impeached by self-interest when he testifies, and 2) impeachment is especially sensitive when the criminal defendant’s conviction is similar to the crime charged.²

The discussion at the previous meeting was preliminary, but the Committee did reach basic agreement on some matters regarding the proposals to amend Rule 609(a)(1). These points might be summarized as follows:

1. If the rule is to be amended, it should not be on account of restorative justice, but rather because the rule is not working well or there is some conflict in the courts that will be rectified by an amendment.
2. Any move to abrogate or substantially amend the rule should consider the fact that the rule was the result of a hard-fought compromise in Congress.

² When the Bellin article was raised at the last meeting, a comment was made that the proposal should be deferred because the Committee did not have the full Bellin article in the agenda book. I have reproduced Professor Bellin’s Rule 609 article for this agenda book.

3. Any amendment must be justified by a showing that courts are not applying the balancing test in a meaningful or fair way.

This memo considers both the proposal to eliminate Rule 609(a)(1) and proposals to amend it. Much of the material in this memo reproduces the arguments and research that were set forth in the memo for the last meeting. But there are several new additions:

1. A discussion of empirical data on the operation of the rule, on the effect it has on the decision to testify, and on the penalty that a criminal defendant suffers by not testifying.

2. An extensive discussion of the case law, drawing upon research by Professor Ric Simmons of Ohio State, and a comprehensive case outline prepared by Professor Richter. This case digest is set forth in the agenda book immediately behind this Reporter's memorandum.

3. A proposal by Professor Simmons to limit admissibility under Rule 609(a)(1) to theft-related crimes only.³

4. A discussion about some difficulty in the cases over whether a court can "compromise" by allowing impeachment with a felony, but without disclosing to the jury what the felony was. The difficulties of this compromise, and some case law counseling against it, may be an additional part of any amendment to Rule 609(a)(1).

I. Legislative History: The Dispute in Congress on Rule 609(a)

A. Introduction and Background

The practice of impeaching criminal defendants with felony convictions was not originally intended to be punitive. At one time under the common law, felons were considered incompetent to testify. The Supreme Court, in *Rosen v. United States*, 246 U.S. 461, 471 (1918), abandoned this rule of incompetency, stating that "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury." Thus the concern over the character of a felon-witness was seen (as it is today) as a question of credibility and not competency. The practice of impeachment with prior convictions was considered to be a more targeted way to address the problem of a felon-witness's credibility than a complete bar to testimony; it "was a byproduct of a progressive reform that removed rather than added to the obstacles facing convicts (including, of course, many criminal defendants) who sought to testify." Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L.Rev. 289, 295 (2008).

³ The Reporter is most grateful to Professor Simmons for providing his survey and his research for use in this memo.

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It turns out that the right to testify is a gift with strings attached. When defendants couldn't testify, the jury could not draw a negative inference. Now that they can testify, juries can draw a negative inference from the absence of testimony, despite being instructed not to do so. Empirical research conducted by Jeffrey Bellin, stemming from mock trials, juror interviews after real cases, and other sources, indicates that defendants who do not testify in fact suffer a silence penalty. *See generally* Bellin, *The Silence Penalty* (forthcoming in the Iowa Law Review). If that research is sound, then broad impeachment rules end up putting the criminal defendant in a box: testify and suffer a propensity penalty when prior convictions are introduced, or don't testify and suffer a silence penalty. Professor Bellin's data indicates that "the 'silence penalty' harms defendants nearly as much as the more-universally-dreaded 'prior offender penalty.'" That is, a defendant who remains silent at trial suffers about the same damage to his acquittal prospects as a defendant who testifies and is impeached with a prior conviction."⁴

B. Rule 609 in Congress⁵

The legislative history of Rule 609(a) indicates deep disagreement among the Advisory Committee, the House, and the Senate about the value of prior conviction impeachment, particularly when the witness is the accused. Congress spent more time on Rule 609(a) than on any other evidence rule. While the debate was often couched in narrow terms, the argument in Congress became increasingly broad and ideological, mostly focusing on how to balance the rights of an accused against the rights of society to defend itself from criminals.

Rule 6-09(a) in the Preliminary Draft of the Federal Rules of Evidence would have provided a rule that all convictions for crimes involving dishonesty or false statements, as well as all felony convictions, were automatically admissible. The drafters made no provision within the proposed rule for discretionary exclusion preventing unfair prejudice or unnecessary delay. In proposing this rule, the Advisory Committee was consistent with the common law, under which all felonies, and all misdemeanors involving false statements, were automatically admissible to impeach all witnesses.

Public comment on the Advisory Committee's Preliminary Draft focused on the absence of any discretion to exclude, no matter how serious, the threat of prejudice to an accused in a criminal case. Rule 6-09(a) was unfavorably compared to the approach of a then-recent D. C. Circuit Court of Appeals decision, *Luck v. United States*, 348 F.2d 763 (D.C.Cir. 1965). In *Luck* the court construed a provision of the District of Columbia Code as permitting discretionary exclusion of convictions offered to impeach an accused. (The D.C. Rule provided that prior

⁴ The Reporter is most grateful to Professor Bellin for providing the research from his forthcoming article for use in this memo.

⁵ This section on the legislative history is only minimally changed from the prior agenda book.

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convictions “may” be admitted). The Advisory Committee responded to the public criticism by adding a section to Rule 609(a) in the Revised Draft of the Federal Rules of Evidence, providing for the exclusion of conviction evidence if its probative value was substantially outweighed by the danger of unfair prejudice. The drafters also revised their committee note to make clear their reliance on the *Luck* doctrine.

Unfortunately for the drafters, less than a year before promulgation of the Revised Draft, Congress had amended the District of Columbia Code for the purpose of eliminating the *Luck* doctrine. (The language was changed from “may be admitted” to “shall be admitted”). The drafters apparently had been unaware of that amendment. Senator McClellan, a powerful member of the Judiciary Committee, the point man on the Evidence Rules in the Senate, and an outspoken advocate for prosecutorial interests, adamantly objected to Rule 609(a) in the Revised Draft, characterizing it as an intentional effort by the drafters to undermine congressional policy as expressed in its amendment to the District of Columbia Code. This supposed affront to congressional will contributed to Senator McClellan's subsequent legislative attempt to limit the rulemaking power of the Supreme Court, a proposal that threatened the entire project to create a Federal Rules of Evidence. The drafters reacted to Senator McClellan's ire by returning, in the next draft, to the form of Rule 609(a) employed in the Preliminary Draft – i.e., automatic admissibility of all felonies and all convictions based on dishonesty or false statement. The Advisory Committee's Note was rewritten to explain that the purpose of this reversal was to make the rule consistent with congressional policy as manifested in the 1970 amendments to the District of Columbia Code. The Supreme Court submitted subdivision (a) to Congress in this form.

Significant discussion of Rule 609(a) took place during hearings held by a subcommittee of the House Judiciary Committee. Most witnesses and correspondents favored a return to the Revised Draft approach by recognizing judicial discretion to exclude any conviction for unfair prejudice. The House subcommittee was at least partially swayed by the tenor of these comments. In the first Committee Print of June 28, 1973, a provision was added to Rule 609(a) giving the courts discretion to exclude convictions for “crimes punishable by death or imprisonment in excess of one year.” No similar discretion was recognized for crimes “involving dishonesty or false statement.” Thus, the subcommittee chose a middle ground between the Revised Draft's grant of discretion to exclude for unfair prejudice in all cases and the Supreme Court Draft's absolute denial of discretion.

The full House Judiciary Committee approved yet another version of subdivision (a), rejecting the subcommittee version because it did not adequately protect an accused from abuse. The Committee's version permitted convictions to be admitted “only if the crime involved dishonesty or false statement.” No provision was made for balancing prejudice and probative value for those falsity-based convictions. (This is essentially the version that Judge Rice now advocates.) One member of the Committee complained in a statement in the Committee Report that the balance now had been weighted too heavily in favor of the accused.

The floor debate in the House over Rule 609(a) focused upon the appropriate balance between society's interests in seeing the guilty convicted and the accused's right to testify. An amendment was proposed that substituted the language of the original Supreme Court version, eliminating discretion to exclude for unfair prejudice and permitting admission of all felony convictions, as well as any crime involving dishonesty or false statement. That amendment was defeated and the House Judiciary Committee's version of Rule 609 was passed: i.e., only falsity-based convictions would be admissible, but automatically so.

Proceedings in the Senate also reflected the diversity of viewpoints on Rule 609(a). The Senate Judiciary Committee heard from witnesses and correspondents favoring the House version, the Revised Draft, and the Supreme Court Draft. The Committee attempted to compromise by endorsing yet another version of Rule 609(a) which borrowed elements from each of these predecessors. (That version provided for balancing of all convictions, but non-falsity felonies would not be admissible against criminal defendants). Senator McClellan proposed on the Senate floor an amendment reminiscent of the Supreme Court Draft in that it made all felony convictions and all falsity-based convictions of any kind admissible, and eliminated the power to exclude any of those convictions for unfair prejudice. McClellan's amendment was narrowly approved. This left the Conference Committee with the task of reconciling the two versions of Rule 609(a) which, from all those proposed, defined the scope of admissibility most narrowly and most broadly. The narrow position was that only falsity-based convictions would be admissible, with no reference to judicial balancing. The broad version was that all felony convictions and all falsity-based convictions would be automatically admissible. The Committee compromised by making crimes involving dishonesty or false statement admissible with no discretion to exclude for unfair prejudice, while also making felony convictions for crimes not involving dishonesty or false statement admissible – but only if probative value outweighed unfair prejudice “to the defendant.” Thus there was a special protection intended for accused-witnesses, more protective than the Rule 403 test. Apparently exhausted, both houses acceded and enacted Rule 609(a).

II. What Deference Should Be Given to the Legislative History? ⁶

One could argue that a rule that went through so much fire and came out as a compromise should be given some deference before that compromise is undone. The exact amount of deference that should be given to a Congress that worked on this rule 45 years ago is subject to debate. Here are some possible arguments that cut against significant deference to the Congressional output:

A. *The Rule has already been amended twice.* The Great Compromise was one that ended up with a rule that made no sense in at least one respect. The language “to the defendant” was intended to protect criminal defendants but by its terms civil defendants were protected as well. This resulted in an imbalance in the impeachment rules in civil cases – defendant-witnesses were protected by a balancing test but plaintiff-witnesses were not. The Supreme Court, in *Green*

⁶ This section is largely new.

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v. Bock Laundry, 490 U.S. 504 (1989), rejected this literal interpretation as being nonsensical, and called upon rulemakers to rectify the anomaly. A 1990 amendment to Rule 609(a)(1) limited the balancing test of “probative value must outweigh the prejudice” to *criminal* defendants who are testifying. And it also made clear that Rule 403 applied to non-falsity convictions offered against any witness other than a criminal defendant.

But the rule had another infirmity as well – the line between crimes that were automatically admissible under Rule 609(a)(2) and those admissible after balancing under Rule 609(a)(1) was vaguely drawn. In particular, the rule was unclear on whether a trial court could go behind the conviction and admit it under Rule 609(a)(2) if the court found that the witness lied in some way in the course of committing a crime. Such a process was nonsensical because it ended in a finding that the crime (such as murder) was more probative of untruthfulness if the witness lied to commit it – but the jury (the body that is supposed to be deciding credibility) would never know this because they would only be told what the conviction was, not how it was committed. So the Rule was amended in 2006 to clarify that the court must in virtually all cases look only at the elements of the conviction and not try to speculate on how it was committed.

So the Great Compromise Rule was not a model of rule-drafting, and the fact that has been amended twice – substantive changes, not counting a major facelift in the restyling– shows that it is hardly an untouchable.

It might be argued that despite these amendments, a total abrogation of Rule 609(a)(1) does show too little deference. But it seems hard to argue that providing what amounts to a minor tuneup of Rule 609(a)(1), after that specific provision has already been amended, is somehow an affront to Congress. And a good argument can be made that the Bellin proposal is a minor tune-up that is in fact designed to restore the protection for criminal defendants that Congress, after much work, decided to promote.

B. Changing Circumstances Due to Increased Criminalization?

It is common knowledge that the number of federal crimes has expanded dramatically since 1975. RICO and CCE are just two examples. Thus the frequency of impeachment with prior convictions – or the threat of it that will keep the defendant from testifying – is much greater than it was when the Compromise was reached. A Committee member, in an email to the Reporter, stated that “[b]ecause Rule 609(a) resulted from a Congressional compromise, any effort to amend it should be compelling” and was “not sure we are there yet.” But the member also noted that “[b]ecause a much wider array of conduct has been criminalized (some 5,000 federal crimes today, I understand), it may be that the premise for the Congressional compromise has been undermined to some extent.”

C. *Many More Defendants Are Subject to Prior Conviction Impeachment Today*

Empirical data indicates that there are many more defendants with prior convictions today than previously. The data is not a perfect fit for comparing the rates in 1975 and today. Kalven and Zeisel surveyed criminal trials in a number of American jurisdictions in 1955 and found that 42% of trial defendants had a felony record and 82% testified.⁷ By 2001, the National Commission of State Courts reported that 76% of defendants had a felony record and only 50% testified. The data is consistent with the undisputed fact that the number of incarcerated defendants has increased over the last 20 years. So, again, the opportunities for impeachment with prior convictions is likely to be much greater than at the time of the Great Compromise. It is at least arguable that if Congress had envisioned the frequency with which prior convictions were going to be used against criminal defendants, a different compromise might have been reached.

D. *An Amendment That Restores Protection to the Criminal Defendant Might Be Considered to Be Consistent with Congressional Intent.*

Another possible way to think about the legislative history is that even as a compromise, there *was* a special attempt to protect criminal defendants as witnesses. If that protection is not working out – if criminal defendants are being impeached too easily, or being kept off the stand too broadly – then perhaps the balance struck could be rethought. These matters are discussed in the following sections.

E. *If the Rule Is Broken, How Does It Get Fixed?*

Assume for the moment that Congress either got it wrong, or Congress got it right and many courts are getting it wrong. What does “deference to Congress” mean in that situation? Does it mean that the Rules Committee should not act at all, because “it’s Congress’s rule and it is up to Congress to fix it?” Realistically, how likely is that to happen? Since 1975, Congress has acted three times to directly enact Evidence Rules. The first instance was when John Hinckley was found insane in the prosecution for attempting to assassinate President Reagan, and Congress responded with the Insanity Defense Reform Act, which directly added a new subdivision (b) to Rule 704. The second instance was when Congress intervened and enacted the *Advisory Committee’s* proposed amendments to Rule 412 – amendments that had been rejected in the Supreme Court. The third instance was after the acquittal of William Kennedy Smith from charges of rape, and Congress responded by directly enacting Rules 413-15. None of these situations is in any way similar to one in which Congress would proactively seek to amend the Federal Rules of Evidence because one of them wasn’t working or wasn’t being applied correctly.

Moreover, the Rules Committees have consistently taken the position that while Congress has the authority to directly enact the rules, it is far better policy to have rules changes made

⁷ Kalven & Zeisel, *The American Jury* at 144 (2d ed. 1971).

through the deliberative and non-political rulemaking process. And with respect to Rule 609 *itself*, the Committee has not hesitated to act when it believed that the Rule needed improvement – as shown by the above discussion of the two substantive amendments to the Rule.

Of course, this discussion was pursuant to the assumption that Rule 609 needs improvement. One can respond to that argument that improvement is one thing and recalibrating the Congressional balance is another.

III. State Variations

A number of states have rules that provide for greater protection from impeachment with criminal convictions than does the Federal Rule.

A. Alaska Rule 609(a)

1. General Rule. the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is only admissible if the crime involved dishonesty or false statement.

Comment: The “only” is misplaced. It should state that “evidence that the witness has been convicted of a crime is admissible only if [or not admissible unless] the crime involved dishonesty or false statement.”

Also of some interest, Alaska Rule 609(b) covers convictions that are five instead of ten years old. So all in all Alaska is far more protective than the Federal Rule.

B. Hawaii Rev. Stat. Ann. §626-1, Rule 609(a):

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty. However, in a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime, for the sole purpose of attacking credibility, unless the defendant has oneself introduced testimony for the purpose of establishing the defendant's credibility as a witness, in which case the defendant shall be treated as any other witness as provided in this rule.

Comment: This rule goes even further than abrogating Rule 609(a)(1). It also abrogates Rule 609(a)(2), at least as applied to criminal defendants who are witnesses (unless they open the door).

C. *Kansas Stat. Ann. § 60-421*

Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility. If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.

Comment: Kansas abrogates Rule 609(a)(1) as to all witnesses, and prohibits *any* impeachment of criminal defendants with prior convictions.

D. *Michigan Rule of Evidence 609*

1. General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(a) the crime contained an element of dishonesty or false statement, or

(b) the crime contained an element of theft, and

(i) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(ii) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

Comment: As compared to Federal Rule 609(a)(1), Michigan covers only one set of crimes – those that contain an element of theft. If Rule 609(a)(1) is to be limited, the Michigan version is not a bad idea, as it is based on differentiating probative value among crimes. Michigan is saying that theft-related crimes are more likely to be probative of a character for truthfulness than, say, violent crimes.

Professor Ric Simmons, in an article to be published in *Boston College Law Review* (an outstanding law review, as Dan Coquillette will tell you), proposes a change to Rule 609(a)(1) that would limit it to theft-related convictions. He cites empirical data to justify this position. That data and Professor Simmons's arguments will be discussed at the end of this memo.

E. Montana Rule of Evidence 609

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.

Comment: Montana abrogates Rule 609 entirely. The Montana Advisory Commission “does not accept as valid the theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony.” The Commission conceded that committing certain crimes is probative of character for truthfulness, but “it is the specific act of misconduct underlying the conviction which is really relevant, not whether it has led to a conviction.” So this sounds like a big deal, but all that Montana has really done is shifted conviction impeachment to bad act impeachment under Rule 608(b). That makes for some differences in balancing as compared to Federal Rule 609(a) and its many balancing tests. (Rule 608(b) impeachment is governed across-the-board by Rule 403). But it is not as if Montana is prohibiting attacks on a witness’s character for truthfulness based on the wrongs that the witness has done.

F. Pennsylvania Rule of Evidence 609:

1. In General. For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or *nolo contendere*, must be admitted if it involved dishonesty or false statement.

Comment: Pennsylvania has no Rule 609(a)(1) at all. The entire rule is 609(a)(2). Essentially this would be the Federal Rule under Judge Rice’s proposal. The Pennsylvania Advisory Committee explains that the variance from Federal Rule 609 is to account for pre-existing Pennsylvania case law.

It should be noted, though, that the Pennsylvania Rule’s bar on Rule 609(a)(1) is by inference only. It doesn’t specifically say that such convictions are inadmissible. It only says what is admissible, and so relies on the maxim *expression unis exclusion alterius*. As a matter of good rulemaking – and especially given the existing structure of the Federal Rule – it would definitely be better to add a specific statement that non-falsity based convictions are inadmissible to impeach a witness’s character for truthfulness. That option is explored below in the drafting alternatives.

G. West Virginia Rule 609(a)

1. General Rule.

(a) *Criminal Defendants.* For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing.

(b) *All Witnesses Other Than Criminal Defendants.* For the purpose of attacking the credibility of a witness other than the accused

(c) evidence that the witness has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

(d) evidence that the witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Comment: West Virginia replicates the Federal Rule as to all witnesses other than the criminal defendant. It abrogates Rule 609(a)(1) as applied to criminal defendants.

IV. Balancing Probative Value and Prejudicial Effect Under Rule 609(a)(1)

There are three suggestions that have been made for changing Rule 609(a)(1): 1) Judge Rice's suggestion of abrogation; 2) Professor Jeff Bellin's suggestion that the Rule be amended to emphasize that the court should take account of two important factors in its balancing of probative value and prejudicial effect: a) that the defendant comes to the stand self-impeached; and b) that if the conviction is similar to the crime charged, it should generally not be admissible under the more protective balancing test applicable to criminal defendants; and 3) Professor Ric Simmons's suggestion that Rule 609(a)(1) be limited to theft-related convictions.

While the proposals differ, they all share the same two foundational arguments: 1) that convictions that do not involve dishonesty or false statement are only minimally probative of whether a person will lie under oath; and 2) that Rule 609(a)(1) is often applied so broadly that it has a very negative impact on a criminal defendant's exercise of the right to testify, and may well result in the defendant deciding not to go to trial at all. These two foundational assumptions will be discussed immediately below. After that there is a discussion of empirical studies that might be pertinent to these foundational questions, and a discussion of case law applying the Rule 609(a)(1) balance.

A. *Minimal Probative Value of Non-Falsity Convictions?*

As Judge Rice notes, the traditional reason for allowing impeachment with non-falsity based prior convictions is that a person who has been convicted of such a crime is thought to have shown a willingness to place his own interests above those of society. That disregard of societal interests is considered probative of the witness's willingness to disregard the oath and testify falsely. To state the extreme hypothetical, a witness who has been convicted of several murders is unlikely to worry much about laws on telling the truth.

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Judge Rice notes that some research indicates that “moral conduct in one situation is not *highly* correlated with moral conduct in another” (emphasis added), and it is surely true that the probative value of a non-dishonesty conviction is less than that of a falsity-based conviction. But Rule 609(a), of course, recognizes the diminished probative value of non-falsity based convictions. Not all of them are admissible and, with respect to the accused, there is a balancing test that is more protective than that for any other witness. Judge Rice notes the balancing test but states that “it fails to address the core flaw in Rule 609(a)(1): a felony conviction’s presumed relevance based on the witness’s evil propensity.”

With respect to criminal defendants who wish to testify, there is a strong argument to be made that even if a bad act is probative for impeachment generally, that probative value cannot be considered in a vacuum. Rather the question is the *marginal* probative value after it is considered that the defendant has a motive to falsify in order to avoid conviction of the crime *charged*. To take the extreme case, assume the defendant is being tried for murder. And assume he has a clean record. And assume he is guilty and would be lying on the stand, but the lie would have some chance of creating a reasonable doubt. The incentive to lie in this situation is obvious, even though he doesn’t have the character to do so. He does a cost-benefit analysis, figuring out the sentence for perjury and the sentence for murder, and that cost-benefit analysis clearly counsels in favor of lying on the stand. Can we really say that a person with a prior conviction – not based on falsity – is much more likely to lie in this situation than a person without one. At any rate, the probative value, such as it is, is *marginal*. And it is that marginal probative value that must be weighed in the balancing test.

Professor Friedman hypothesizes the marginal probative value of prior convictions of a criminal defendant through a juror’s internal discussion at the end of a case (tweaked by the Reporter): “At first I thought it was very unlikely that, if Defoe committed a murder, he would be willing to lie about it. But now that I know he committed a drug crime, that possibility seems substantially more likely.”⁸ See also *People v. Allen*, 429 Mich. 558. 603 (1988), in which the court narrowed the Michigan version of Rule 609(a)(1)(b) to theft-related crimes only, relying heavily on the acknowledgment that “when a criminal defendant testifies jurors are quite aware that he has a unique concern with the outcome of the trial and is more likely to have fabricated his testimony than any other witness. His testimony is therefore likely to be given diminished weight irrespective of impeachment.”

And yet federal courts, based on the case law digest attached to this memo, generally do not look at marginal probative value. The balancing factors that the lower courts use are:

⁸ Friedman, *Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul*, 38 U.C.L.A. L. Rev. 637 (1991).

1. the kind of crime involved (including its probative value as to witness-truthfulness and its similarity to the charged crime); (2) when the conviction occurred; (3) the importance of the defendant's testimony to the case; and (4) the importance of the credibility of the defendant.

United States v. Caldwell, 760 F.3d 267 (3rd Cir. 2014).⁹ There is no explicit reference to marginal probative value after taking into account the criminal defendant's inherent motive to falsify. (The third factor, importance, is not about motive to falsify but rather about the importance of allowing the defendant to exercise his constitutional right to testify). One could say that the term "probative value" implicitly requires the court to take account of the defendant's motive to falsify. But a look at the case law digest prepared by Professor Richter indicates that courts rarely if ever consider the self-interest of the defendant as affecting probative value. Thus, it would appear that Congress, and the courts, have left a gaping hole in the analysis of probative value, resulting in the admission of many more convictions than is justified by a proper analysis of credibility. A proper analysis would be one that takes account of all the forms of impeachment that are working against the defendant.

Surely if a criminal defendant has made a prior inconsistent statement, and has been convicted of perjury eight times, a court will take these forms of impeachment into account and find that piling on with a conviction that is not even based on falsity is not justified – i.e., the marginal probative value does not outweigh the prejudicial effect (especially if the conviction is similar to the charged crime). The case digest indicates that courts indeed evaluate the marginal probative value of Rule 609(a)(1) convictions when the defendant has other convictions that are going to be automatically admissible. *See, e.g., United States v. Cunningham*, 2012 WL 12865641 (W.D. Mich. 2012) (conviction for escape not admissible where the defendant had six previous dishonesty crimes that would be automatically admissible to impeach him under Rule 609(a)(2); the existence of these impeaching offenses lowered the probative value of the escape felony). If marginal probative value is considered when there are other forms of impeachment, then why do courts not consider the most important form of impeachment – motive to falsify – as part of the marginal probative value analysis? The Supreme Court has declared that the exposure of a witness's motivation to falsify is a "proper and important" mode of impeachment. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). *See also Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (evidence of motive to falsify carries a "strong potential to demonstrate the falsity" of a witness's testimony). It is surely the case that a motive to falsify in a particular case is more probative of credibility than an attack on character for truthfulness under Rule 609(a)(1), which relies on the debatable propositions that: 1. Violating a law not dependent on falsity is probative of the law prohibiting perjury, that is based on falsity; and 2. The character trait is so strong that it overcomes the

⁹ *See also United States v. Mahone*, 537 F.2d 922 (7th Cir. 1976) (using the same factors but splitting up the first factor into two --- probative value as to credibility and similarity of the crime --- and thus applying five factors).

deterrent effect of a possible perjury prosecution (not to speak of the risk that the judge will find that defendant lied and take that into account in sentencing).

Acceptance of the above argument – that courts are evaluating the probative value of a prior conviction without considering its marginality in light of the defendant’s motive to falsify – does not inevitably lead to acceptance of Judge Rice’s position that Rule 609(a)(1) should be eliminated. But it does point out a problem in the application of the existing rule – one that has led the Compromise balancing test to be perhaps less protective than Congress might have contemplated. This problem in the balancing test is specifically addressed by Professor Bellin’s proposal to require the courts to consider the probative value of a Rule 609(a)(1) conviction in light of the fact that the defendant comes to the stand already impeached with a motive to falsify.

B. Deterrence of the Constitutional Right to Testify?

Beyond the attack on probative value, a second prong of the critique on Rule 609(a)(1) – emphasized by Judge Rice and other scholars – is the concern that the threat of overuse of prior convictions deters many criminal defendants from testifying. That concern has received fuel from a study done of all the defendants who have been exonerated by DNA testing. It turns out that 39% of them did not testify, and 91% of that non-testifying group had prior convictions that would probably have been admissible, or were ruled to be admissible, under broad impeachment rules like Rule 609(a). John Blume, *The Dilemma of the Criminal Defendant with a Prior Record--Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 484-86 (2008). Another study of criminal cases throughout the country, conducted in the 1970’s by Professor Myers, found that 62% of defendants without criminal records testified while 45% of those with criminal defendants testified.

There are some caveats to this data. First, it is not determined whether the convictions in those cases were admitted anyway under Rule 404(b) – if they were, then there must have been some other reason for the defendant not testifying, because testifying would have added no new prejudice. Second, there are many reasons for a defendant not to testify – most notably the fear of cross-examination – and nothing in the study rules out alternative causes. Third, there is no showing that the convictions were not-falsity based – if they were falsity-based, then Rule 609(a)(1) is not the problem.

All that said, it is hard to deny that the risk of impeachment with prior convictions could have had an effect in some of the cases. *See also* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403, 482 (1992) (noting that “[t]he threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand” and citing empirical evidence that “a defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not”). As the Federal Public Defender pointed out at the last meeting, it is common practice to encourage a witness not to testify if that would make prior convictions admissible. And as stated above, more and more defendants are subject to the

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disincentive to testify, because many more criminal defendants now have criminal records that they need to be concerned about.

Another possibility to consider is that the risk of broad impeachment rules could be a partial cause behind the decision to plead guilty and not go to trial. So far, there is no data on the impact of Rule 609 on the decision to plead, and realistically it would be hard to get reliable data on a cause and effect. But it would seem to be a rational choice to plead if two consequences could occur at trial: 1) the defendant would refuse to testify in order to forestall broad impeachment with prior convictions; and 2) by not testifying, the defendant would be subject to a silence penalty. In many cases of course there really is no defense other than testimony from the defendant. It is notable that in the district court cases described in the attached case study, most of the defendants whose convictions were found admissible in *in limine* rulings apparently did not go to trial.

C. Empirical Data

Judge Rice asked Professor Michael Saks to submit a summary of empirical studies which, according to Professor Saks, “inquire into the impact of prior convictions on jurors’ thinking about the case at bar, and the (apparent lack of) impact of limiting instructions directing jurors to employ the prior conviction evidence for the purposes of assessing credibility and not for the purpose of estimating the probability that the defendant committed the crime currently charged.” Some of the data also indicates that the threat of impeachment deters defendants from testifying. What follows is the summary provided by Professor Saks, with some additions and comments:

Correlational Analyses of Actual Trials

Kalven and Zeisel, *The American Jury* (1966).

Drawing on data from 3576 trials from state courts around the U.S., observed that conviction rates were 27 percent higher for cases in which prior conviction evidence was presented than for those cases in which such evidence was not presented.

Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 *Law & Soc’y Rev.* 781 (1979).

Statistical analysis of 201 Indiana jury trials; finding a statistically significant association between the number of a defendant's prior convictions and the likelihood of conviction; juries were more likely to convict defendants who had numerous prior convictions; apparently, however, in only 36 of these jury trials did the jury learn of the priors directly through testimony (suggesting that the past crimes are good predictors of conviction for a current crime even if the jury does not learn about the prior crimes).

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Note: Professor Bellin has reevaluated this data and determined that it is explained by the “silence penalty” that defendants suffer when they do not testify – a penalty that is roughly equivalent to that imposed by the jury when they hear about the defendant’s prior convictions. And Myers herself has agreed with that assessment. See *The Silence Penalty*, Forthcoming in the Iowa Law Review.

Eisenberg & Hans, Taking a Stand On Taking the Stand: The Effect of a Prior Criminal Record On the Decision to Testify and On Trial Outcomes, 94 Cornell L. Rev. 1353 (2009).

From a database compiled by the National Center for State Courts, statistical analysis of 382 actual trials in four large counties around the U.S. in which prior crimes were at issue in the decision of a defendant whether to testify; finding statistically significant associations (1) between the existence of a criminal record and the decision to testify at trial, (2) between the defendant's testifying at trial and the jury's learning about the defendant's prior record, and (3), in cases with weak evidence, between the jury’s learning of a criminal record and conviction (from under 20% to over 50%); in cases with strong evidence against defendants, learning of criminal records is not strongly associated with conviction rates; finding little evidence that prior record information causes reduction in credibility assessments; authors conclude from the pattern of findings that that criminal records are relied on to convict when other evidence in the case normally would not support conviction.

Mock Juror and Jury Experiments Simulating Criminal Cases

Doob & Kirshenbaum, Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused, 15 Crim. L.Q. 88 (1972).

Mock juror (non-deliberating individuals) experiment; individuals were recruited from various locations in Toronto; finding increase in rate of convictions when jurors were aware of a prior conviction for a similar crime; limiting instructions did not prevent the effect.

Cornish & Sealy (L.S.E. Jury Project), Juries and the Rules of Evidence, 1973 Crim. L. Rev. 208.

Mock jury (deliberating groups) experiments in England using 646 community members; finding an increase in the proportion of guilty verdicts in a theft case and (for one of two defendants) in a rape case when jurors learned of a defendant's previous record for crimes similar to that charged; when prior conviction was for a dissimilar crime, no increase in conviction rate occurred.

Hans & Doob, Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries, 18 Crim. L.Q. 235 (1976).

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Mock jury experiment in Canada involving 160 residents or visitors to the Toronto area (of whom 40 were University of Toronto students), deliberating as 4-person juries; finding that juries which learned that the defendant had previously been convicted of the same crime were significantly more likely to find the defendant guilty than were jurors who had no information about his prior record.

Clary & Shaffer, Effects of Evidence Withholding and a Defendant's Prior Record on Juridic Decisions, 112 J. Soc. Psychol. 237 (1980).

Mock juror experiment, using 132 undergraduate students; varied defendant witness's legal history (previous conviction for attempted armed robbery, previous acquittal, no record) and whether witness appeared to try to evade answering questions versus answered in a straightforward manner; finding that defendants who appeared to withhold evidence were far more likely to be judged guilty (recommended verdict) and guiltier (ratings of guiltiness) of the charged crimes (armed robbery and murder) than those who answered forthrightly; the prior crime conditions had no statistically significant effect on guilt judgments. The authors "suggest that the act of the withholding evidence in the courtroom is such a powerful piece of 'extralegal' information that it may overwhelm any influence the defendant's prior legal history might otherwise have had."

This data is some indication of a silence penalty, for not testifying.

Wissler & Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 Law & Hum. Behav. 37 (1985).

Mock juror experiment using 160 adults recruited from various locations in Boston; finding that evidence of similar prior crime increased conviction rate compared to no prior crime or dissimilar prior; also, same-crime prior led to higher rate of convictions than did a prior for perjury; *on measures of witness credibility, defendants were invariably rated the lowest, and those ratings were unaffected by prior conviction information*, including prior conviction for perjury; despite judges' instructions regarding proper use of prior conviction evidence, the defendant's "credibility was not significantly higher with no prior conviction nor lower with a prior conviction for perjury" and the "credibility rating of the defendant was significantly lower" than that of all other witnesses. *The mock jurors used prior conviction evidence to "help them judge the likelihood that the defendant committed the crime charged" in spite of limiting instructions.* Most telling was the fact that a higher conviction rate was found where, all else being the same, the impeaching crime was murder than where the impeaching crime was perjury. The only explanation for this last result is that the prior conviction evidence was not used exclusively to evaluate credibility. This is emphasized by the fact that the researchers found that there was no significant difference between the mock jurors' ratings of defendant's credibility when a prior conviction was

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introduced and when one was not. They concluded that “[t]he credibility ratings of defendant did not vary as a function of prior conviction,” while “[c]onviction rates [did vary] as a function of prior conviction....”

Note: This study seems to support the proposition that jurors are aware that the defendant has a motive to falsify and that impeachment with prior convictions simply adds prejudicial effect without much corresponding value as to credibility. It also shows that limiting instructions are not effective in limiting prejudice.

Greene & Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 *Law & Hum. Behav.* 67 (1995).

Mock jury experiment using adult participants recruited from persons called for jury duty in Colorado; jurors were more likely to convict if they learned of a prior conviction, compared to a prior acquittal or no conviction information at all; *17% of mock jurors convicted the accused based on just the facts, while 40% convicted when in addition they learned of the defendant's prior record; limiting instructions by the judge were ineffective in bringing about legally proper use of the prior record evidence.*

Lloyd-Bostock, *The Effects on Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study*, 2000 *Crim. L. Rev.* 734.

British mock jury experiment; varied the presence, similarity, and recency of prior convictions; finding that jurors who learned of a recent similar conviction rated the probability that the defendant committed the crime as higher, estimating the probability of guilt as 66% compared to 52% for those who did not hear of the prior; recent similar convictions increased the likelihood of conviction and dissimilar convictions showed a comparative decline; knowing of prior conviction versus control did not affect credibility ratings (however, jurors who learned of a recent dissimilar record said that they were more likely to believe the defendant than jurors in any of the other conditions); most assumed that defendants probably had prior convictions even if no evidence or priors was given; author suggests the different patterns for similar and dissimilar prior convictions imply that jurors primarily use criminal-record evidence to infer propensity rather than to assess credibility.

Lloyd-Bostock, *The Effects on Lay Magistrates of Hearing That the Defendant Is of "Good Character," Being Left to Speculate, or Hearing That He Has a Previous Conviction*, 2006 *Crim. L. Rev.* 189.

British experiment in which lay magistrates watched video depiction of trial and deliberated in groups of three (as they normally do); compared to a defendant with no prior

record, magistrates judged the same defendant with a record as significantly more guilty of the present charge; like the majority of the mock jurors, 69% of the magistrates assumed defendants had prior criminal records even when no evidence of that was given.¹⁰

In addition to the studies cited by Professor Saks, there are two new empirical studies that may provide an indication of the actual impact of Rule 609(a)(1):

1. *The Bellin study:* Professor Bellin conducted a mock juror study – a simulated trial of a defendant for breaking into a store and stealing jewelry. The simulation was designed and pilot-tested to suggest guilt, but not conclusively. Four scenarios were presented: 1. The defendant did not testify and no prior convictions were introduced; 2. The defendant testified and was not impeached; 3. The defendant testified and was impeached with a fraud conviction; and 4. The defendant testified and was impeached with a robbery conviction (i.e., similar to the crime charged). (Thus this test eliminates the impact that might come from Rule 404(b), as the conviction is introduced solely for impeachment. And it separates out the impact from Rule 609(a)(2), as it shows the difference when a defendant is impeached with a fraud conviction and when a defendant is impeached with a robbery conviction). Limiting instructions were provided to prohibit a “bad person” inference when impeachment evidence was admitted, and to avoid drawing a negative inference from the defendant’s decision not to testify when that was the case.

The results were that the jurors convicted most often when they heard about the robbery conviction. (82% of the cases). Where the defendant did not testify and no conviction was introduced, he was convicted in 76% of the cases. Where the defendant testified and was impeached with a fraud conviction, he was convicted in 73% of the cases. And where the defendant testified free of impeachment he was convicted in 62% of the cases.

The apparent conclusions from the Bellin study are:

a. There is significant prejudicial effect when the defendant is impeached with a crime similar to that charged; that is, a similar conviction has an effect that outstrips probative value –the robbery conviction was more outcome-determinative than the fraud conviction even though it was less probative.

¹⁰ The data discussed in the above studies are subject to at least two provisos: First, in some of the studies, the data is about jurors learning of a defendant’s conviction *in any way*. Thus some of the studies do not sort out the impact of Rule 609(a)(1), because many convictions admissible under that Rule are admissible under Rule 404(b) even if the defendant never testifies. Second, some of the studies do not investigate the *type* of conviction that is admitted. If the conviction involves falsity, it is admissible under Rule 609(a)(2) and so the data is not directed to the impact of Rule 609(a)(1). On the other hand, the studies do make the case that convictions that are similar to the crime charged have an outsized effect.

b. Limiting instructions are of very limited effect.¹¹

c. There is a silence penalty for failure to testify. Defendants were slightly worse off when they didn't testify than when they testified subject to a Rule 609(a)(2) conviction. Beyond this mock trial study, Professor Bellin cites a lot of further data on the existence of a silence penalty – post-trial interviews with jurors, and a number of other mock trial studies. The takeaway point is that criminal defendants are put in a box – if they avoid taking the stand because of the threat of impeachment, they are subject to suffering a prejudicial inference that is roughly as powerful as the conviction they are trying to avoid.

2. *The Simmons study:* Professor Ric Simmons conducted a survey of federal judges, posing a case in which the prosecution offers a Rule 609(a)(1) conviction that is “completely unrelated” to the crime charged. The judges were asked to assume that the defendant would be impeached with a single conviction, and sought to limit the judge’s answer to the probative value for character impeachment (and not for any other purpose). The judges were given a list of convictions, and asked, on a scale of 0 to 100, “how much probative value would you assign to the prior conviction in conducting your Rule 609 balancing test?” And they were also asked, on a scale of 0-100, “how unfairly prejudicial you think the prior conviction would be?” 864 district court judges were contacted. 49 judges submitted completed responses.¹²

The results of the survey were calculated in terms of whether the conviction would be admissible under the Rule 609(a)(1) balancing test. For example, and hypothetically, if a trial judge said 55 probative value and 53 prejudicial effect, the conviction would be admissible. If it was a tie, 55 to 55, the conviction would be inadmissible.

The judges’ admission percentage were as follows for the crimes surveyed:

Aggravated assault: 20.4% admission rate.
Assault: 18.4%
Assault—Hate Crime: 16.3%
Domestic Violence: 22.4%
Burglary: 61.2%
Carjacking: 53.1%
Child Molestation: 22.4%

¹¹ See also Dodson, *What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 Drake L.Rev. 1, 31 (1999) (describing empirical data based on mock trials and post-trial juror interviews indicating that the limiting instruction given regarding prior convictions offered to impeach are generally not understood and rarely followed).

¹² This seemed to me to be a pretty low return rate, but I asked Tim Lau of the FJC about it and he said it was an acceptable rate of return.

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Cocaine Possession: 12.2%
Cocaine Sale: 24.5%
Underage Drinking: 20.4%¹³
Embezzlement: 91.8%
Grand Theft Auto: 57.1%
Illegal Immigration: 18.4%
Marijuana Possession: 12.2%
Murder: 26.5%
Murder of Policeman: 30.6%
Prostitution: 14.3%
Rape: 34.7%
Robbery: 49%
Selling Marijuana: 24.5%
Shoplifting: 49.0%¹⁴
Statutory Rape: 14.3%
Insider Trading: 85.7%

Professor Simmons also gave the same survey to 300 law students. While there are some deviations, in general the law students would be much less likely to admit convictions against criminal defendants under Rule 609(a)(1). For example, 8.2% of students would admit an assault conviction while 18.4% of judges would do so.

The takeaways from this survey are limited by the fact that the balancing that was done was not relative. Respondents were not asked about the marginal probative value of a prior conviction, considering that the defendant comes to the stand with a strong motive to falsify. And of course the balancing that was done in the abstract, outside the context of a real case.¹⁵ (Though Professor Simmons argues that one of the strengths of this abstract test is that it gives an indication of whether the fundamental premise of Rule 609(a)(1) is sound – i.e., that prior convictions are probative of a criminal defendant’s credibility.) There is another reason to take the results in perspective: a judge’s “ruling” in a survey is different from a ruling in a case with a real live defendant whose liberty is at stake.

¹³ It should be noted that a conviction for this crime is unlikely to be admissible under Rule 609(a)(1) because it is generally not punishable by imprisonment for more than one year.

¹⁴ This is another conviction unlikely to be admissible under Rule 609(a)(1) because shoplifting is generally not punishable by imprisonment for more than one year.

¹⁵ One judge responded that he or she could not participate because “I never decide questions regarding the admissibility of prior convictions based on Rule 609 without a full consideration of the context in which the question arises.”

But with those provisos, there are at least three takeaways from the Simmons survey that can be useful in assessing whether an amendment to Rule 609(a)(1) is needed:

a. Probative value varies.

It's not surprising to find that judges and students believe that the probative value of Rule 609(a) convictions depends on the conviction. Rule 609(a)(1) covers a wide swath of convictions; and it stands to reason that, for example, a violence-based crime would have less probative value on character for truthfulness than a crime that is underhanded, like theft. That may have some bearing on whether probative value is being properly assessed by courts (with examples abundant in the attached case digest). And it is useful in considering whether an amendment should address a compromise used by many courts, in which convictions are admitted under Rule 609(a)(1) but without telling the jury what the conviction was for.

b. Theft crimes are more likely to be admitted.

It stands to reason that theft crimes are more likely to be admitted because they bespeak an element of underhandedness and shadiness that is more probative of a propensity to lie on the stand than, say a crime involving violence or sexual misconduct. Professor Simmons concludes from this that the rule would be more fairly applied – and prejudice limited – if admissibility under Rule 609(a)(1) were allowed *only* for theft-related crimes. Michigan has this version of Rule 609(a)(1). A drafting alternative that would limit Rule 609(a)(1) to theft-based crimes is set forth and discussed at the end of this memo.

c. Stigmatizing crimes are admitted more often than would appear justified given their prejudicial effect.

In the survey, convictions for such inflammatory crimes as child molestation, rape, murder, and drug crimes were found admissible by a large percentage of judges. These figures are borne out by some of the cases in the case digest, in which convictions for inflammatory crimes were admitted, sometimes even when the crime was similar to the crime charged. *See, e.g., United States v. Ford*, 2016 WL 259640 (D.D.C. 2016) (prior PCP convictions admissible to impeach the defendant charged with PCP crimes). This finding may be relevant in determining whether the balancing test in Rule 609(a)(1) should be tweaked in some way. And it also might be considered by some to support abrogation of the rule.

D. Case Law on Rule 609(a)(1)

The appellate case law on Rule 609(a)(1) shows some cases in which the accused received the full protection of the more protective balancing test, and a somewhat larger number in which impeachment has probably been broader than Congress would appear to have intended. There is

a reasonable possibility for appellate relief where the conviction offered for impeachment is similar to the crime charged and not highly probative of truthfulness, or where the conviction is for conduct that is especially inflammatory. *See, e.g., United States v. Caldwell*, 760 F.3d 267 (3rd Cir. 2014) (prior felon-firearm conviction could not be admitted to impeach the accused in a felon-firearm prosecution); *United States v. Sanders*, 964 F.2d 295 (4th Cir. 1992) (error to admit evidence of prior convictions for assault and contraband possession in a prosecution for assault with a dangerous weapon); *United States v. Martinez*, 555 F.2d 1273 (5th Cir. 1977) (error to admit prior narcotics conviction in a prosecution for conspiracy to distribute cocaine); *United States v. Kemp*, 546 F.3d 759 (6th Cir. 2008) (error to admit prior convictions for taking indecent liberties with a minor in a prosecution for felon-firearm possession); *United States v. Bagley*, 772 F.2d 482 (9th Cir. 1985) (error to admit prior robbery convictions in a prosecution for bank robbery). *See also United States v. Brackeen*, 969 F.2d 827 (9th Cir. 1992) (in a bank robbery prosecution, the trial judge excluded the defendant's prior bank robbery convictions under Rule 609(a)(1), but improperly admitted them under Rule 609(a)(2)).

On the other hand, there are many examples in reported appellate cases in which prior convictions have been found properly admitted against an accused under Rule 609(a)(1), sometimes even when the conviction is identical to the crime charged, and sometimes when the conduct is especially inflammatory. *See, e.g., United States v. Brito*, 427 F.3d 53 (1st Cir. 2005) (no error to admit drug-trafficking convictions in a prosecution for possession of a firearm by an illegal alien; noting that drug-trafficking crimes “are generally viewed as having some bearing on veracity”; that the defendant's credibility was very important because the case hinged on a credibility choice; and that the prejudice was minimized because the convictions were not similar to the crime charged); *United States v. Hayes*, 553 F.2d 824 (2nd Cir. 1977) (prior conviction for drug smuggling was properly admitted in a prosecution for bank robbery: the crime was recent; drug smuggling “ranks relatively high on the scale of veracity-related crimes, although not so high as to fall clearly within the second prong of Rule 609(a)”; and prejudice was diminished because the conviction was dissimilar from the crime charged); *United States v. Shaw*, 701 F.3d 367 (5th Cir. 1983) (prior convictions for rape and assault were properly admitted to impeach a defendant in a murder prosecution); *United States v. Jackson*, 546 F.3d 801 (7th Cir. 2008) (prior conviction for receiving stolen property was properly admitted to impeach a defendant charged with insurance fraud; the conviction reflected conduct bearing on the defendant's truthfulness, even though it was not automatically admissible under Rule 609(a)(2)); *United States v. Hernandez*, 106 F.3d 737, 740 (7th Cir. 1997) (acknowledging that similarity of prior conviction to the charged offense was “a factor that requires caution” but concluding that it was outweighed by “the importance of the credibility issue in this case”); *United States v. Headbird*, 461 F.3d 1074 (8th Cir. 2006) (prior convictions for violent felonies were properly admitted to impeach a defendant in a felon-firearm prosecution: “One who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath.”); *United States v. Givens*, 767 F.2d 574 (9th Cir. 1985) (no error to admit prior robbery convictions to impeach the defendant in a prosecution for armed

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robbery); *United States v. Smith*, 10 F.3d 724 (10th Cir. 1993) (prior convictions for robbery and burglary were properly admitted to impeach the defendant in a bank robbery prosecution).

It should be noted that it is relatively rare for negative Rule 609 rulings in the trial court to be appealed by an accused. That is because the negative ruling ordinarily occurs *in limine*, and in order to preserve the claim of error the defendant must actually testify and be impeached with the conviction on cross-examination. *Luce v. United States*, 469 U.S. 38 (1984) (defendant who does not testify waives the right to complain about an *in limine* ruling holding prior convictions to be admissible); *Ohler v. United States*, 529 U.S. 753 (2000) (defendant who raises an objectionable prior conviction on direct examination waives the right to complain that its admission was error). It appears that in many cases, if the trial court rules *in limine* that a conviction will be admissible to impeach him should he testify, the defendant decides not to testify, and an appellate court never reviews the trial court's ruling. The relative lack of appellate review could be thought to distinguish Rule 609 from, say, Rule 404(b). The point was made by a member last meeting that we shouldn't worry so much about Rule 404(b) because appellate courts have operated as a backstop to correct extreme rulings. While the vigorousness of review of Rule 404(b) decisions can be disputed, at least it can be said that there *is* review, because the evidence is admitted at trial. The prospect of appellate courts "sorting it out" is far less likely with respect to Rule 609(a) rulings, especially as to criminal defendants.

In the district courts, where there are reported decisions, there is also good and bad, careful and not careful. The attached case digest shows a pretty large number of cases in which the courts have found convictions admissible even though they should be considered on the less probative end of the Rule 609(a)(1) scale – like drug crimes, crimes of violence and sexual offenses. And in many cases, the convictions found admissible are very similar to the crime charged. *See, e.g., United States v. Boyajian*, 2016 WL 225724 (C.D. Cal. 2016) (sex offense conviction admissible to impeach the defendant's trial testimony in a sexual offense case). There is a good argument that these courts have failed to apply the more protective Rule 609(a)(1) test properly. But there are also a fair number of cases where convictions are excluded, especially when the conviction is similar to the crime charged.

The Rule 609(a)(1) balancing test, as applied in most courts, looks at the following factors:

- (1) the kind of crime involved (including its probative value as to witness-truthfulness and its similarity to the charged crime);
- (2) when the conviction occurred;
- (3) the importance of the defendant's testimony to the case; and
- (4) the importance of the credibility of the defendant.

United States v. Caldwell, 760 F.3d 267 (3rd Cir. 2014). *See also United States v. Mahone*, 537 F.2d 922 (7th Cir. 1976) (using the same factors but splitting up the first factor into two – probative value as to credibility and similarity of the crime – and thus applying five factors).

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A major problem with the balancing test is that two of the factors seem to cancel each other out, in cases where the criminal defendant's testimony would be important to the resolution (which is surely most cases). On the one hand, the court must factor in that importance as a factor toward exclusion, because there is an interest in having the accused testify. But on the other hand, the credibility of the accused is very important (given the importance of his testimony) and that is a factor cutting in favor of admitting the prior conviction.¹⁶ The court in *Caldwell, supra*, “acknowledge[d] the tension” between these two factors, but continued to apply them – as do other federal courts.¹⁷

In many cases in the case digest and on appeal, the two factors are not applied to cancel each other out. Rather, a court chooses to emphasize one factor rather than the other as a path to its conclusion that the conviction is admissible or inadmissible. Thus, in most cases where the courts admit convictions, there is an emphasis on the importance of the defendant's credibility, while in the cases that exclude convictions, there is an emphasis on the importance of the defendant being allowed to testify. *See, e.g., United States v. Tolliver*, 374 Fed.Appx. 655, 658 (7th Cir. 2010) (drug distribution case: “Here, Toliver's testimony and credibility were central to the case * * *. Thus, although the similarity of [Toliver's] two [drug distribution] crimes increased the risk of prejudice, the importance of Toliver's credibility weighed in favor of admissibility.”); *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991) (“In this case, defendant's credibility and testimony were central to the case, as Perkins took the stand and testified that he did not commit the [bank] robbery. We therefore conclude that the district court did not abuse its discretion in denying Perkins's motion to preclude the government from asking him about his recent prior conviction for bank robbery.”).

Professor Simmons compiled about 130 rulings on Rule 609(a)(1) – many of which are found in the case digest – and found that while most courts are “taking the balancing test seriously”

¹⁶ See Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L.Rev. 289, 318 (2008) (“In essence, the factors cancel each other out. To the extent the defendant's testimony is ‘important’ * * * his credibility becomes ‘central’ in equal degree, leading to a curious equipoise.”).

¹⁷ It can also be argued that the ruling in *Luce, supra* – that only defendants who testify can appeal impeachment- by-conviction rulings – renders the third factor (importance of the witness's testimony) nonsensical on appeal. That factor is designed to get the court thinking about not deterring the accused from testifying. But at the appellate level, only those defendants who *have* testified will be able to appeal. How does an appellate court apply the deterrence factor to a situation where, by definition, the accused was not deterred from testifying? See Bellin at 323: “Even if the trial court considers the defendant's testimony to be of critical importance to the jury, it no longer follows that impeachment should be rejected on that ground. The jury will hear the defendant's testimony (in fact, has already heard that testimony) regardless of whether the trial court admits the impeachment for use in cross-examination.”

there are nonetheless some “troubling trends.” He describes the troubling data from the case law as follows:

Judges admit crimes of violence at an oddly high rate: over half of the prior convictions for assault-type crimes were admitted, even though our survey results show that they have close to the lowest level of probative value for credibility and a relatively high level of unfair prejudice. Judges also admitted three quarters of the prior convictions for drug possession, even though surveys indicated that the unfair prejudice of that crime is far higher than the probative value for credibility. Perhaps most troubling of all, in approximately 18% of the cases, the prior conviction was admitted—including the name of the crime—even though it was identical or nearly identical to the crime for which the defendant was currently on trial. This implies that a substantial minority of the judges are admitting prior convictions in which the unfair prejudice almost certainly outweighs the probative value. This is not surprising: the survey indicated a number of outlying judges who would admit nearly every prior conviction.

Finally, and most importantly, it is fair to state that few if any of the cases in the case law digest assess convictions offered for impeachment in terms of their *marginal* probative value in light of the fact that the defendant’s credibility is already impaired by his obvious motive to falsify. That means by definition that many convictions currently admitted are being assigned more probative value than they actually have, leading to incorrect determinations under Rule 609(a)(1).

E. A Compromise? Admitting Only the Fact of Conviction, Without Telling the Jury What the Crime Was

The case digest contains a section on the many cases that end up admitting Rule 609(a)(1) convictions for impeachment, but providing some supposed protection for the defendant by allowing the jury to know only *that* the defendant was convicted of a felony, not what the conviction is for. Thus the conviction is “sanitized” when it gets to the jury.

There is nothing in the text of the rule, nor the legislative history, that *definitively* addresses whether a court can admit a conviction without telling the jury what the conviction is for. However, the rule refers to “evidence” of a conviction – and arguably that sounds like the judgment of conviction, not just the fact that the witness was convicted. Moreover, Rule 608(b) provides that “extrinsic evidence” of a prior conviction is admissible to prove “specific instances of a witness’s conduct.” That extrinsic evidence surely contemplates the judgment of conviction, which will indicate the crime; the “witness’s conduct” is not the conviction itself but the crime that resulted in the conviction. Thus, the leading treatise on the subject states that “the essential facts of a witness's convictions, including the statutory name of each offense, the date of conviction, and the

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sentence imposed, are included within the ‘evidence’ that is to be admitted for impeachment purposes.” 4 Weinstein’s Evidence § 609.20[2] at 609–57 (2d ed.2005).¹⁸

Besides the textual problem, there are reasons to question the practice of sanitizing convictions. As discussed above, it is common ground that some Rule 609(a)(1) convictions are more probative than others. By stripping the conviction of its name, the court either diminishes or increases the probative value insofar as the jury can evaluate it. This seems especially problematic where the court, when balancing, finds the conviction to be on the probative end of the Rule 609(a)(1) spectrum, then proceeds to strip the conviction of that higher probative value when it gets to the jury. *See, e.g., United States v. Durbin*, 2012 WL 894410 (D. Mont. 2012) (in a case apparently involving drug-related crimes, the court finds that drug-related convictions are especially probative of character for truthfulness, but admitted just the fact of the conviction and not the nature of the past offense.). That kind of practice – ruling on the probative value of a conviction based on the elements of the crime, but then not allowing the jury to know the crime, was rejected in 2006 in a related context. The 2006 amendment to Rule 609(a)(2) prohibits a court from going behind the crime to find it more probative of veracity, because the jury will not be privy to the underlying facts – the thinking was that probative value must be assessed in light of how the jury will evaluate credibility.

The court in *United States v. Estrada*, 430 F.3d 606 (2nd Cir. 2005), raises questions about using Rule 609 to allow admission of only the fact and not the nature of the conviction. The court declared as follows:

Both Rule 609(a)(1) and (a)(2) contemplate admitting “evidence” of a witness’s convictions for impeachment purposes. The language of both provisions is identical with respect to the generalized description of the “evidence” of a witness's convictions that is to be admitted. The presumption * * * is that the “essential facts” of a witness’s convictions, including the statutory name of each offense, the date of conviction, and the sentence imposed, are included within the “evidence” that is to be admitted for impeachment purposes. * * *

The overwhelming weight of authority supports this conclusion and suggests that, while it may be proper to limit, under Rule 609(a)(1), evidence of the underlying facts or details of a crime of which a witness was convicted, inquiry into the “essential facts” of the conviction, including the nature or statutory name of

¹⁸ In contrast, the details of the conviction, such as where it was committed, the identity of the victims, the number of coconspirators, etc., are not admissible under Rule 609; and the better rule is that they are not admissible under Rule 608 either, because to admit them would undermine the special treatment of convictions in Rule 609. *See, e.g., United States v. Osazuwa*, 564 F.3d 1169 (9th Cir. 2009) (details of a prior conviction are not admissible under Rule 609, nor under Rule 608, because impeachment with prior convictions is within the exclusive purview of Rule 609).

each offense, its date, and the sentence imposed is presumptively required by the Rule, subject to balancing under Rule 403. See *United States v. Howell*, 285 F.3d 1263, 1267–68 (10th Cir.2002) (finding that evidence of the number and nature of felony offenses is ordinarily required under Rule 609(a)(1) because a witness's convictions bear to differing degrees on credibility depending on these characteristics); *United States v. Burston*, 159 F.3d 1328, 1335–36 (11th Cir.1998) (holding that the probative value of prior felony convictions varies with their nature and number); *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir.1987) (concluding in a civil case that the “crime must be named” because the jury cannot evaluate a witness's credibility “if all it is told is that the witness was convicted of a ‘felony’ ”); 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6134, at 224 (1993) (stating that the “mere fact” approach, under which only the fact of a felony conviction is admitted, is difficult “to justify with the language and structure of Rule 609”); 4 WEINSTEIN & BERGER § 609.20[2] at 609–57 to 60 (stating that the impeaching party is usually limited to establishing the name of the offense, the date of conviction, and the sentence, and that it may be improper “to limit impeachment to the mere fact of a prior conviction, without allowing the impeaching party to specify the nature and number of offenses involved”).

This interpretation of Rule 609 is consistent with both the Rule's structure and the insight that different felonies, even those that do not constitute *crimen falsi*, bear on credibility to varying degrees. * * * In short, the balancing requirement incorporated into Rule 609(a)(1) presumes that some details of a witness's felony convictions will be considered. * * * [I]t is the jury's function to assess the probative value of a witness's specific conviction or convictions as part of its overall evaluation of the witness's credibility. * * * We believe that felonies not involving dishonesty or false statement such as to fall within the scope of Rule 609(a)(2) nonetheless bear on credibility to varying degrees.¹⁹

Estrada is not directly controlling on the question of whether a criminal defendant's convictions can *ever* be sanitized. For one thing, it involved sanitizing the convictions of government witnesses – which is why it refers to the Rule 403 test. For another, the trial court in *Estrada* decided to strip the convictions without analyzing the loss of probative value from such a ruling. But *Estrada* does point out that stripping a conviction of its name is at least in tension with

¹⁹ See also *United States v. Howell*, 285 F.3d 1263 (10th Cir. 2002) (error to admit only the fact of a conviction where the trial judge did not apply a presumption that the nature of a witness's felony convictions should ordinarily be disclosed to the jury); *United States v. Burstein*, 159 F.3d 1328 (11th Cir. 1998) (error to admit only the fact of convictions, as the assumption of Rule 609(a) is that probative value varies based on the crime, and the trial judge never balanced the probative value and prejudicial effect of the unsanitized convictions).

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the fundamental premises that 1) it is the jury that ultimately assesses credibility, and 2) convictions falling within Rule 609(a)(1) have different probative value. And it shows a tension, if not an actual conflict, among the courts with regard to sanitizing convictions. At the very least it shows that stripping the conviction of any content must be done carefully, after considering the probative value and prejudicial effect of the conviction as sanitized.

It might be contended that sanitization is a good thing because it *protects* defendants. But that is a debatable proposition. If sanitization were not permitted the court would have to face the music and might well find it necessary to exclude the conviction. By allowing a too-easy safety valve, the defendant may end up with the short end of the compromise. So it might well be that sanitization is not doing the defendant many favors. Though of course it could be (cynically?) argued that without the safety valve, a trial court would just exercise discretion to admit the unadulterated conviction by finding that its probative value outweighs the prejudicial effect.

It might be argued that a court that sanitizes convictions is actually engaged in a sophisticated balancing test—concluding that the loss in probative value of a conviction is offset by the diminishment of prejudice that will occur if the conviction is sanitized. But there are many cases in the case digest in which the court is not engaged in careful balancing. A reading of the cases in the digest seems to indicate that in many cases the court, with broad strokes and a sense of rough justice, thinks that it is a good idea to compromise by sanitizing the conviction. As Professor Richter, who prepared the case outline, put it: “Some courts perform very thoughtful balancing and conclude that probative value for impeachment will only outweigh unfair prejudice if the prior felony is presented in a sanitized way. Others simply order sanitized presentation with little conviction-specific justification and definitely seem to be splitting the baby and throwing the defendant a bone.”

Is there anything for the Committee to address with regard to sanitization? There are several possibilities to consider. And all of these possibilities are assuming that there is a reason to propose an amendment to Rule 609(a)(1) in the first place. That is, it would seem that the question of sanitization is not sufficiently problematic to justify amending Rule 609(a)(1) on its own. In any event, some possibilities for treatment include:

1. *Prohibiting admission of a sanitized conviction:* There are reasons to prohibit the practice, but given its widespread use a prohibition seems unwise. *See, e.g., United States v. Hursh*, 217 F.3d 761 (9th Cir. 2000) (approving lower court’s admission of a conviction similar to the crime charged, noting with approval that the trial court sanitized the conviction).

2. *Providing specific guidelines on when sanitization can be used:* This could be in the text, or more likely in the Committee Note. The guideline possibilities range from the complex to the straightforward.

The complex route would provide that sanitization is permitted only if the court makes two specific findings: 1) that the probative value of the conviction in natural form does not outweigh the prejudicial effect; and 2) that the probative value of the conviction in sanitized form *does* outweigh the prejudicial effect. In this way, the presumption that the jury should hear what the conviction was for could be effectuated – sanitizing would only apply if the jury could not hear what the crime was in the first place, because the conviction with the name of the crime would be inadmissible. But the downsides of this two-step approach are: a) It is complex and sounds like micromanaging; and 2) A court might find that the unsanitized conviction’s probative value outweighs prejudicial effect and *still* decide to admit only the fact of conviction because that fact is still sufficiently probative and substantially diminishes the prejudice of the unadulterated conviction. Presumably a court should be allowed to reach that result if it is beneficial to the defendant. (Indeed the defendant should be able to argue for such a result.)

3. *Providing simply that sanitizing must be preceded by balancing and must satisfy the balancing test.* The text or Note might provide that the court that decides to admit only the fact of conviction must determine that the probative value of the fact of conviction outweighs its prejudicial effect. And the Note might caution that the sanitization procedure requires careful balancing and should not be used as an automatic safety valve. These guidelines might be helpful in bringing some regulation to a process that seems inconsistently and sometime fuzzily applied.

The section on drafting alternatives, *infra*, provides examples of amendments addressing the issue of sanitizing convictions.

V. Questions About the Scope of An Amendment

Assuming for now that Rule 609(a)(1) should be amended in some way, there are questions about how far any amendment should extend. This section discusses some of those questions.²⁰

A. *Impeaching Other Witnesses*

The focus of the scholarly attacks on Rule 609 has always been impeachment of criminal defendants with their prior convictions – and that was also the focus of Congress. But of course there are other witnesses with convictions; how should they be treated?

Under Judge Rice’s proposal, the result is simple. No conviction currently covered by Rule 609(a)(1) would be admissible to impeach any witness’s character for truthfulness, because that Rule would be completely eliminated. That consequence is consistent with Judge Rice’s reliance on restorative justice – the premise being that a person who has served his time should be restored to society without imposing legal disabilities unrelated to a legitimate government

²⁰ This section is substantially unchanged from the memo for the previous meeting.

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purpose. Under that theory, any felon-witness in any case should be free from the stigma of impeachment with felonies that are unrelated to dishonesty.

It should be noted, though, that one consequence of elimination would be that criminal defendants will no longer be able to impeach government witnesses with convictions that are now admissible under Rule 609(a)(1). It's true that in some cases, Rule 609(a)(1) is not necessary, because prior convictions might be admissible anyway to show bias. But that is surely not all the cases. There are many defenses which run something like, "the prosecution case is based on nothing but testimony from some really bad people." And such defenses would be impaired by eliminating Rule 609(a)(1). In some cases, it might be argued that even after an elimination of Rule 609(a)(1), the accused could argue that his constitutional right to confront witnesses would require the court to admit a non-falsity-based conviction. But those cases would be relatively rare. Courts routinely uphold limitations on cross-examination and impeachment if they are reasonable. *See, e.g., United States v. Sanders*, 708 F.3d 976, 991 (7th Cir. 2013) ("a limitation on cross-examination implicates the core of the Confrontation Clause when the defense is completely forbidden from exposing the witness's [credibility]"); *United States v. Domina*, 784 F.2d 1361, 1366 (9th Cir. 1986) ("Domina claims that the district court improperly limited his cross-examination of Purnell by not permitting the defense to explore whether drug use adversely affected Purnell's credibility. The Sixth Amendment to the United States Constitution guarantees an accused in a criminal prosecution the right to cross-examine adverse witnesses. * * * This right is subject to the broad discretion of a trial judge to preclude harassment or unduly prejudicial interrogation. * * * The district judge did not abuse his discretion in balancing the probative value of the desired cross-examination against its potential prejudice, and the restriction of the cross-examination did not violate the confrontation clause of the sixth amendment."). The end result of an elimination of Rule 609(a)(1) is likely to be some loss of impeachment evidence that criminal defendants would want to use against government witnesses.

One possibility – one that would run counter to Judge Rice's restorative justice theory – would be to eliminate Rule 609(a)(1) only insofar as applied against criminal defendants. That is, the Committee might consider leaving a one-way use for non-falsity-based convictions. But many of the attacks on Rule 609(a)(1) would seem to apply to impeachment of government witnesses as well. The basic attack is: 1) such convictions lack sufficient probative value in predicting whether a person will lie under oath; and 2) such convictions unfairly brand a witness as a bad person, causing unfair prejudice to the party whose testimony the witness favors. It is difficult to see how those concerns are inapplicable as applied to prosecution witnesses.

It can be argued, though, that the major problem with Rule 609(a)(1) is the special one of criminal defendants who are being deterred from testifying – after all they have a constitutional right to do so and the jury would surely want to hear from them. The uniqueness of the criminal defendant's situation might arguably call for an abrogation that would be limited to them. But if that argument is accepted, there would be no similar justification in eliminating Rule 609(a)(1) as applied to witnesses *called* by the defendant to testify. So, if the Committee were to consider a

limitation on the applicability of Rule 609(a)(1), rather than a total elimination, the only logical limitation would be one that excludes convictions of a criminal-defendant who seeks to testify, but preserves possible admissibility for convictions of witnesses called by the defense.

B. The Impact in Civil Cases

In all the hubbub about Rule 609, very little is ever said about its use in civil cases. Judge Rice's proposal would eliminate Rule 609(a)(1) in civil cases – a position grounded in the restorative justice ideal discussed above. Professor Bellin, along with other scholars, would apparently leave civil cases where they found them, because the major (only?) problem with Rule 609(a)(1) is its abuse in cases where the criminal defendant seeks to testify and is impeached with prejudicial convictions that lack real probative value.

There are a fair number of reported civil cases involving Rule 609(a)(1) issues. Most are civil rights cases. *See, e.g., Donald v. Wilson*, 847 F.2d 1191 (6th Cir. 1988) (in an excessive force case, there was no error in admitting the plaintiff's prior rape conviction to impeach his character for truthfulness); *Murr v. Stinson*, 752 F.2d 233 (6th Cir. 1985) (in an excessive force case, the sheriff was properly impeached with cocaine convictions); *Romanelli v. Suliene*, 615 F.3d 847 (7th Cir. 2010) (in a suit for the violation of a prisoner's right to receive medical care, there was no error in admitting the prisoner's prior convictions for sexual assault and bail jumping, to impeach him).

On the one hand, it could be argued that there is no reason to eliminate Rule 609(a)(1) in a civil case. Nobody has pointed to any serious or widespread problem in applying or using the Rule in civil cases. And of course the unique problem of a criminal defendant who wishes to exercise his constitutional right to testify is not applicable. On the other hand, if it is concluded that the Rule is simply wrong – because it allows evidence of little to no probative value to be admitted, at the expense of unfair prejudice through improper and inflammatory character inferences – then there would be no good reason to continue applying Rule 609(a)(1) to civil cases. This is of course a question for the Committee.

C. The Impact on Rule 608(b)

Assume that Rule 609(a)(1) is abrogated. Thus, a criminal-defendant could not be impeached with, say, his felony conviction for stealing a car. But what if he takes the stand and the prosecutor asks: "Isn't it true that you stole a car?" The prosecutor argues that he can ask that question because he is not asking whether the defendant was convicted. He is asking about whether he committed a bad act under Rule 608(b).

Rule 608(b) allows a cross-examiner to inquire into bad acts of a witness, in order to attack the witness's character for truthfulness, subject to Rule 403 – meaning that the question is allowed unless the probative value of the bad act in showing the witness's character for untruthfulness is

Memorandum to Advisory Committee on Evidence Rules
Re: Possible Amendments to Rule 609(a)(1)
April 1, 2018

substantially outweighed by the risk of unfair prejudice suffered by the party whose testimony the witness favors. Both the original Advisory Committee Note and the Committee Note to the 2003 amendment specify that impeachment with bad acts is permissible subject to Rule 403. *See United States v. Abair*, 746 F.2d 260, 263 (7th Cir. 2014) (cross-examination with bad acts to attack a witness's character for truthfulness "remains subject to the overriding protection of Rule 403").

If Rule 609(a)(1) is to be abrogated, the Committee would need to deal with the possibility of parties using Rule 608(b) as an end-run. There are some courts that currently allow Rule 608(b) as an end run on an important limitation found in Rule 609 – that when a conviction is allowed, the jury does not get to hear the details of the underlying acts, only the crime of which the witness was convicted and the date of the conviction. Some courts have held that a cross-examiner can in fact raise the details of these acts simply by citing Rule 608(b). *See, e.g., Elcock v. Kmart Corp.*, 233 F.3d 734 (3rd Cir. 2000); *United States v. Barnhart*, 599 F.3d 737 (7th Cir. 2010). Other courts disagree, concluding that the limitations imposed on the details of the conviction would have no effect if the cross-examiner could simply ask about the underlying acts under Rule 608(b). *See, e.g., United States v. Osazuwa*, 564 F.3d 1169 (9th Cir. 2009) (impeachment with prior convictions is within the exclusive purview of Rule 609). If Rule 609(a)(1) is deleted, it would not be surprising for parties, in the courts that permit it, to use Rule 608(b) to raise the acts underlying the otherwise inadmissible conviction.

Surely it would make no sense to promulgate a rule that could be so easily evaded. Therefore elimination of Rule 609(a)(1) – either in whole or in part, as discussed above – would have to be accompanied, at minimum, by a Committee Note which clearly states that the acts underlying the now-barred conviction may not be raised under Rule 608. Though it is probably preferable that the point be made in the text of Rule 608(b) itself – because Committee Notes are not rules, and the Standing Committee has an unwritten rule that you can't put something in a Note that is not in the text of the Rule.

But even if there is something in the text or the Note that prohibits a Rule 608(b) end-run, there will be a remaining anomaly. That prohibition will apply only to bad acts that underlie a conviction – it will not apply to bad acts for which the witness was never convicted. Here is a hypothetical that shows the anomaly: Joe is charged with bank robbery and he wants to testify. He has been previously convicted of bank robbery. If Rule 609(a)(1) is eliminated and the necessary no-end-run rule is added, Joe can testify free of any impeachment regarding the prior bank robbery. Now Bill is charged with bank robbery and he wants to testify. The prosecution has good faith proof that he committed a prior bank robbery, for which he has not been charged.²¹ If the court

²¹ Good faith proof is all that is required to ask a question about bad acts. *See, e.g., United States v. Whitmore*, 359 F.3d 609, 622 (D.C.Cir. 2004) ("the general rule is that the questioner must be in possession of some facts which support a general belief that the witness committed the offense or the degrading act to which the question relates").

finds that the prejudicial effect does not substantially outweigh the probative value, the prosecution may ask about the bank robbery despite any abrogation of Rule 609(a)(1).

That result makes no sense. It would mean that a defendant who has been convicted of a crime is in a better place than one who has not. That's just silly.

It could be argued that it is in fact unlikely for a court to allow the prosecution to ask the question about the prior bank robbery as its probative value would in fact be substantially outweighed by its prejudicial effect. But if that is true, why would Rule 609(a)(1) need to be eliminated? That Rule has a more protective balancing test for criminal defendants than the Rule 403 test. If a court under Rule 608(b) would exclude the bad act, it should follow *a fortiori* that it would exclude the prior conviction for the bad act.

It might be argued that it is acceptable to allow bad acts under Rule 608(b) even though the conviction is not admissible under Rule 609(a), because under Rule 608(b), the witness can just deny that the bad act occurred. No extrinsic evidence is allowed to disprove the denial. But the difference in the rules as to extrinsic evidence does not support the principle that bad acts can be addressed on cross-examination where the conviction is not admissible under Rule 609. That is because even though the witness can deny it, the cross-examiner still gets to raise it, and the jury is fully exposed to the prejudicial information of bad character. Moreover, denying a bad act that was the basis of a conviction is grounds for a perjury charge.

In the end, it would appear logically impossible to decouple Rule 608(b) and Rule 609(a)(1). That means that any elimination of Rule 609(a)(1) would probably require a comparable change to Rule 608(b). But that would not mean *elimination* of Rule 608(b) because it must remain to cover the bad acts that are falsity-based – such as those that underlie the convictions that will remain automatically admissible under Rule 609(a)(2).

The solution would appear to be a limitation to Rule 608(b) impeachment that tracks the language in Rule 609(a)(2). Something like the following:

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

* * * * *

- (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~~ involve dishonesty or false statement and are acts 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.

Assuming Rule 609(a)(1) is abrogated, this drafting solution has a number of benefits. Most importantly, it avoids the use of Rule 608(b) as an end-run of an elimination of Rule 609(a)(1). More importantly, it serves the same purpose as any elimination of Rule 609(a)(1) – it protects a party from impeachment of witnesses with acts that have less probative value as to truthfulness than acts of falsity, and that carry prejudice from improper character inferences. Finally, it resolves a conflict in the courts as to whether Rule 608(b) permits inquiry into underlying acts when evidence of the conviction is barred by Rule 609 – and the resolution of the conflict is correct on the merits.

Finally, the need to amend Rule 608(b) probably exists if Rule 609(a)(1) is changed as opposed to abrogated. Any change that would limit the admissibility of prior convictions would have to be backed up by a corresponding change that would prevent the proponent from evading the change by offering the underlying acts under Rule 608(b).

What follows is a new thought that was not raised in the previous memo:

And it should be noted that there is at least a theoretical need for amending Rule 608(b) to dovetail with Rule 609(a)(1) right now, when the conviction is offered against a criminal defendant. Assume that the court finds that the conviction is not admissible against the defendant because the probative value does not outweigh the prejudicial effect. It is surely possible that the underlying facts are probative enough of veracity that they are not *substantially outweighed* by the prejudicial effect. That is to say, the Rule 608(b)/403 test is more permissive than the Rule 609(a)(1) test applied to criminal defendants.

Perhaps what is called for is an added sentence to Rule 608(b):

(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:

- (1) not the subject of a conviction; and

- (2) probative of the character for truthfulness or untruthfulness of:
 - (A) the witness; or
 - (B) 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.

The Committee Note could be simple and direct:

Rule 608(b) has been amended to assure that if a witness has been convicted, admissibility of that conviction to impeach a witness's character for veracity is controlled by Rule 609, and a proponent will not be allowed to ask the witness about the facts underlying the conviction under Rule 608(b). If such examination were allowed, the limitations imposed on impeachment with prior convictions could be easily and inappropriately evaded.

D. Rule 403 Still Applicable?²²

A principle that runs through the Evidence Rules is that Rule 403 balancing is applicable unless a rule says otherwise. So for example, Rule 403 balancing is applicable to prior bad acts after the government establishes a non-character purpose for those acts under Rule 404(b). And Rule 403 balancing is applicable after a plaintiff establishes a proper purpose for a subsequent remedial measure. *See, e.g., Stallworth v. Illinois Cent. G. R.R.*, 690 F.2d 858 (11th Cir. 1982) (even though a subsequent remedial measure was relevant to feasibility, the trial court had discretion to exclude it under Rule 403). And, impeachment by bias is covered by Rule 403 even though there is no Evidence Rule that specifically covers bias. *United States v. Abel*, 469 U.S. 45 (1984).

So there is a risk that a simple or "mere" abrogation of Rule 609(a)(1) could lead to a litigant arguing that Rule 403²³ remains applicable to impeachment with non-falsity-based convictions. That would not be a strong argument, after an elimination of Rule 609(a)(1), but it is one that should be guarded against by careful rulemaking. One way to address the possible problem is to do more than simply abrogate Rule 609(a)(1). Instead of a vacuum, Rule 609(a)(1) could be amended to provide specifically that convictions currently covered by the Rule are not

²² This section is from the prior memo.

²³ More specifically, Rule 402, which provides that all relevant evidence is admissible.

admissible to impeach a witness. That would assure that any Rule 403 argument would be put to rest. The drafting example for that proposition is set forth in the next section.

VI. Drafting Examples

A. *Abrogating Rule 609(a)(1)*²⁴

This subsection assumes that the Committee has determined that all convictions currently found admissible under Rule 609(a)(1) should be found inadmissible.²⁵ As stated above, it will not do to simply delete the language of Rule 609(a)(1). This is so for at least two reasons: 1. It will raise questions about the continued applicability of Rule 403; and 2. It will put a big hole in the Rule, as there will be no (a)(1), but (a)(2) will remain. So there must be affirmative language of exclusion in place of the current language of admissibility under Rule 609(a)(1). What follows are two possible versions of an amendment – one that retains the structure of the existing Rule 609(a)(1) and the other that essentially makes Rule 609(a)(2) the Rule.

1. *Version 1: Retaining the Structure*

The virtue of this version is that retaining the structure provides constancy for electronic searches, and for the nomenclature that has been used for 40 years. That is to say, Rule 609(a)(2) remains Rule 609(a)(2). The drawback of this version is that it is a bit awkward. It starts with a general rule of inadmissibility but then shifts to a rule of automatic admissibility.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) ~~the evidence generally may not be admitted; but for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence :~~

~~(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and~~

²⁴ These examples regarding abrogation are the same as those in the prior memo.

²⁵ Proposals to refine or narrow the balancing test that is currently applied to Rule 609(a)(1) convictions are set forth later in this section.

~~(B) — must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and~~

- (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.

2. *Different structure, single rule:*

The virtue of this alternative is that it is a simple and direct rule, allowing admissibility only for convictions involving dishonesty or false statement. The downside is that the numeric structure has been altered, so it is disruptive to electronic searches and imposes dislocation costs.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) **In General.** ~~The following rules apply to attacking Evidence of a criminal conviction offered to attack a witness’s character for truthfulness by evidence of a criminal conviction:~~

~~(1) — for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:~~

~~(A) — must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and~~

~~(B) — must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and~~

~~(2) — for any crime regardless of the punishment,~~ the evidence must be admitted, but only 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.

Note: This alternative should take care of the “residual Rule 403 problem” because it states that admissibility is conditioned on the conviction being falsity-based, and so should be reasonably read to bar the court from employing Rules 402 and 403 to admit convictions that are not based on a dishonest act or false statement. Another possibility is to say that convictions are generally inadmissible, but must be admitted if they involve a dishonest act or false statement.

3. *Draft Committee Note*

The draft Committee Note can probably be the same for both of the above alternatives. Here is a possible Note:

Rule 609(a) has been amended to preclude admissibility of convictions that do not involve a dishonest act or false statement, when offered to impeach a witness's character for truthfulness. Congress allowed such impeachment but imposed important limitations, especially when the witness is the accused. Experience has shown that the congressional intent to limit admissibility of such convictions has not been realized. Moreover, the available empirical evidence indicates that the probative value of such convictions is minimal when offered as a prediction that the witness will lie on the stand and that the prejudicial effect of such convictions can be profound. That threat of prejudice may well result in deterring a defendant in a criminal case from testifying at all. The Committee has determined that it is better to bar admission of such convictions than to employ a balancing test that has proved to be insufficiently protective. The Rule retains automatic admissibility for those convictions that are the most probative, i.e., those that involve a dishonest act or false statement.

While Rule 609 governs evidence of convictions, this amendment also has an impact on admissibility of the bad acts that underlie the convictions. If a conviction is inadmissible under this Rule as amended, it is inappropriate to allow a party to inquire about the bad acts underlying the conviction. Accordingly, Rule 608(b) has been amended to impose a limitation on bad act impeachment that tracks the provisions of Rule 609(a).

The amendment imposes no limitations on the use of convictions for other forms of impeachment, such as for contradiction, or to establish bias.

B. Protecting Accused-Witnesses Only

Rule 609. Impeachment by Evidence of a Criminal Conviction

- (a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

- (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; ~~and~~ but
- (B) ~~must~~ may not be admitted in a criminal case in which the witness is a defendant, ~~if the probative value of the evidence outweighs its prejudicial effect to that defendant;~~ and
- (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.

Draft Committee Note

Rule 609(a) has been amended to preclude admissibility of convictions that do not involve a dishonest act or false statement, when offered to impeach a witness’s character for truthfulness and that witness is a defendant in a criminal case. Congress allowed such impeachment but imposed important limitations when impeachment involves a defendant in a criminal case. Experience has shown that the congressional intent to limit admissibility of such convictions when offered against a defendant in a criminal case has not been realized. Moreover, the available empirical evidence indicates that the probative value of such convictions is minimal when offered as a prediction that the witness will lie on the stand and that the prejudicial effect of such convictions can be profound. That threat of prejudice may well result in deterring a defendant in a criminal case from testifying at all. The Committee has determined that it is better to bar admission of such convictions against a defendant in a criminal case than to employ a balancing test that has proved to be insufficiently protective. The amendment does not affect the existing rules on impeachment of other witnesses; and it retains automatic admissibility, even against the criminal defendant, for those convictions that are the most probative, i.e., those that involve a dishonest act or false statement.

While Rule 609 governs evidence of convictions, this amendment also has an impact on admissibility of the bad acts that underlie the convictions of a defendant in a criminal case. If a conviction is inadmissible under this Rule as amended, it is inappropriate to allow a party to inquire about the bad acts underlying the conviction. Accordingly, Rule 608(b) has been amended to impose a limitation on bad act impeachment that tracks the provisions of Rule 609(a).

The amendment imposes no limitations on the use of convictions for other forms of impeachment, such as for contradiction, or to establish bias.

C. Applying the Bar in Criminal Cases Only

Rule 609. Impeachment by Evidence of a Criminal Conviction

- (a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to Rule 403, in a civil case ~~or in a criminal case in which the witness is not a defendant~~; and
 - (B) **must may not be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant**; and
 - (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.

Draft Committee Note

Rule 609(a) has been amended to preclude admissibility of convictions that do not involve a dishonest act or false statement, when offered to impeach a witness's character for truthfulness in a criminal case. Congress allowed such impeachment but imposed important limitations. Experience has shown that the congressional intent to limit admissibility of such convictions has not been realized in criminal cases. Moreover, the available empirical evidence indicates that the probative value of such convictions is minimal when offered as a prediction that the witness will lie on the stand and that the prejudicial effect of such convictions can be profound. That threat of prejudice may well result in deterring a defendant in a criminal case from testifying at all. The Committee has determined that it is better to bar admission of such convictions in criminal cases than to employ a balancing test that has proved to be insufficiently protective.

The amendment does not affect the existing rules on impeachment in civil cases, and retains automatic admissibility for those convictions that are the most probative, i.e., those that involve a dishonest act or false statement.

While Rule 609 governs evidence of convictions, this amendment also has an impact on admissibility of the bad acts that underlie the convictions that are

barred. If a conviction is inadmissible under this Rule as amended, it is inappropriate to allow a party to inquire about the bad acts underlying the conviction. Accordingly, Rule 608(b) has been amended to impose a limitation on bad act impeachment that tracks the provisions of Rule 609(a).

The amendment imposes no limitations on the use of convictions for other forms of impeachment, such as for contradiction, or to establish bias.

D. Amending the Rule 609(a)(1) Balancing Test to Emphasize that the Court Must Consider the Marginal Probative Value of the Conviction, and the Similarity of the Conviction to the Crime Charged, When the Criminal Defendant is Impeached²⁶

One option, short of abrogation, is to try to do something about the current balancing test, discussed in detail earlier in this memo. Professor Jeffrey Bellin contends that the balancing test promulgated by the courts – which was derived from pre-Federal Rules case law – in fact subverts the intent of Congress, which was to allow only very limited use of non-falsity based prior convictions, especially as against criminal defendants.

Professor Bellin criticizes “a three-decade-long trend in the federal courts toward replacing the facially anti-impeachment text of the Rule with a decidedly pro-impeachment, five-factor analytical framework that places an almost insurmountable burden on defendants attempting to exclude prior convictions.” Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L.Rev. 289, 318 (2008). And as discussed above in this memo, it can be argued that many courts are failing at the balancing test because they don’t consider probative value *after* factoring in that the defendant’s credibility is discounted by his motive to falsify in order to avoid incarceration.

Professor Bellin advocates a more focused, “case-specific” approach in substitution of the pretty flimsy multi-factor balancing test currently used by the courts. The goal would be to require the court to identify “the aspects of each conviction and the facts of the particular case that could potentially justify the counterintuitive conclusion that a prior conviction’s ‘probative value’ as impeachment outweighs its ‘prejudicial effect to the accused.’” Professor Bellin explains that two-step inquiry as follows:

First, focusing on a conviction’s probative value, the trial court must recognize that the defendant’s credibility as a witness is always minimal, even without impeachment evidence [because the jury is already aware that the defendant has his liberty at stake and thus has a motive to falsify]. Consequently, the first question under Rule 609 is not whether a prior conviction has some

²⁶ This material, and especially the draft Committee Note, have been changed since the last meeting.

relevance as impeachment, but rather: what will the introduction of the defendant's prior conviction add to the jury's evaluation of the defendant's testimony? For a conviction to be considered more than marginally probative under this analysis, its evidentiary significance must be based on something more than a speculative "readiness to do evil." That consideration is easily subsumed by the more compelling fact of the defendant's abiding interest in acquittal. Rather, the analysis must rest on the specific facts of the case or of the conviction itself. For example, a conviction would be more than marginally probative when the defendant, on direct examination, attempts to create an impression of having led a law abiding life (i.e., trying to appear as "a Mother Superior"); makes some claim that is directly inconsistent with the existence of a prior conviction (e.g., "I have never seen drugs before in my life," or "I am not a crook"); or where the defense utilizes prior convictions to impeach government witnesses, creating a false contrast between the defendant and his accusers.

With respect to the prejudice inquiry, the trial court should ask a similar case-specific question, recognizing that the admission of the defendant's prior offenses as impeachment will virtually always result in some "prejudicial effect to the accused." Specifically, the court must inquire: why is the prejudicial effect of the prior conviction diminished (or enhanced) in this case? A diminished risk of prejudice might be present when a relatively minor conviction (e.g., theft) is offered to impeach a defendant charged with a dissimilar and significantly more serious crime (e.g., murder); where the evidence introduced at trial has already identified the defendant as a prior offender (e.g., a crime committed in prison); or where the defendant's prior conviction will be admitted for other purposes (e.g., to establish an element of the offense). In contrast, in circumstances where prejudicial effect is unusually high, such as where a prior conviction is for an identical or particularly infamous crime (e.g., child molestation), the trial court must begin with a presumption of inadmissibility under Rule 609 due to the sheer implausibility that the probative value of such evidence could ever outweigh its prejudicial effect.

There is a good argument that Professor Bellin's narrowing of the analysis could result in an improvement in the implementation of the Rule 609(a)(1) balancing test as it applies to criminal defendants. It would focus the courts on what are probably the two most important factors to assess: 1) the *marginal* probative value of the conviction; 2) the particular need to screen for prejudice where the crime is similar to the crime charged or particularly inflammatory.

As a matter of rulemaking, the change would presumably apply only to the test involving criminal defendants – that has always been the major focus of the reform efforts in the scholarship, and the critique of the case law that applies these balancing factors is exclusively directed to cases in which the criminal defendant is being impeached. It is only in those cases where probative value must be assessed in light of the defendant's self-interest, it is only in those cases where the

risk of direct prejudice is most problematic, and it is only in those cases in which the constitutional right to testify is implicated.

Here is what a change in text, to implement Professor Bellin's more focused test, might look like:

Rule 609. Impeachment by Evidence of a Criminal Conviction

- (a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
 - (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence (considering the witness's status as an interested party and any other available impeachment evidence) outweighs its prejudicial effect to that defendant (considering the nature of the conviction and any similarity of the conviction to the crime charged); and

Here is a draft Committee Note for an amendment that would provide a more focused balancing test.²⁷

A prior conviction of a defendant testifying in a criminal case is admissible under Rule 609(a)(1)(B) only if its probative value in assessing character for truthfulness outweighs its prejudicial effect. The amendment emphasizes that assessing probative value of a prior conviction on the credibility of a defendant in a criminal case cannot be done in a vacuum. The trial judge must assess probative value in light of the fact that the defendant is, by the very act of testifying, impeached by self-interest. The court must also consider the possibility that the defendant may be impeachable with other evidence, such as a prior inconsistent statement, or a conviction automatically admissible under Rule 609(a)(2). The amendment clarifies that the trial court must assess the *marginal* probative value of the prior conviction. See Advisory Committee Note to Rule 403 (emphasizing the availability of other means of establishing the same point as a factor in assessing

²⁷ This draft Note was prepared by Professor Bellin at the Reporter's request and amended by the Reporter for this meeting.

probative value). Second, impeachment of a criminal defendant with convictions that are similar to the crime charged, or especially inflammatory, has a direct and profound prejudicial effect, independent of the probative value as to character for truthfulness. The amendment highlights the importance of protecting criminal defendants from such extreme prejudice, and as such it intends to implement the will of Congress, which provided special protections in Rule 609(a)(1) for criminal defendants who wish to testify.

Many courts have applied a multi-factored framework that includes amorphous considerations like the “centrality of credibility” and the “importance of the defendant’s testimony.” These factors, derived from case law that predates Rule 609(a)(1), undermine the Congressionally-enacted “special balancing test for the criminal defendant who chooses to testify.” Advisory Committee Note to 1990 Amendment. The Rule has been amended to refocus the analysis on the original, straightforward calculus intended by Congress – marginal probative value versus prejudicial effect.

If a conviction is inadmissible under this Rule as amended, it is inappropriate to allow a party to inquire about the bad acts underlying that conviction. Accordingly, Rule 608(b) has been amended to impose a limitation on bad act impeachment that tracks the provisions of Rule 609(a)(1). [If no amendment to Rule 608(b) is proposed, the language could read as follows: “Thus, if a conviction is not admissible under this Rule, the bad acts underlying the conviction cannot be used for impeachment under Rule 608(b).”]

The amendment imposes no limitations on the use of convictions for other forms of impeachment, such as for contradiction, or to establish bias.

E. Adding Guidance About Compromising By Sanitizing the Conviction

Assuming the Committee finds it appropriate to provide some structure and assistance to courts on the question of sanitizing convictions, the guidance should probably be directed to the situation of impeachment of criminal defendants. But theoretically sanitizing could be a legitimate analysis in any Rule 609 situation.

What follows is a model that adds sanitizing to the text, and another that raises it in the Committee Note. The proposed additions are folded into the proposal to amend the balancing test, set forth immediately above. It makes no sense to talk about sanitization if Rule 609(a)(1) is abrogated.

1. Change to Text:

- (a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
- (A) ~~must be admitted, subject to Rule 403,~~ in a civil case or in a criminal case in which the witness is not a defendant, must be admitted, subject to Rule 403; and
- (B) ~~must be admitted~~ in a criminal case in which the witness is a defendant;
- (i) must be admitted if the probative value of the evidence (considering the witness's status as an interested party and any other available impeachment evidence) outweighs its prejudicial effect to that defendant (considering the nature of the conviction and any similarity to the crime charged);
- (ii) may be admitted [- if not admissible under subdivision (b)(1) -] as a conviction without disclosing the nature of the crime committed if the conviction's probative value outweighs its prejudicial effect; and²⁸

Comment: The bracketed material seeks to codify a two-step approach in which the court can only proceed to sanitizing the conviction if it finds that the probative value of the unsanitized conviction does not outweigh its prejudicial effect. That would preserve a presumption that the jury should hear what the conviction is for. But as discussed earlier in this memo, it is a complex resolution that might impair a court's flexibility.

2. Addition to note – which would work with or without the addition to text.

Portion of Committee Note

A number of courts have admitted only the fact of a conviction [against a defendant in a criminal case] [to impeach a witness]. That solution could be

²⁸ Many thanks to the Style Subcommittee for this version. It is substantially better than the one I started with.

problematic, because convictions falling within Rule 609(a)(1) have varying probative value, and admitting only the fact of conviction deprives the jury of the opportunity to properly assess the conviction's probative value. On the other hand, admitting only the fact of conviction might be useful in some cases to limit the prejudice [to a defendant in a criminal case] without substantially impairing probative value. Admitting only the fact of conviction is not, however, an automatic safety valve or a means to a rough compromise. The court must still find that the probative value of only the fact of conviction outweighs its prejudicial effect to the defendant in a criminal case. It is not enough to weigh the crime's probative value and prejudicial effect and then simply rule that the fact of conviction is admissible as a compromise.

F. Proposal to Limit Rule 609(a)(1) to Theft-Related Crimes.

Professor Ric Simmons recommends that Rule 609(a)(1)(B) be amended to limit admissibility to theft-related crimes – and then to apply the balancing test to those crimes. The justification for this proposal is the data that Professor Simmons obtained from his survey of judges and students (discussed above) in which there was general agreement that theft-related crimes are probative of a defendant's character for truthfulness, while other crimes falling within Rule 609(a)(1) are considered not nearly as probative.

Professor Simmons's findings are in accord with common assumptions that most people make about theft crimes as opposed to, say, violent crimes – the former says more about the witness's propensity to lie than the latter. While you don't have to lie to shoplift or burgle (which is why they are not automatically admissible under Rule 609(a)(2)), they are not exactly upstanding crimes that might be committed by truthful activity. They are crimes involving underhanded activity. It is recognized in many courts applying Rule 609(a)(1) that crimes of theft are more probative than crimes involving violence. *See, e.g., United States v. Jackson*, 546 F.3d 801 (7th Cir. 2008) (conviction for receiving stolen property was highly probative even though almost 10 years old); *United States v. Caldwell*, 760 F.3d 267 (3rd Cir. 2014) (probative value of prior firearms conviction is low).²⁹ Moreover, the State of Michigan, as discussed above, limits its version of Rule 609(a)(1) to crimes that contain an element of theft.

A drafting alternative that would limit Rule 609(a)(1) to theft-related crimes could look like this:

- (a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

²⁹ In his forthcoming article, Professor Simmons notes that in many states, theft crimes are automatically admissible under the state version of Rule 609(a)(2). *See, e.g., Richardson v. State*, 579 P.2d 1372 (Alaska 1978); *State v. Ray*, 116 Wash.2d 531 (1991).

- (1) for a crime containing an element of theft that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
 - (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
- (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.

Reporter’s Comment:

Professor Simmons has a different suggestion, which would be to limit impeachment for theft-related crimes only with respect to criminal defendants. That is, his amendment would change only Rule 609(a)(1)(B), as follows:

- (a) **In General.** The following rules apply to attacking a witness’s character for truthfulness by evidence of a criminal conviction:
 - (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
 - (B) ~~must~~ may be admitted in a criminal case in which the witness is a defendant, only if the crime involves an element of theft, receiving stolen property, or similar activity, and if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

There are a couple of critiques for the Simmons version:

1. The use of “may” instead of “must” is inconsistent with the rest of the rule, which is based on either mandatory automatic admission, or mandatory admission after the application of a balancing test. To say that the judge has discretion to exclude a conviction even after it is admissible under the appropriate balancing test was thought by Congress to give too much

discretion to the judge – as to Rule 609(a)(1), the judge already has discretion in applying the balancing test. “Double discretion” was not contemplated.

2. There doesn’t seem to be a good reason to narrow the rule to theft crimes for criminal defendant witnesses only. If the basis of the narrowing is that only these crimes have sufficient probative value to even be candidates for admissibility, that probative value differential is equally applicable to impeachment of civil witnesses, prosecution witnesses, and witnesses called by the accused.

3. Saying that the rule “involves” an element of theft is arguably an invitation to go behind a crime and determine whether the witness committed a theft in the course of committing the crime – for example the theft of a car to commit a murder. That “going behind the crime” analysis was rejected with respect to Rule 609(a)(2), and there is no good reason to reinstitute it in Rule 609(a)(1). So it would seem that the Michigan language – that the crime “contain” an element of theft, would be preferable.

4. Professor Simmons uses the term “theft, receiving stolen property, or similar activity” – that require case law development to figure out how far an amended Rule 609(a)(1) would go. It could be argued that the Michigan language – “containing an element of theft” – raises problems of interpretation as well, because it may be argued not to cover crimes such as receiving stolen property. But Michigan courts have not had trouble categorizing such “receipt” crimes as theft-related. *See, e.g., People v. Stewart*, 1997 WL 33344058 (Mich. App.) (receiving and concealing stolen property is a crime containing an element of theft under Michigan Rule 609).

All in all, if the Committee *is* interested in limiting convictions to theft-related crimes, incorporating the Michigan language, as does the draft above, seems to be the cleaner and more comprehensive alternative.

One final concern that is applicable to both of the “theft-related” limitations discussed above. There is probably a good argument that many judges (and others) would see another class of crime as being underhanded and stealthy, and thus on the high end of the probative value scale of Rule 609(a)(1) crimes – that would be certain drug crimes, like drug distribution and manufacture.³⁰ Certainly that is so in some of the cases in the attached case digest, which find drug-related crimes to be especially probative. Limiting Rule 609(a)(1) to theft-related crimes means that drug crimes would never be admissible to attack a witness’s character for truthfulness. That is sure to be controversial. On the other hand, adding “drug-related crimes” to the permissible list raises questions about how much benefit there is to having categorical exclusions. The list of included crimes would probably outnumber the list of excluded ones, and there would probably be

³⁰ Though this assumption is not borne out in the Simmons survey, where the respondents found drug crimes to be substantially less probative than theft crimes.

Memorandum to Advisory Committee on Evidence Rules
Re: Possible Amendments to Rule 609(a)(1)
April 1, 2018

a push to add other crimes to the “included” list – such as escape from incarceration, immigration crimes, etc.

Draft Committee Note for the Theft-Related Alternative:

Rule 609(a)(1) has been limited to allow a witness’s character for truthfulness to be impeached with non-falsity based convictions only if the crime contains an element of theft, and then only if the conviction satisfies the balancing tests in the rule that currently exist. Experience has shown that courts have readily admitted convictions to impeach a witness’s character for truthfulness even where the probative value of these convictions is very low. Because the balancing tests have often not been employed to provide the necessary protection for testifying witnesses – and particularly for protection of defendants in a criminal case who wish to testify – the Committee has determined that a bright-line approach prohibiting admissibility of less probative convictions is necessary. Drawing the line at theft-related convictions is sensible as those are the convictions that are most probative of all those currently covered by Rule 609(a)(1).

The amendment refers to convictions “containing an element of theft.” This means that a court may look only to the elements of the crime of which the witness has been convicted. The court may not look behind the conviction to determine whether the witness might have done a theft in the course of committing the crime for which the witness was convicted. Crimes containing an element of theft include crimes such as concealing and receiving stolen property, as such crimes clearly are dependent on knowledge of theft for conviction.

TAB 8B

District Court Rulings on Rule 609(a)(1)(B) Impeachment –2009-present

*Case Digest by Professor Liesa Richter, based on research conducted by
Professor Ric Simmons, Ohio State University Law School*

A review of recent district court cases analyzing the admissibility of prior felony convictions against criminal defendants for impeachment purposes reveals a variety of approaches to such evidence. Some courts freely admit prior felony convictions for impeachment purposes under Rule 609(a)(1)(B), even those that are very similar to the charged offense. Other courts attempt to protect the defendant from unfair prejudice by sanitizing references to the past felony convictions they admit for impeachment purposes. On the other hand, some courts exclude the only prior felony convictions potentially eligible to impeach a criminal defendant under Rule 609(a)(1)(B), particularly when those convictions are similar to the charged offenses. Some courts compromise by admitting some of a criminal defendant's prior felony convictions for impeachment, while excluding other eligible convictions. Finally, some courts decline to rule on the admissibility of prior felony convictions under Rule 609(a)(1)(B) prior to trial.

Reporter's Note: The references in the cases below to the balancing of Rule 609(a)(1) factors usually refers to the following factors used by most of the lower courts:

(1) the kind of crime involved (including its probative value as to witness-truthfulness and its similarity to the charged crime); (2) when the conviction occurred; (3) the importance of the defendant's testimony to the case; and (4) the importance of the credibility of the defendant.

United States v. Caldwell, 760 F.3d 267 (3rd Cir. 2014). *See also United States v. Mahone*, 537 F.2d 922 (7th Cir. 1976) (using the same factors but splitting up the first factor into two --- probative value as to credibility and similarity of the crime --- and thus applying five factors).

Reporter's Note: The commentary to the case law is by the Reporter.

I. The Court Admits All of Defendant's Felony Convictions Under Rule 609(a)(1)(B)

Many courts admit all of a criminal defendant's prior felony convictions eligible for impeachment use under Rule 609(a)(1)(B), often including prior convictions similar to the charged offense. Some courts support the admissibility of these prior felonies by placing great emphasis on the government's need for impeachment and on the defendant's choice to put his or her credibility in issue by testifying (which are essentially automatic factors). Others order the admission of prior felony convictions more summarily with less analysis.

- **United States v. Perry, 2017 WL 2875946 (D. Minn. 2017):** The defendant was prosecuted for the unlawful possession and reckless discharge of a firearm. The district court found that all three of the defendant's prior felony convictions – a 2005 conviction for reckless discharge of a firearm, a 2008 conviction for terroristic threats, and a 2010 conviction for terroristic threats and domestic assault – would be admissible to impeach him under Rule 609(a)(1)(B). The court did not address the similarity of the past offenses to the charged crimes or analyze the specific Rule 609(a)(1) factors. Instead, the court summarily held that the probative value of all the

convictions outweighed any unfair prejudice because the defendant puts his character for truth in issue when he decides to take the stand.

- **United States v. Williams, 2017 WL 4310712 (N.D. Cal. 2017):** Six of eleven charged defendants were heading to trial in a RICO prosecution arising out of gang-related activities involving guns, drugs, prostitution, and stolen property. Although the court deferred a final ruling on the admissibility of the defendants' many prior convictions under Rule 609 until trial, the court provided a table indicating tentative rulings for each defendant. As the court noted, the table showed that the court was inclined to admit all prior felonies that were less than ten years old and to exclude all older felonies. This would mean that many felonies involving firearms, drugs, robbery, burglary, and murder would be admissible to impeach the defendants' trial testimony. The court did not give an analysis for each prior felony, but simply provided a tentative ruling for each.

- **United States v. Ford, 2016 WL 259640 (D.D.C. 2016):** Multiple defendants were charged with conspiracy to distribute PCP, possession of PCP with intent to distribute, carrying firearms in a connection with a drug crime, and with being felons in possession of firearms and ammunition. The court first allowed several of the defendants' prior PCP convictions to be admitted at trial through Rule 404(b) using a conclusory analysis. The court found that all prior convictions admitted under Rule 404(b) could also be used to impeach because no new prejudice would result from that use. The government also sought to use additional PCP convictions, and other convictions of several defendants for carjacking, assault, firearm possession, unauthorized use of a vehicle, and destruction of property to impeach their trial testimony under Rule 609(a)(1)(B). The court found that all of the prior convictions showed a conscious disregard for the rights of others and said something about the credibility of the defendants. Although the court expressed an intention to admit almost all prior convictions, it expressly reserved ruling with respect to one defendant with two similar prior convictions, stating that one of the convictions would be admitted to impeach trial testimony but that the court would decide whether to allow a second *after* hearing the defendant's testimony at trial.

- **United States v. Thomas, 214 F. Supp. 3d 187 (E.D.N.Y. 2016):** The defendant was prosecuted for being a felon in possession of a firearm and the prosecution sought to impeach his trial testimony with five prior felony convictions for: 1) robbery; 2) assault; 3) reckless endangerment; 4) menacing; and 5) criminal contempt. The court refused to permit any of these prior convictions to be admitted under Rule 404(b), but then considered admissibility to impeach through Rule 609(a)(1)(B). The court found the probative value of the defendant's convictions high, particularly because theft and robbery show dishonesty. The court noted that the crimes were recent and that the defendant had continued committing crimes. Although the court acknowledged some similarity between the felon in possession charges and the prior violent crimes, the court stated that similarity does not automatically require exclusion. The court found the defendant's credibility important because he would attempt to contradict government witnesses. Finally, the court noted that the jury would be aware that the defendant was a "felon" due to the nature of the charged offense, such that knowing the particular felonies would not create significant additional prejudice. Thus, the court found all prior felonies admissible to impeach with an appropriate limiting instruction confining them to impeachment use.

- **United States v. Warren, 2016 WL 931100 (M.D. Fla. 2016):** The defendant was charged with being a felon in possession of a firearm after officers found guns under a passenger seat in a vehicle in which he was sitting. The defendant had five prior convictions between 2006 and 2008 for: 1) carrying a concealed firearm; 2) unlawfully possessing a firearm; 3) possession of drugs with intent to distribute; 4) fleeing from an officer; and 5) driving with a suspended license. The central issue in the case was the defendant’s knowing possession of the guns under his seat and the court admitted both of his prior firearms convictions through Rule 404(b) to prove his knowledge and intent. The government sought permission to use the remaining convictions to impeach the defendant’s trial testimony. The court stated that the defendant’s credibility would be at issue if he chose to testify and found that he had failed to establish sufficient prejudice from the use of his remaining felony convictions to exclude them (thus incorrectly placing the burden on the defendant to show prejudice rather than on the prosecution to show probative value outweighing any potential prejudice). Although the court noted that its pretrial ruling could be revisited at trial, the court indicated that it was inclined to allow the government to use all of the defendant’s recent felony convictions to impeach him.

- **United States v. Boyajian, 2016 WL 225724 (C.D. Cal. 2016):** The defendant was charged with a sex offense against a minor victim. The court found the defendant’s prior sex offense conviction admissible under Rule 404(b) and held that the government could also use it to impeach the defendant’s trial testimony under Rule 609(a)(1) because the defendant’s credibility was crucial and because the prior sex offense suggested dishonesty.

- **United States v. Sneed, 2016 WL 4191683 (M.D. Tenn. 2016):** The defendant was charged with the possession and distribution of cocaine and sought to exclude evidence of three prior felony convictions from trial: 1) a conviction for the sale of a controlled substance; 2) a conviction for the attempted possession of a controlled substance; and 3) a reckless aggravated assault conviction. Although the court did not specify the dates of conviction or release, it analyzed admissibility under Rule 609(a)(1)(B). The court summarily found that the defendant’s credibility would be central to the case if he chose to testify and that, therefore, all prior felonies would be admissible to impeach him. The court did not discuss the probative value of the prior offenses for impeachment or discuss the similarity of the past drug offenses to the instant case.

- **United States v. Hebert, 2015 WL 5553662 (E.D. Ok. 2015):** The defendant was charged with being a felon in possession of explosives after a box of blasting caps was discovered in his home. Wishing to testify at trial that he had no knowledge of the blasting caps, the defendant moved to exclude evidence of three prior convictions for impeachment purposes: 1) a 2008 conviction for possession of methamphetamine with intent to distribute; 2) a 2013 conviction for possession of a controlled substance; and 3) a 2014 conviction for burglary. The court analyzed the Rule 609(a)(1)(B) factors one at a time, noting that none of the defendant’s convictions were for crimes involving an element of dishonesty, but that all of them called his veracity into question. The court found all three convictions recent, particularly the two in the prior two years, thus increasing their probative value. The defendant argued that the association between drugs and guns could carry over to the “explosives” charged in the instant case and argued that the similarity between the past drug crimes and the current offense precluded use of his prior convictions. The court disagreed, finding possession of blasting caps too distinct from past drug offenses to create any risk of propensity use. The court emphasized that the defendant’s testimony was important because he was the only witness who could deny the requisite knowledge of the blasting caps. For

the same reason, the court found the defendant's credibility crucial. With four of five balancing factors weighing in favor of admission, the court found that probative value outweighed any unfair prejudice and ruled that all of the defendant's prior convictions could be used to impeach his trial testimony under Rule 609(a)(1)(B).

- **United States v. Verner, 2015 WL 1528917 (N.D. Ok. 2015):** The defendant was charged with possession of methamphetamine with intent to distribute and sought to prevent the government from using four prior convictions against him at trial: 1) a 2001 conviction for possession of a stolen vehicle; 2) a 2006 burglary conviction; 3) a 2007 conviction for possession of a controlled substance; and 4) a 2007 conviction for possession with intent to distribute marijuana and for unlawfully possessing a firearm. Because the defendant expressed his intention to testify that the drugs arresting officers found in his underwear were planted, the court held that the defendant's two previous drug convictions would be admissible under Rule 404(b) to prove his knowledge and intent. The court found that those drug convictions and the burglary conviction would be admissible to impeach the defendant's testimony under Rule 609(a)(1)(B) as well. (Apparently, these were the only convictions the government sought to admit). The court found that burglary is probative of veracity and stated that past drug convictions have impeaching value particularly when a defendant "denies involvement with illegal drugs." The court noted the recency of the defendant's past convictions and the importance of his credibility at trial. In response to the defendant's concerns about propensity use of his prior drug convictions, the court noted that it would give a limiting instruction, that it would not allow "details" of past convictions to be shared, and that a defendant places his credibility at issue when he decides to take the stand and that the jury needs information about past convictions to evaluate that credibility.

- **United States v. Rembert, 2015 WL 9592530 (N.D. Iowa 2015):** The defendant was charged with being a felon in possession of a firearm and with possession of marijuana with intent to distribute. It appears that the defendant did not object to the admission of two of his prior convictions, an earlier marijuana conviction offered under Rule 404(b) and a prior forgery conviction offered to impeach his testimony under Rule 609(a)(2). The defendant did seek to preclude the government from impeaching him with another marijuana conviction and a theft conviction, however. The court found, in conclusory fashion, that both convictions were probative and that the defendant's credibility was important. The court did not address the similarity of the past drug offense to the current charges. It found both prior convictions admissible to impeach.

- **United States v. Sleugh, 2015 WL 3866270 (N.D. Cal. 2015):** The defendant was charged with robbery, drug possession, and with unlawfully possessing and using a firearm after shooting someone during a drug deal. The defendant sought to exclude evidence of his 2008 armed robbery conviction at trial. The court excluded the conviction during the prosecution's case-in-chief under Rule 404(b) after a careful analysis, but then held the conviction admissible to impeach the defendant under Rule 609(a)(1), without analysis of the relevant factors.

- **United States v. Walia, 2014 WL 3734522 (E.D.N.Y. 2014):** A defendant was charged with the importation of drugs and with possession with intent to distribute them. The court summarily held that the defendant's 2011 felony conviction for driving under the influence could be used to impeach his testimony under Rule 609(a)(1)(B) "because of its probative value, which is not unduly prejudicial."

- **United States v. Glenn, 2014 WL 4095842 (M.D. Tenn. 2014):** The defendant was charged with making false statements to the Social Security Administration. The government sought to use two 2010 felony convictions, one for defrauding the Social Security Administration and the other for embezzlement of funds from a church, during its case-in-chief through Rule 404(b). The court found that the 2010 conviction for defrauding the Social Security Administration could be admitted under Rule 404(b) to prove the defendant's knowledge and the absence of mistake in falsifying information provided to the Social Security Administration in the instant case. The court found that, although the 2010 embezzlement felony was also probative of the defendant's intent, its probative value was reduced by its cumulative nature. Thus, the court found it inadmissible under Rule 404(b). The court found both 2010 felonies admissible to impeach the defendant under Rule 609(a)(1)(B), however, noting that the defendant's credibility would be crucial in the case and that both crimes were highly probative of dishonesty. The court noted that both crimes potentially qualified for automatic admission under Rule 609(a)(2), but explained that it lacked sufficient information about the underlying state offenses to apply Rule 609(a)(2). Therefore, both felonies could be used to impeach the defendant's testimony under Rule 609(a)(1)(B).

- **United States v. Drift, 2014 WL 4662505 (D. Minn. 2014):** The defendant was charged with the sexual abuse of a child and sought to prevent the government from using two prior felony convictions to impeach his trial testimony: 1) a 2008 conviction for operating under the influence and 2) a 2008 conviction for terroristic threats. The defendant argued that the terroristic threats conviction, in particular, was not probative of his veracity and that its inflammatory nature might prejudice the jury against him. The court rejected the defendant's arguments and found both convictions admissible to impeach the defendant's testimony. The court emphasized that the defense would aim to undermine and contradict the testimony of the minor victim, making credibility of paramount importance. Without addressing the specific Rule 609(a)(1)(B) factors, the court found that the probative value of the prior convictions outweighed any modest prejudice (that could be alleviated through a limiting instruction).

- **United States v. Gongora, 2013 WL 12219169 (C.D. Cal. 2013):** The defendant was prosecuted for conspiracy, fraud, and failure to file tax returns. The government sought permission to impeach him with his 2004 felony conviction for grand theft arising out of his presentation of a forged or altered bank check. The court found the prior conviction more probative of credibility than prejudicial under Rule 609(a)(1)(B) with very little analysis.

- **United States v. Sutton, 2011 WL 2671355 (C.D. Ill. 2011):** The defendant was charged with possession of crack with intent to distribute and sought to prevent the government from using a nine year-old conviction for delivery of a controlled substance (one of his two prior drug felony convictions) under either Rule 404(b) or to impeach his trial testimony under Rule 609(a)(1). The court first found the prior drug crime admissible during the government's case-in-chief through Rule 404(b) to prove the defendant's knowledge and intent. The court went on to analyze the admissibility of the same felony conviction under Rule 609(a)(1)(B). The court found that drug offenses possess some probative value with respect to veracity. Although the conviction was nine years old at the time of trial, the court found that the defendant did not have a clean record in the intervening years. Although the court noted the similarity of the prior conviction in passing, it found that a limiting instruction would limit prejudice. Finally, the court found the defendant's credibility key given that his testimony would likely contradict that of

several other witnesses, thus increasing the probative value of his prior felony. The court concluded that the government could impeach the defendant's trial testimony with his prior similar drug conviction.

- **United States v. Martinez, 2010 WL 11537701 (D. Alaska 2010):** The defendant was charged with narcotics offenses and sought to prevent the government from using his prior robbery conviction to impeach his trial testimony. The court examined the Rule 609(a)(1)(B) factors, finding that robbery is a crime that suggests dishonesty, particularly because the defendant hid the proceeds of the robbery and lied about its commission (though this is going behind the conviction itself in a way that is prohibited under Rule 609(a)(2)). The court also found probative value high because the prior crime was recent, occurring four years earlier. The court noted that there was no similarity between the prior robbery and the instant narcotics charges that might lead to an impermissible propensity inference. Finally, the court acknowledged that the defendant's testimony would be key to the defense, but that the government would need impeaching evidence to help the jury weigh the defendant's credibility. The court found that probative value outweighed any unfair prejudice and allowed the defendant's robbery conviction to be used to impeach him, explaining that criminal defendants are not entitled to take the stand with a false aura of veracity.

- **United States v. Harper, 2010 WL 1507869 (E.D. Wis. 2010):** The defendant was charged with being a felon in possession of a firearm after allegedly shooting a gun out of the window of a vehicle in which he was a passenger. The vehicle allegedly fled from officers shortly after the shots were fired. The government sought to impeach the defendant with four prior felony convictions: 1) a 1995 conviction for battery; 2) a 2001 conviction for the manufacture and delivery of cocaine; 3) a 2006 conviction for fleeing and eluding officers in a vehicle; and 4) a 2006 conviction for drug possession. Because the 1995 conviction fell outside the ten-year window due to a continuance of the trial date, the court found it inadmissible under Rule 609(b). The court found the other three felony convictions admissible to impeach the defendant's trial testimony. Although the defendant argued that drug possession and flight did not suggest dishonesty, the court noted that all felonies are impeaching and that Rule 609(a)(1) felony convictions need not be for crimes of dishonesty in order to be admitted. The court noted the recency of the three felonies. The defendant argued that his 2006 conviction for fleeing in a vehicle would cause unfair propensity prejudice due to its similarity to the events of the instant case, but the court disagreed. The court noted that the defendant was charged only with firearm possession and that flight and firearms were not similar. Further, the court explained that the defendant was accused of being the passenger in the fleeing vehicle in the instant case, further eliminating any propensity concern. The court also found the defendant's credibility crucial where his only defense would involve denying possession of the firearm found in the vehicle. The court acknowledged that admitting all three convictions could be considered prejudicial, but found that prejudice was lessened because the jury would already know the defendant was a "felon" due to the current charge. Therefore, the court found that the defendant's credibility was sufficiently important to justify admission of all three prior convictions.

- **United States v. Stolica, 2010 WL 538233 (S.D. Ill. 2010):** The defendant was charged with illegal counterfeiting and with being a felon in possession of a firearm. The defendant moved to preclude the government from admitting two 1999 convictions for bank robbery to impeach his trial testimony. The court found one conviction outside the Rule 609 ten-year time period and one inside of that window. Nonetheless, the court held that both bank robbery

convictions would be admissible to impeach the defendant's testimony at trial. The court found that bank robbery was indicative of credibility even though it was not a crime of dishonesty. The court also found that bank robbery presented little propensity risk due to its lack of similarity to the charged offenses of counterfeiting and illegal possession of a firearm. Finally, the court found that the defendant's credibility was very important because he would likely contradict government witnesses if he took the stand. In admitting both convictions, the court emphasized that they would only be admissible in the event that the defendant chose to testify – thus they were not admissible under Rule 404(b).

- **United States v. Campbell, 2010 WL 1610583 (C.D. Ill. 2010):** A defendant facing cocaine distribution charges sought to prevent the government from using his prior conviction for the manufacture and delivery of a controlled substance to impeach his trial testimony. With no analysis regarding the prejudice caused by admission of a similar past conviction, the court found that the prior felony had impeachment value and should be permitted if the defendant chose to testify. The court held that the crime charged, the date, and the disposition would be allowed.

- **United States v. Lujan, 2008 WL 11359114 (D.N.M. 2008):** Without explaining the current charges or performing analysis, the court ruled that the defendant's prior conviction for the possession of marijuana would be admissible against him if he testified. The court stated only that the defendant's credibility was important and that the prior conviction could demonstrate a motive for the instant offense (which would implicate Rule 404(b) rather than Rule 609 which the court was analyzing).

- **United States v. Alfonso, 1995 WL 276198 (S.D. N.Y. 1995):** A defendant charged with conspiracy to distribute cocaine sought to prevent the prosecution from impeaching his trial testimony with his prior conviction for attempted criminal possession of cocaine. The court found the conviction admissible to impeach because drug trafficking was considered dishonest in the Second Circuit. With no analysis of unfair prejudice, the court found the prior conviction admissible to impeach the defendant if he testified.

- **United States v. Jackson, 1995 WL 337067 (N.D. Ill. 1995):** A defendant was charged with operating a fraudulent telemarketing scheme and sought to prevent the government from impeaching his trial testimony with two prior drug convictions. The court found that the defendant's commission of prior felonies reflected on his credibility and noted that the past crimes bore no resemblance to the charged fraud, thus minimizing unfair prejudice. Although the defendant argued that his trial testimony was crucial and could determine the outcome of the case (and so he should not be prevented from testifying for fear of impeachment) the court found that this elevated the importance of his credibility and the probative value of the impeaching convictions. The court ruled that both convictions would be admissible and stated that the defendant could request a limiting instruction, including with regard to the nature of the prior convictions during trial. The court did not order sanitized presentation of the prior convictions, however.

II. The Court Sanitizes Defendant's Felony Convictions Admitted Under Rule 609(a)(1)(B)

Many courts that are inclined to allow use of a criminal defendant's felony record for impeachment under Rule 609(a)(1)(B) compromise by sanitizing the government's references to the defendant's past misdeeds. This typically means that the government may cross-examine a defendant about a generic "felony" or "felonies" committed on a specified date. Courts utilize this technique most frequently when faced with prior felony convictions that are similar to the charged offense. Sometimes, the prosecution proposes, or at least agrees to such sanitized references. In other courts, this practice is prohibited, on the ground that the jury cannot properly assess the probative value of the conviction on the defendant's character for truthfulness unless they know what the conviction was for.

- **United States v. Washington, 2017 WL 3642112 (N.D. Ill. 2017):** The defendant was charged with being a felon in possession of a firearm after officers allegedly saw him throw a firearm over a fence. The defendant had two prior convictions with which the government sought to impeach his trial testimony: 1) a 2009 conviction for the manufacture and delivery of marijuana and 2) a 2012 burglary conviction. The defendant asked the court to sanitize the convictions by precluding mention of the names of his prior offenses, while the government argued for full use of the convictions to impeach. In weighing the Rule 609(a)(1)(B) factors, the court noted that marijuana offenses and burglary possessed only modest probative value in connection with truthful testimony. The court noted that the marijuana conviction was somewhat old, but that the defendant had not stayed out of trouble since that time, enhancing probative value. Further, the court found that neither prior offense was identical to the charged offense, reducing unfair prejudice. Still, the court found that defendant's testimony was extremely important because his own version of events constituted his sole defense. Thus, the court decided to allow both felonies to be used to impeach, but required them to be sanitized such that their names and the sentences received could not be mentioned. The court acknowledged that the names of prior offenses could be admitted in usual circumstances but also noted that courts in the Northern District of Illinois "regularly sanitize" impeaching convictions.

- **United States v. Waggy, 2017 WL 3299085 (E.D. Wash. 2017):** The defendant was prosecuted for making telephone calls designed to harass, intimidate, and threaten using obscene and lascivious language and acts. The defendant had three prior convictions potentially available for impeachment: 1) a 2008 harassment conviction; 2) a 2005 harassment/threat to kill conviction; and 3) a 2000 child rape. Acknowledging the inflammatory nature of the 2000 conviction, the government sought to impeach only with the 2008 and 2005 convictions. The court analyzed admissibility using the Rule 609(a)(1)(B) factors, noting that a "close call" should result in exclusion. The court found unfair prejudice too high for the 2008 and 2005 convictions due to their similarity to the charged offense and their salacious nature. *The court ruled that the government could not question the defendant about any of his specific convictions, but could only ask whether he had been convicted of "a felony."*

- **United States v. Dumire, 2016 WL 4507390 (W.D. Va. 2016):** A defendant was charged with being a felon in possession of a firearm, as well as with obstruction of justice arising out of witness intimidation and retaliation resulting in the death of the witness. The defendant had one prior conviction for malicious wounding with a firearm that the government sought to use for

impeachment. The court found the prior conviction too similar to the instant offense and found that it would be unduly prejudicial if the jury learned that both incidents involved shooting someone. *The court ruled that it could be used only if the government referred to it as a prior “felony involving a firearm.” Thus, the court allowed the conviction to impeach if partially sanitized.*

- **United States v. Marquez, 2016 WL 10720983 (D.N.M. 2016):** Seventeen defendants were indicted for methamphetamine distribution. All but one pled guilty and the government sought to use two prior felony convictions to impeach the defendant’s testimony. The court analyzed a 2000 aggravated battery conviction under Rule 609(b) and found that the government failed to satisfy its burden of producing specific facts to overcome the presumption against admitting convictions more than ten years old and excluded the conviction. The court analyzed the defendant’s 2008 conviction for being a felon in possession of a firearm under Rule 609(a)(1)(B). It found that telling jurors that defendant had a felony conviction would put them on notice that he may not be credible. Although the prior conviction was not similar to the charged drug offenses, the court found prejudice in the fact that a prior conviction for being a “felon in possession of a firearm” would actually reveal two prior felonies to the jury (the 2008 conviction and the predicate felony). The court found that defendant’s credibility was important because his testimony would necessarily contradict other evidence. *After balancing the court allowed sanitized evidence of the 2008 “felony” without the name of the offense to be used to impeach the defendant’s testimony.*

- **United States v. Castelluzzo, 2015 WL 3448208 (D.N.J. 2015):** Two defendants were charged in connection with a drug distribution conspiracy and the government moved for permission to use one defendant’s prior felony convictions to impeach his trial testimony. The defendant had a 2008 theft by deception conviction, a 2008 drug possession with intent conviction, and a 2006 drug possession with intent and felon-in-possession of a firearm conviction. The court found the theft conviction automatically admissible pursuant to Rule 609(a)(2) (which most courts would not do because theft crimes do not contain an element of false statement) and carefully balanced the Rule 609(a)(1)(B) factors with respect to the other convictions. The court noted that the similarity of the prior drug convictions presented significant propensity risk. The court found that the age of the convictions did not diminish their probative value, however, because the defendant remained on probation for the crimes during the current charged conspiracy. Because the defendant’s testimony constituted his only possible defense, his testimony was important and this weighed against admission. Still the court found that the defendant’s credibility would be critical and impeachment important. (So, as usual, the importance of the defendant’s testimony crossed itself out – it is important to limit impeachment in order to allow the defendant to testify, but equally important to impeach him). *The court decided to admit the prior drug convictions if the government would agree to characterize them only as “two non-violent felonies.”* The court found that sanitizing the convictions would ameliorate any unfair prejudice – but the court did not address the problem that sanitizing the conviction renders their probative value inscrutable.

- **United States v. Elder, 2015 WL 13035104 (S.D. Ind. 2015):** A defendant was charged with conspiracy to distribute methamphetamine. He sought to prevent the government from impeaching his trial testimony with two prior felony convictions: 1) a 1997 conviction involving wire fraud and operation of a drug enterprise (for which he was released in 2005) and 2) a 2009 conviction for distribution of methamphetamine, arguing that their similarity to his charged

offense would cause significant unfair propensity prejudice. The court carefully weighed the Rule 609 factors, finding that drug offenses were not highly probative of veracity, but that the recency of the offenses suggested their relevance to the defendant's current credibility. The court agreed with the defense that the similarity of the prior convictions to the charged offense was highly prejudicial, but found that the importance of the defendant's testimony and credibility weighed in favor of admission. The court found the Rule 609 balancing to be a "close call" due to the jury's need for impeaching information and the potential prejudice to the defendant. The court ultimately found both convictions admissible to impeach *with only the fact of a "felony" conviction and the date revealed* to protect the defendant from a propensity inference (though the jury could still draw a "once a criminal always a criminal" propensity inference). (In an opinion entered one day earlier in the same case, the trial judge ruled with little analysis that another defendant's 1999 conviction for possession of equipment for the manufacture of drugs and a 2007 felony conviction for maintenance of a common nuisance would also be admissible to impeach him if he testified. The court did not sanitize the convictions or discuss the similarity of the 1999 drug offense to the charged crime. *See United States v. Elder*, 2015 WL 1403270 (S.D. Ind. 2015)).

- **United States v. Thomas, 2015 WL 2341320 (W.D. Wis. 2015):** The defendant was apparently charged with a drug offense, although the nature of the indictment was not described. The prosecution sought leave to impeach the defendant with three prior drug felony convictions pursuant to Rule 609(a)(1)(B) if he chose to testify. Although all three were within the requisite ten-year time frame, the court immediately noted the similarity of the prior convictions to the charged offense, opining that a limiting instruction would likely be ineffective in protecting the defendant from an impermissible propensity inference. Therefore, the court held that the government could use all three felony convictions to impeach, *but only in a sanitized form that did not reveal the nature of the prior convictions to the jury.*

- **United States v. Clayton, 2014 WL 508523 (N.D. Iowa 2014):** The defendant was charged with bank robbery. He had two prior felony theft convictions that the government sought to use under Rule 404(b), as well as for impeachment. The court rejected the government's attempt to admit the convictions during its case-in-chief under Rule 404(b). The court found that both convictions were probative of the defendant's honesty under Rule 609(a)(1)(B) only because they were "felonies" and not because of their specific nature, suggesting that their similarity to the current robbery charges could cause propensity prejudice. *Therefore, the court held that the prosecution could cross-examine the defendant only as to whether he had been convicted of "two felonies" without revealing their nature.*

- **United States v. Perez, 2014 WL 3362240 (E.D. Cal. 2014):** The defendant was charged with being a felon in possession of a firearm and ammunition and with the possession of an unregistered firearm after allegedly shooting his son. The defendant sought to preclude the government's use of his five prior felony convictions for heroin possession, resisting an officer, and assault with a deadly weapon as impeachment evidence under Rule 609(a)(1). *Without analysis of the Rule 609(a)(1) factors, the court held that all five could be used to impeach in a sanitized form that revealed only that the defendant had been convicted of "five felonies."* Further details about the nature or facts of all five offenses would be excluded unless the defendant opened the door to such information during his direct testimony.

- **United States v. Saquil-Orozco, 2012 WL 2576678 (N.D. Iowa 2012):** The defendant was charged with possession of a firearm by a convicted felon and with being an illegal alien present in the United States after being removed from the country. The defendant sought to prevent the government from impeaching him with a 2007 conviction involving the possession of cocaine with intent to distribute. Although the government expressed an intent to ask him about his prior felony on cross-examination, the government agreed that it would not reveal the nature of the prior conviction. The court analyzed the admissibility of the prior drug conviction under Rule 609(a)(1)(B) and found that, *in its sanitized form*, its probative value outweighed any unfair prejudice and allowed the cross-examination as suggested by the government.

- **United States v. Swint, 2012 WL 3962704 (D. Ariz. 2012):** The defendant was charged with assaulting a federal officer and claimed self-defense. The government sought permission to use the defendant's 1991, 1992, and 2003 assault convictions under Rule 609 to impeach his veracity if he testified at trial. The defendant opposed the request, arguing that his past assaults were not indicative of veracity and that their similarity to the charged offense would create an unfair propensity inference about his violent tendencies. The defendant sought exclusion of the convictions or, at least, sanitized reference to them. *The court held that the government could ask the defendant about the fact of a 2003 "felony" conviction without reference to the nature of the prior crime.* The court reserved ruling on the admissibility of the 1991 and 1992 convictions (which were subject to the more stringent balancing standard of Rule 609(b) due to their age) until trial.

- **United States v. Durbin, 2012 WL 894410 (D. Mont. 2012):** Although the opinion never specifies the charged offense, it appears that the defendant was prosecuted for drug-related crimes. The defendant moved to exclude his 2008 felony conviction for the delivery of marijuana under Rule 609(a) should he choose to testify. The court analyzed the Rule 609(a) factors, noting that drug crimes are considered to be probative of veracity in the Ninth Circuit. The court found that the recency of the 2008 conviction increased its impeaching value. The court noted that the similarity of the prior conviction to the charged crime created a risk of unfair propensity use that weighed against admission. Finally, the court found that the defendant's testimony and credibility would be crucial if he testified at trial. Accordingly, the court held that the government could use the 2008 conviction to impeach the defendant, but prohibited the prosecution from revealing the nature of the past offense.

Comment: note the inconsistency of emphasizing that drug crimes are probative of veracity, and admitting the conviction partly on that basis, but then depriving the jury (whose role it is to assess credibility) of the information that it was a drug crime. (This is similar to the inconsistency (rectified in 2006) where a court would hold a conviction automatically admissible under Rule 609(a)(2) if it found that the witness lied while committing a non-falsity crime – a fact that the jury would never know).

- **United States v. Gomez, 772 F. Supp. 2d 1185 (C.D. Cal. 2011):** The defendant was charged with the possession of methamphetamine with intent to distribute and the government moved for permission to impeach his trial testimony with two prior felony convictions: 1) a 1997 conviction for conspiracy to possess with intent to distribute methamphetamine; and 2) a 2006 felony conviction for false personation. The court first found the 1997 felony within the ten-year time period required by Rule 609 due to the defendant's release from custody in 2004. The court

found the impeaching value of the 1997 conviction diminished by the existence of the more recent 2006 felony that could be used to impeach the defendant. Further, the court noted that the similarity between the 1997 methamphetamine conviction and the instant charges would create a risk of unfair propensity use. Because the defendant's credibility would be crucial if he chose to testify, however, the court held that the government could impeach with the 1997 felony conviction, but further ordered that "to mitigate the risk of prejudice to defendant, the court will 'sanitize' the conviction and not allow the government to introduce evidence regarding the nature of the felony for which defendant was convicted." Because the 2006 felony conviction for false personation required proof that the defendant purposely and falsely impersonated another for financial gain, the court found this conviction automatically admissible to impeach the defendant's trial testimony under Rule 609(a)(2).

Comment: Query the necessity of admitting the older conviction after admitting a falsity-based, more recent conviction. It may be that "sanitizing" a conviction is just a way to avoid confronting the fact that its probative value is minimal, but at least the damage is limited.

- **United States v. Chaco, 801 F. Supp. 2d 1217 (D.N.M. 2011):** The defendant was charged with aggravated sexual abuse of his daughter and sought to prevent the use of four prior felony convictions to impeach his trial testimony: 1) a 2004 robbery conviction; 2) a 2004 breaking and entering conviction; 3) a 2004 false imprisonment conviction; and 4) a 2004 conviction for an attempt to disarm an officer. At a pretrial hearing in which the court suggested its inclination to exclude all of the defendant's prior felonies, the government offered to sanitize the convictions to prevent the jury from learning the names of the prior offenses and agreed to an instruction explaining that none of the past offenses were for sexual assault. In its ultimate ruling on the issue, the court traced the history of felony impeachment, expressed disapproval of the policy permitting such impeachment, but found that some impeachment with prior felonies was clearly consistent with congressional intent. In weighing the Rule 609(a) factors, the court noted that the case amounted to a true credibility contest between the victim and the defendant, thus making the importance of impeachment greater. Despite the defendant's concerns that the jury would perceive him as a "bad person" if he were impeached with his prior felony convictions, the court emphasized that none of the prior convictions were for similar offenses, thereby reducing the risk of unfair prejudice. Because credibility was so crucial, the court determined that it would allow impeachment with "four prior felony convictions," thus sanitizing the convictions consistent with the government's previous offer to do so. The court did not explain why sanitizing the dissimilar convictions was necessary.

- **United States v. O'Neil, 839 F. Supp. 2d 1030 (S.D. Iowa 2011):** The defendant was charged with conspiracy to distribute cocaine and sought to prevent the government from using two prior felony convictions under either Rule 404(b) or Rule 609: 1) a 1997 conviction for cocaine distribution; and 2) a 2000 conviction for the delivery of a controlled substance. The court rejected the government's attempt to admit the evidence through Rule 404(b), finding that it was insufficiently probative of knowledge or intent to justify the propensity prejudice sure to result from its admission. The court found that all felonies have some impeaching value pursuant to Rule 609, but stated that the nature of the 2000 drug offense did not add to that impeaching value because the prior drug crime did not suggest dishonesty. The court emphasized the likely propensity prejudice from even impeaching use of the prior similar drug conviction. The court

held that the government could impeach the defendant with the fact of a 2000 “felony conviction” without revealing the nature of that conviction. The court excluded the 1997 conviction as old and similar to the charged offense under Rule 609(b).

Comment: Here is a case where, if sanitization was not an option, the trial court might have found that the conviction wasn’t admissible at all. Sanitization may or may not on balance be beneficial to the defendant.

- **United States v. Bruguier, 2011 WL 4708853 (D.S.D. 2011), *rev’d in part on other grounds* 735 F.3d 754 (8th Cir. 2013):** The defendant was charged in connection with alleged sexual assaults on minors and incapacitated persons. After his conviction, he moved for acquittal and for a new trial based upon alleged trial errors, including the district court’s decision to allow his impeachment with a prior vandalism felony. In an interesting twist, the defendant claimed that the court’s decision to sanitize the felony caused him prejudice because the jury should have been told that his prior conviction *was not* for sexual assault. The court rejected this contention, finding that the defendant had been free to reveal the nature of his prior conviction to the jury himself during his testimony and that his strategic decision not to do so was not grounds for a new trial.

- **United States v. Harriman, 2010 WL 5477752 (N.D. Iowa 2010):** The defendant was prosecuted for being a felon in possession of a firearm and sought to preclude the government from admitting his 1997 convictions for kidnapping and burglary to impeach his trial testimony. The court found that fewer than ten years had passed since the defendant’s release from custody and that the prior felony convictions were probative of veracity. The court noted that special caution was required for the use of a criminal defendant’s prior convictions and expressed concern about propensity inferences the jury might draw from the nature of the defendant’s past crimes. Therefore, the court allowed the government to impeach the defendant *only with the fact and date of his prior convictions, without revealing their nature to the jury.*

Comment: The tone of the opinion indicates that if the trial court had not had the sanitization safety valve, it would have excluded the conviction entirely.

- **United States v. Brown, 606 F. Supp.2d 306 (E.D.N.Y. 2009):** Two defendants were charged with conspiracy and with distribution of crack cocaine. Defendant Brown was also charged with using a firearm in connection with a drug trafficking crime and Defendant Midyett was charged with being a felon in possession of a firearm. Defendant Brown moved to preclude the government from impeaching his trial testimony with two prior convictions: 1) a 1997 conviction for unlawful possession of a firearm and 2) a 1999 conviction for criminal contempt arising out of the defendant’s attack on a person protected by a court order with an ice pick. The court found that Brown’s 1997 conviction was more than ten years old and subject to the stringent balancing test in Rule 609(b). Finding low probative value for the gun offense and high prejudice due to the presence of a gun charge in the instant case, the court excluded Brown’s 1997 felony conviction under Rule 609(b). The court found Brown’s 1999 criminal contempt conviction subject to Rule 609(a)(1)(B) and performed a careful analysis of the applicable factors. First, the court found low probative value of the criminal contempt conviction for impeachment purposes. The court noted that violation of a court order was not necessarily dishonest and that impulsive violence did not suggest a lack of veracity. The court found that the age of the prior conviction

further lessened its probative value. The court found significant prejudice as well, noting that both the prior conviction and current charges involved weapons and that an attack with an ice pick is highly inflammatory. Still, the court found that it would be unfair to allow the defendant to take the stand and contradict government witnesses without impeachment, especially because the defense was planning to impeach government witnesses with their prior felony convictions. The court held that a sanitized version of the 1999 conviction that revealed only the fact of a felony conviction, the date, and sentence would be permitted. Although defendant Midyett did not move to preclude the government from impeaching his trial testimony with his 2001 conviction for possession of narcotics, the court went on to consider his impeachment *sua sponte*, finding that it too would be admissible against Midyett only in sanitized form due to its similarity to the charged offense and its low probative value.

Comment: This case is in tension with Second Circuit case law, which questions a court allowing impeachment with convictions where the jury doesn't know what the conviction is for. *United States v. Estrada*, 430 F.3d 606 (2nd Cir. 2005).

III. The Court Excludes All of Defendant's Felony Convictions Under Rule 609(a)(1)(B)

Some courts have refused to allow the prosecution to impeach a criminal defendant with any of his or her eligible prior felony convictions under Rule 609(a)(1)(B). This occurs most often in cases where available felony convictions are for offenses similar to the charged offense.

- **United States v. Church, 2017 WL 2180284 (E.D. Pa. 2017):** Two defendants were prosecuted for cocaine distribution offenses. Both had prior felony convictions the government sought to use for impeachment. One defendant had a 2004 conviction for cocaine distribution and the other had a 2011 felony conviction arising from the distribution of cocaine and marijuana. The district court performed a thorough analysis of the Rule 609(a)(1)(B) factors and found the probative value of both drug convictions minimal in demonstrating veracity or the lack thereof. The court emphasized that the most important factor was the similarity between the prior convictions and the instant charges. The court found the risk that jurors might use the prior felonies as evidence of the defendants' propensities to deal drugs significant. The court found that the importance of the defendants' testimony also weighed in favor of exclusion because allowing the impeachment would discourage them from testifying. The court acknowledged that the importance of the defendants' credibility would weigh in favor of admission should they take the stand, however. Thus, the final two factors *canceled each other out* (as is usually the case) and failed to alter the existing balance showing minimal probative value and high unfair prejudice. The court excluded both convictions, but noted that the issue could be revisited if either defendant testified in a manner that opened the door to contradiction with the convictions.

- **United States v. Anderson, 174 F. Supp. 3d 1041 (D.D.C. 2016):** The defendant was charged with being a felon in possession of a firearm and ammunition. The government sought permission to impeach the defendant with two prior felony convictions: (1) a 2010 possession of a firearm involving a machine gun and (2) a 2005 attempted possession of cocaine with intent to distribute. Both fell within Rule 609's ten-year time period and the court analyzed their admissibility pursuant to the Rule 609(a)(1)(B) factors. The court first noted that different convictions possess varying degrees of probative value for impeachment and found that both of the defendant's prior crimes were crimes of impulse rather than acts reflecting on credibility,

making their probative value limited. The court also emphasized the importance of the similarity of the prior convictions and the heightened propensity prejudice suffered by a defendant impeached with a similar past offense. The court found the prior firearm possession highly prejudicial for that reason. The court also noted that, although the prior drug conviction was within the ten-year period required by Rule 609, it was on the cusp and almost stale, thus reducing its probative value. The court finally found that the defendant's testimony and credibility were crucial because he would dispute the testimony of government witnesses regarding recovery of the weapon in the instant case. Therefore, the court found that the government had "failed to meet its burden" of demonstrating that probative value was greater than unfair prejudice and excluded both prior convictions.

- **United States v. Washington, 2015 WL 1403887 (N.D. Ill. 2015):** The defendant was charged with possession with intent to distribute, heroin, crack, and marijuana. He was also charged with being a felon in possession of a firearm and ammunition, as well as with using a firearm in connection with drug trafficking. Prior to trial, the government sought permission to impeach the defendant's trial testimony with his 2007 felony conviction for the attempted aggravated discharge of a firearm. The court weighed the requisite Rule 609(a)(1)(B) factors, finding that the prior firearms offense was not a dishonesty crime, but had some slight probative value for impeachment. Because the defendant was released from custody only three years prior to the instant offense, the court found the prior conviction recent and probative for that reason. The court emphasized that the similarity of the prior offense to the firearms counts in the current case weighed heavily against admission due to the risk of propensity use. Finally, the court noted the importance of the defendant's testimony to his defense and found that he would be deterred from testifying if the prior conviction were admitted due to the similarity of the offense and the likely ineffectiveness of a limiting instruction. The court, therefore, found that the probative value of the past firearm offense for impeachment did not outweigh its likely unfair prejudice and ordered the prior conviction excluded.

Note: This is a case in which the importance of the witness's testimony was evaluated only in light of the interest of allowing the defendant to testify, and not to the countervailing interest in assessing his credibility. So those factors did not end up crossing each other out.

- **United States v. Valueland Auto Sales, Inc., 2015 WL 300469 (S.D. Ohio 2015):** A company and two individual defendants were charged with federal crimes arising out of the fraudulent reporting of cash deposits on behalf of the company. One of the two individual defendants sought to prevent the prosecution from using a prior conviction for money laundering to impeach his trial testimony. The court weighed the Rule 609(a)(1)(B) factors, finding that the probative value of money laundering was high for purposes of impeachment because it tended to suggest deception. All other factors weighed against admission, however. Because the offense was committed 14 years earlier and the defendant had been released from custody 6 years earlier, the court found the probative value diminished. Due to the similarity between the past conviction for money laundering and the instant reporting charges, the court expressed concern that the prior conviction would be used by the jury to suggest a propensity for improperly handling funds. Finally, the court afforded great weight to the defendant's right to testify in his defense and concluded that any probative value was significantly outweighed by the risk of prejudice. Thus, the court excluded the only conviction the government sought to use to impeach. (Again no cross-out factor seems to be material to the court's determination to exclude the evidence).

- **United States v. Holland, 41 F. Supp. 3d 82 (D.D.C. 2014):** The defendant was charged with conspiracy to distribute and with distribution of cocaine and heroin. The government sought to use two prior felony convictions to impeach the defendant’s testimony, an assault conviction and a theft conviction, both of which arose out of a single mugging. In excluding both of the defendant’s convictions, the court carefully weighed the *Gordon* factors. The court found that crimes of violence are not probative of veracity and that the government produced no information suggesting that the assault involved any falsehood. Although the court acknowledged that theft involves disregard of the rights of others and may have more probative value with respect to a testifying defendant’s veracity, the court found the probative value of the defendant’s theft conviction “minimal” where it arose out of the same mugging as the assault and involved no falsehood. The court emphasized that propensity prejudice is particularly acute for criminal defendants and that the jury obtains little evidence to determine credibility from the name of a prior offense in any event. The court found that limiting instructions designed to confine the evidence to impeachment required “mental gymnastics” a jury cannot perform.

- **United States v. Willis, 2014 WL 2589475 (N.D. Ok. 2014):** The defendant was charged with Social Security fraud after representing that he lived alone, while allegedly living with his wife. Prior to trial, the defendant sought to preclude the prosecution from introducing his two prior felony convictions to impeach his important trial testimony that he did, in fact, live alone at the relevant time: 1) a 2002 conviction for cocaine distribution (with a 2010 release from prison) and 2) a 1987 conviction for forgery. The court excluded both convictions after carefully evaluating the Rule 609 factors. The court found that cocaine distribution was not particularly probative of veracity and that the offense was old. Although the court noted that drug distribution was not similar to Social Security fraud and created little propensity prejudice, the court found the defendant’s testimony important to his defense. The court also emphasized that the government would call numerous witnesses who would contradict the defendant’s testimony about his residence, reducing the need to impeach the defendant with his prior drug conviction. Thus, the court found that prejudice outweighed probative value and excluded the cocaine distribution conviction. The court explained that the forgery conviction would be automatically admissible but for its age and weighed probative value against unfair prejudice under Rule 609(b). Notwithstanding the impeaching value of a forgery conviction, the court found that its age and similarity to the current offense weighed heavily against admission and excluded it as well.

- **United States v. Douglas, 2012 WL 361694 (D. Minn. 2012):** The defendant was charged with possession of a firearm by a convicted felon and sought to preclude the use of multiple prior convictions for assault, aggravated robbery, and burglary as impeachment evidence. The court rather summarily found that none of his many priors were indicative of a lack of veracity and found significant propensity prejudice because many of the prior crimes involved the defendant’s use of force and the instant charges involved the possession of a firearm. Thus, without analyzing them one by one, the district court excluded all of the defendant’s prior convictions under Rule 609.

- **United States v. Sparks, 2012 WL 5878094 (S.D. Ind. 2012):** The defendant was prosecuted for being a felon in possession of a firearm. The prosecution sought permission to impeach the defendant with two prior felonies: 1) a 1995 conviction for being a felon in possession of a firearm and for unlawful possession of a sawed-off shotgun and 2) a 1986 perjury conviction. Due to the date of release, the court analyzed the 1995 conviction under Rule 609(a)(1)(B) and

found that the prior similar conviction posed a grave risk of prejudice to the defendant. Although the government argued that the defendant's credibility would be important and that it needed some impeachment information, the court stated that it could not imagine the jury using this prior conviction for anything but propensity. The court also noted that the jury would be aware that the testifying defendant was "a felon" due to the nature of the instant prosecution. Therefore, the court excluded the prior felon-in-possession conviction. The court analyzed the 1986 perjury conviction under Rule 609(b) due to its age, finding the probative value of the twenty-six year-old conviction insufficient to overcome the more stringent balancing test in that provision. Thus, both of the defendant's prior felonies were excluded under Rule 609.

- **United States v. Cunningham, 2012 WL 12865641 (W.D. Mich. 2012):** The defendant was charged with assault of a federal officer, arising out of a U.S. Marshall's attempt to arrest the defendant as a parole absconder. The government sought to use the defendant's 2004 felony conviction for prison escape to impeach his testimony at trial under Rule 609(a)(1)(B). The court first noted that any use of the prior conviction to prove anything about the defendant's efforts to elude the federal officer during the instant offense would not constitute proper impeachment, but would represent propensity evidence impermissible under Rule 404(b). The court further found that the prior escape was not very probative of veracity. It noted that the defendant had six previous dishonesty crimes that would be automatically admissible to impeach him under Rule 609(a)(2) and that the existence of these impeaching offenses further lowered the probative value of the escape felony. Although the escape offense was only seven years old, it remained less probative of veracity than the more recent dishonesty offenses. The similarity of the prior felony to the charged offense weighed strongly against admission and, although impeachment of the defendant would be important, the dishonesty offenses would provide the government with an adequate opportunity. Thus, defendant's motion *in limine* to exclude his 2004 escape conviction under Rule 609(a)(1)(B) was granted.

Comment: This is just a case in which the government was greedy. They were already going to impeach the defendant with six automatically admissible convictions. And yet they wanted to also impeach with a conviction that was similar to the crime charged. In these circumstances, the argument that the conviction is necessary for, and will be limited to, impeachment, seems disingenuous.

- **United States v. Vasquez, 840 F. Supp. 2d 564 (E.D.N.Y. 2011):** A defendant was charged with being a felon in possession of a firearm. The government sought to use three prior felony convictions for the attempted sale of controlled substances in 1999, 2003, and 2005 to impeach the defendant's trial testimony. The court carefully analyzed the Rule 609(a)(1)(B) factors, noting that some drug crimes may be indicative of dishonesty. Although the defendant's street sales of drugs were more probative of veracity than mere possession offenses, they were far less probative than drug trafficking crimes. Thus, the court found probative value "moderately low." The court found the 1999 and 2003 convictions less probative due to their age. The court found unfair prejudice high for all three prior convictions because the jury might decide that the defendant was guilty of the charged gun offense because he was a drug dealer due, to the common association between guns and drugs. Although the court acknowledged that the defendant would contradict the government's witnesses and that his credibility was important, the court noted that the jury would already know that the defendant was a "felon" due to the felon-in-possession charge

and the stipulation to that effect. Therefore, the court found that probative value for impeachment could not outweigh unfair prejudice and excluded all three felonies for impeachment.

- **United States v. Alexander, 2011 WL 6181434 (E.D. Mich. 2011):** The defendant was prosecuted on drugs and weapons charges. After learning that the defendant intended to testify to a “mere presence” defense, the government sought to use his 2007 conviction for marijuana delivery under both Rule 404(b) and to impeach under Rule 609(a). The court denied the government’s request to admit the conviction through Rule 404(b), finding that its unfair propensity use substantially outweighed any probative value. Due to the similarity of the past conviction to the charged offense, the court also excluded the prior drug conviction under Rule 609(a)(1), stating that the government could not impeach with it unless the defendant somehow opened the door by denying past connections with drugs during his direct testimony.

- **United States v. Hoffman, 2010 WL 1416869 (S.D. W. Va. 2010):** The defendant was charged with a criminal violation of the Restoration, Conservation & Recovery Act (RCRA) arising out of the unlawful storage of hazardous materials in connection with an electroplating business. The government sought permission to use the defendant’s 1999 conviction for violation of the Clean Water Act by unlawfully disposing hazardous materials in connection with a similar business enterprise. The government sought admission under both Rule 404(b) and as impeachment evidence under Rule 609(a)(1). The court rejected both efforts, finding that the defendant’s knowledge concerning the hazardous nature of the chemicals he stored was not in dispute and that unfair propensity prejudice substantially outweighed any proper non-character purpose under Rule 404(b). The court also summarily rejected the government’s efforts to admit the 1999 conviction for impeachment purposes, stating that it had no probative value and could only be admitted if the defendant’s direct testimony was contradicted by the prior conviction.

IV. The Court Admits Some, But Excludes Other Felony Convictions Under Rule 609(a)(1)(B)

Some courts compromise by admitting some, but not all, prior felony convictions eligible for impeachment under Rule 609(a)(1)(B). Some of these courts apply a careful analysis in choosing admissible felonies, while others call balls and strikes more summarily.

- **United States v. Jett, 2017 WL 466286 (S.D. Ind. 2017):** It appears that two defendants were charged in connection with a bank robbery and the government sought permission to use the prior felony convictions of one to impeach his trial testimony. The defendant had one prior bank robbery conviction and another for unlawful use of a firearm in connection with a crime of violence. The court analyzed both felonies under Rule 609(a)(1)(B), excluding the bank robbery conviction due to its low probative value for veracity and its high risk of propensity prejudice in the defendant’s trial on the same charge. The court stated that the bank robbery conviction should be excluded under the Rule 609(a)(1)(B) balancing test even though it was a “close call.” The court allowed evidence of the firearm conviction notwithstanding the use of a “pellet gun” in the charged offense, finding that credibility and impeachment were important and that the past conviction and the instant offense were sufficiently dissimilar such that unfair prejudice would not be great.

- **United States v. North, 2017 WL 5185270 (N.D. Ga. 2017):** The defendant was charged with carjacking, discharging a firearm, and unlawful possession of a firearm by a felon after allegedly shooting a man and stealing his car. The defendant had six prior felonies that the government sought to use to impeach the defendant’s trial testimony: 1) a 1985 aggravated assault, battery and criminal interference with property conviction; 2) a 1987 aggravated assault and felon-in-possession of a firearm conviction; 3) a 1995 felon-in-possession of a firearm conviction; 4) a 1998 armed robbery, aggravated assault, and felon-in-possession of a firearm conviction; 5) a 2004 possession of cocaine with intent to distribute conviction; and 6) a 2013 possession of cocaine and heroin with intent to distribute conviction. The court first found the defendant’s felon-in-possession convictions admissible to show his knowledge and intent under Rule 404(b). The court then found that all convictions prior to 2004 were not admissible for the purpose of impeachment because they were governed by Rule 609(b) and were old and similar to the charged offense (although several of them would be admissible under Rule 404(b)). The court analyzed the remaining 2004 and 2013 drug convictions under Rule 609(a)(1)(B). The court found that the defendant’s credibility would be critical where he would have to contradict his alleged victim to defend himself. The court found that drug convictions were not unduly prejudicial in nature. (The court did not discuss the effect of the other felon-in-possession convictions on the probative value of these drug convictions, nor did it address potential connections between guns, carjacking and the drug trade). The court found both drug convictions admissible along with a limiting instruction explaining their impeachment purpose.

- **United States v. Figueroa, 2016 WL 126369 (D.N.J. 2016):** The defendant was charged with being a felon in possession of a firearm and the government sought to use two prior felony convictions to impeach his trial testimony: 1) a 2010 conviction for possession of drugs in close proximity to a school and 2) a 2000 conviction for the receipt of stolen property. The court carefully weighed the Rule 609(a)(1) factors in assessing the admissibility of the drug possession conviction, noting that the relevance of prior convictions to veracity falls along a continuum. The court found the probative value of narcotics convictions in the middle of that continuum, explaining that convictions for mere possession are even less probative of veracity than crimes involving distribution. The court noted that the prior drug possession was not identical to the charged felon-in-possession offense, but found some propensity risk due to the association between guns and drugs. Still, the court found that the jury would need information to assess the defendant’s credibility if his testimony turned the trial into a swearing match between law enforcement officers and himself, and the court noted that the nature of the prior offense would give the jury important information in assessing its impact on the defendant’s credibility. Where the jury would already know the defendant was a “felon” as a result of the current charges, the court found that any prejudice in telling the jury that he was convicted of a drug offense was outweighed by probative value to impeach. Thus, the court found the prior conviction admissible to impeach, but cautioned that the government should make no mention of the “school zone” where the possession offense was committed. The court analyzed the 2000 receipt of stolen property conviction under Rule 609(b) and found the probative value of the older conviction inadequate to survive the more stringent balancing in that provision, particularly because the government would be permitted to use the 2010 drug conviction to impeach the defendant’s testimony.

Note: This is a careful balancing and it makes the important point that 609(a)(1) convictions run a long a spectrum of probative value in impeaching a witness’s character for truthfulness. That insight raises substantial questions about “sanitization compromise”

under which the jury is just told that the defendant has a felony conviction without being told what it is.

- **United States v. Wilson, 2016 WL 2996900 (D.N.J. 2016):** The defendant was prosecuted for being a felon in possession of a firearm. The defendant had five prior felony convictions potentially eligible for admission through Rule 609(a)(1)(B): 1) a 2004 conviction for heroin distribution; 2) a 2004 conviction for possession of cocaine with intent to distribute; 3) a 2004 conviction for receiving stolen property; 4) a 2009 conviction for the unlawful transportation of firearms; and 5) a 2009 conviction for the unlawful possession of a handgun. Of these five convictions, the government sought to impeach the defendant with only two: his 2004 conviction for heroin distribution and his 2004 conviction for receipt of stolen property, thus recognizing the impropriety of impeaching with past similar gun offenses. The court carefully analyzed the probative value of the heroin conviction under Rule 609(a)(1)(B), finding that drug offenses are not very probative of veracity. Conversely, the court found the unfair prejudice of the heroin conviction to be high, emphasizing that jurors may associate drugs and guns. The court found that it was important to allow the defendant to testify and present a defense, and so concluded that the probative value of the heroin conviction could not overcome prejudice and excluded it. The court next weighed the receipt of stolen property conviction, finding that knowing receipt of stolen property implies dishonesty that may have impeachment value. Because the receipt of stolen property offense was not similar to or associated with the charged gun offense, the court found less unfair propensity prejudice. Although the conviction was older, there was a continuing criminal history suggesting that it retained its probative value as to defendant's credibility. Although allowing the defendant to testify was important, that testimony would set up a credibility contest with testifying officers. Accordingly, the court allowed the defendant to be impeached with his 2004 receipt of stolen property conviction only.

- **United States v. Steele, 216 F. Supp. 3d 317 (S.D.N.Y. 2016):** In the defendant's prosecution for being a felon in possession of a firearm, the government sought to impeach the defendant with three prior felony convictions pursuant to Rule 609(a)(1)(B). The government sought to use two previous possession with intent to deliver illegal narcotics convictions and one prior first degree robbery with a firearm conviction. The court ruled that the robbery conviction could be used to impeach after noting that crimes of violence do not indicate dishonesty, but that crimes of theft usually do. The court found that the prejudice from impeachment with the robbery would be minimal where the facts were not similar to the instant offense and where the government would use only the date and statutory name of the offense to impeach. (The court did not discuss the "firearms" component of the prior robbery offense or why its similarity would not be prejudicial). The court ruled that narcotics convictions rarely indicate dishonesty and found that the government had provided no facts indicating that the drug convictions bore on defendant's veracity. Thus both prior drug convictions were excluded.

- **United States v. Waller, 2016 WL 1746057 (N.D. Ga. 2016):** The defendant was charged with being a felon in possession of a firearm and the prosecution sought to use five prior convictions to impeach him: 1) a 2008 felon-in-possession of a firearm conviction; 2) two 2008 burglary convictions; 3) a 2013 felon-in-possession of a firearm conviction; and 4) a 2013 conviction for possession of methamphetamine and marijuana with intent to distribute. The court first found that the defendant's credibility would be critical if he chose to testify because he would necessarily contradict the testimony of the arresting officers. This added probative value to his

prior convictions. The court noted that the similarity of the prior firearms convictions weighed against admitting them, but did not “preclude” admission. The court suggested that the similar prior convictions could reflect negatively on the defendant’s honesty due to his motivation to lie to avoid punishment again for a similar offense. Ultimately the court held that both of the 2013 convictions for drug possession with intent to distribute and for unlawful possession of a firearm would be admitted because they were recent and the defendant’s credibility was central to the defense. The court held that one of the two 2008 convictions for burglary could be used to impeach because of the connection between burglary and dishonesty. The court excluded the second 2008 burglary and the 2008 felon-in-possession convictions as cumulative and prejudicial. Therefore, the court allowed three of the defendant’s five prior convictions, including one for an offense identical to the charged offense to be used for impeachment.

Comment: It seems dangerous to reason that the similarity to the crime charged is a reason for *admitting* a prior conviction for impeachment – the idea being that the defendant would be especially motivated to lie in order to avoid conviction for the same crime (thus perhaps facing sentencing enhancements?). That thinking counteracts the prejudice and could result in routine admissibility of convictions that are identical to the crime charged. If that theory is employed, it should at least be limited to a finding of marginal probative value – not the probative value of being self-interested, but the marginal probative value of being more self-interested than the defendant is in all cases where they are charged with a crime.

- **United States v. Barr, 2015 WL 6870062 (D.N.J. 2015):** The defendant was charged with possession of a firearm and ammunition by a convicted felon. The government sought permission to impeach the defendant’s trial testimony with two prior felony convictions: 1) a 2011 conviction for the manufacture and distribution of heroin and cocaine and 2) a 2013 conviction for the possession and distribution of drugs in a school zone. The court carefully analyzed the Rule 609(a)(1)(B) factors, finding that drug dealing requires planning and secrecy that is quite relevant to credibility. Because prior drug dealing was not identical to the charged offenses, the court found that there would be no classic propensity problem in using these priors to impeach. That said, the court noted the common association between drugs and guns and cautioned that the government could make no reference to the narcotics trade in the neighborhood where the defendant was apprehended in connection with the instant gun charges. Because both prior convictions were recent, the court found both relevant to the defendant’s credibility at trial. The court also noted the importance of the defendant’s testimony and credibility where his defense would come down to a “swearing contest” between the defendant and the arresting officers. Although the defendant sought sanitized reference to his prior convictions, the court found that the prejudice from revealing the nature of the convictions would not be too great and would be important to the jury in assessing credibility. The defendant also sought to have one of his two prior convictions excluded if he testified. The court noted that allowing both recent prior convictions would give the jury a more complete picture of the defendant’s credibility, but determined that the incremental impeachment value of the second conviction would not outweigh the unfair prejudice of a “career criminal” or “bad apple” inference the jury might draw. Therefore, the court allowed the government to use only the defendant’s 2013 distribution of narcotics conviction to impeach him and cautioned against any mention of the school zone where that prior offense took place.

Comment: Note that the court rejected the sanitization compromise, on the ground that its reduction of probative value as to credibility (because the jury would not know what the crime was) outweighed the prejudicial effect of the jury knowing about the crime. This seems to be a good approach to whether to use sanitization, but the cases on this subject mostly don't articulate any balancing approach. The Committee might wish to consider providing guidance to courts on whether and other what circumstances sanitization is an appropriate course of action.

- **United States v. Bailey, 2015 WL 7013545 (N.D. Iowa 2015):** The defendant was charged with cocaine distribution and the government sought to use four prior felony convictions to impeach his trial testimony. The court excluded a ten year-old obstruction of justice conviction as too remote (even under Rule 609(a)(1)(B)), but found two aggravated misdemeanor convictions for “harassment and neglect,” which were punishable by more than one year in prison, admissible. The court stated that these convictions would be more probative than prejudicial with appropriate limiting instructions. Finally, the court found a seven year-old conviction for a cocaine conspiracy admissible to impeach. The court did not analyze the prejudice caused by the admissibility of this similar prior conviction, but found that its recency had “less of a distorting influence on its probative nature and prejudicial impact.” Thus, the court admitted three of four proffered prior convictions, including a similar cocaine offense.

- **United States v. Alexander, 2014 WL 64124 (N.D. Ill. 2014):** The defendant was charged with conspiracy to possess and with attempted possession of cocaine with intent to distribute. The government sought to impeach his trial testimony with six prior felony convictions, a 2011 aggravated assault conviction and five prior drug possession and distribution convictions dating from 2006 back to 2002. The court first considered the four most recent drug convictions under Rule 609(a)(1)(B). Although the court noted the similarity of these past offenses to the charged offense, the court found that the defendant's credibility would be critical at trial where he was expected to testify about interactions with a confidential informant and where he would likely contradict the testimony of other witnesses. For this reason, the court held that all four prior drug offenses could be used to impeach his trial testimony because their probative value outweighed prejudice. The court found the 2011 aggravated assault conviction more probative of veracity than the drug convictions due to its recency and less prejudicial to the defendant due to its dissimilarity to the charged offense. The court reserved ruling on its admissibility to impeach, however, until the government provided information about the punishment for the assault to show that it qualified as a Rule 609(a)(1)(B) felony. Finally, the court excluded the fifth and oldest drug possession conviction, explaining that it could fall under the more stringent Rule 609(b) balancing test and that its age, similarity, and cumulative nature precluded its use.

- **United States v. Ollie, 996 F. Supp. 2d 351 (W.D. Pa. 2014):** The defendant was charged with an offense arising out of an alleged burglary and the government sought permission to use three prior felony convictions to impeach his trial testimony: 1) a 1988 forgery/theft by deception conviction; 2) a 2012 falsification of a firearms record conviction; and 3) a 2012 burglary/theft conviction. The court excluded the 1988 forgery conviction, finding that its probative value to show a lack of veracity could not overcome prejudice given its age and the admissibility of other convictions to impeach the defendant. The court found the 2012 falsification of a firearms record automatically admissible to impeach under Rule 609(a)(2) as a crime requiring an element of dishonesty. The court also admitted the 2012 burglary conviction, finding that

burglary suggested a lack of veracity and noting the recency of the conviction and the importance of the defendant's credibility. Although the court acknowledged "prejudice" resulting from the similarity of the prior conviction to the charged offense (both apparently involved burglary of a residence on the same street), the court nonetheless found the recent prior burglary admissible to impeach the defendant's trial testimony pursuant to Rule 609(a)(1)(B).

Comment: Is it really necessary to admit an identical crime to impeach a witness who is already being impeached by a crime that contains an element of false statement? One would think this would be a classic situation in which probative value is marginal and prejudice outweighs it.

- **United States v. Rivas, 2013 WL 5700742 (N.D. Ill. 2013):** The defendant was charged with drug distribution offenses involving both cocaine and marijuana, as well as with firearms offenses. After being convicted at trial, he moved for a new trial based, in part, on the admission of his 2004 felony conviction for the distribution of cocaine for impeachment purposes. The district court denied the motion for new trial and found that her ruling with regard to impeachment under Rule 609(a)(1)(B) was appropriate. Specifically, the court noted that the government had sought to use three prior drug convictions to impeach the defendant's testimony. She excluded two due to their similarity to the charged offense and the cumulative prejudicial effect of multiple drug convictions. Still, she held that the defendant's credibility at trial was crucial and that it was important for the government to be able to impeach him with one of his prior convictions, notwithstanding its similarity to the charged offense.

- **United States v. Lane, 2013 WL 3759903 (D. Ariz. 2013):** The defendant was charged with offenses involving controlled substances analogues and sought to prevent the government from impeaching his trial testimony with two prior felony convictions: 1) a 2000 bank robbery conviction (with a 2007 release date) and 2) a 1989 fraud conviction (with a 1994 release date). The court analyzed each conviction using the relevant Rule 609 factors, first noting that the fraud conviction fell outside the requisite ten-year time period and could only be admitted if it satisfied the stringent balancing test in Rule 609(b). The court concluded that the twenty-plus year-old fraud conviction lacked sufficient probative value to overcome that high hurdle and excluded the dishonesty crime. The court noted that the bank robbery was indicative of veracity (why?) and was committed only four years prior to the offense in the instant case, increasing its impeaching value. The court also emphasized that the defendant's credibility and knowledge would be critical if he testified in his own defense, further enhancing probative value. Therefore, the court found that the probative value of the bank robbery conviction outweighed any unfair prejudice and held that the government could cross-examine the defendant as to the fact of his bank robbery conviction and the date of conviction.

- **United States v. Boyce, 2011 WL 5078186 (N.D. Ill. 2011):** The defendant was charged with being a felon in possession of a firearm and ammunition. Anticipating that the defendant would take the stand to contradict the version of events provided by his arresting officers, the prosecution sought permission to impeach the defendant's testimony with seven prior felony convictions: five convictions in 1990 for aggravated battery, robbery, and armed robbery, one in 1994 for unlawful use of a weapon, and one in 2002 for drug dealing. The court found that none of the prior convictions involved dishonesty, but also found that the prejudice from impeachment would be diminished where the jury would already know the defendant was a felon

due to the nature of the instant charges. The court found the defendant's credibility central to the case in light of his anticipated defense and found impeachment important. That said, the court excluded all but the 2002 drug dealing conviction, finding that the remaining convictions were outside the Rule 609(a)(1) time limitation. The court found that impeachment with the 2002 conviction was appropriate under 609(a)(1)(B) because the prosecution needed at least one prior conviction to question the defendant's credibility. Because the 2002 conviction was available for impeachment, the court found that defendant's multiple old felonies should be excluded.

- **United States v. Evans, 82 Fed. R. Evid. Serv. 878 (E.D. Ill. 2010):** Three defendants were charged with bank robbery and with the use of a firearm in furtherance of a robbery. One of the three also was charged with being a felon in possession of a firearm. Two of the three defendants sought to exclude evidence of their prior felony convictions to impeach their trial testimony. The defendant who was charged as a felon in possession of a firearm sought to exclude eight prior convictions for cocaine delivery, aggravated battery, unlawful possession of a firearm, aggravated assault, drug possession, and possession of a stolen vehicle dating back to 1990. Addressing the Rule 609(a) factors, the court found that five of the eight offenses committed in the 1990's should be excluded at trial. The age of these convictions, as well as the availability of more recent convictions reduced their probative value significantly. The three remaining convictions in the 2000's for possession of drugs, possession of a stolen vehicle, and aggravated assault all were admitted for impeachment purposes. The court found possession of a stolen vehicle highly probative of veracity and noted the recency of all three of these convictions. Because none of these past offenses were similar to the bank robbery charges in the instant case and because the defendant's credibility would be crucial, the court held that all three could be admitted if the defendant chose to testify. A second defendant sought to exclude two 2008 convictions for drug possession, arguing that they had little bearing on his veracity and could cause the jury to infer that he had a propensity to commit crime. Because the convictions were only two years old, were not similar to the charged bank robbery, and would give the jury much-needed information in assessing the defendant's credibility, the court found both admissible to impeach.

- **United States v. Hampton, 2009 WL 2431291 (C.D. Ill. 2009):** The defendant was charged with being a felon in possession of a firearm. The government sought to use three prior felony convictions to impeach his trial testimony: 1) a 2007 conviction for aggravated battery of an officer; 2) a 1999 conviction for aggravated battery of an officer; and 3) a 1999 conviction for home invasion. Arguing that he had to testify to explain away his confession to the current charges, the defendant sought to exclude all three or to sanitize them if admitted. *The government opposed any sanitization, claiming that the jury needed to know the nature of the prior convictions to assess their effect on the defendant's credibility.* Without analysis, the court agreed with the government that some evidence of the defendant's prior convictions was needed to impeach his testimony, found that two prior felonies were sufficient to impeach, and admitted the 2007 aggravated battery conviction and the 1999 home invasion to be used without any sanitizing.

- **United States v. Gulley, 2010 WL 3834612 (C.D. Ill. 2010):** The defendant was charged with distribution of crack cocaine and sought to exclude evidence of two prior felony convictions: 1) a 2003 conviction for delivery of a controlled substance and 2) a 2006 conviction for possession of a controlled substance. The court noted the Rule 609(a)(1)(B) factors, but was persuaded by the government's argument that the defendant's credibility would be critical at trial and that some impeaching evidence of his past crimes should come in. That said, the court found

that one of the two convictions would be adequate for impeachment if the defendant chose to testify and held that the most recent 2006 conviction for the possession of a controlled substance could be admitted, including the nature of the crime charged.

- **United States v. Blake, 2010 WL 3025584 (C.D. Ill. 2010):** The defendant was charged with distribution of crack cocaine and with being a felon in possession of a firearm. He sought to exclude evidence of two prior felony convictions for impeachment purposes: 1) a 2007 conviction for possession of a controlled substance and 2) a 2002 conviction for possession of a controlled substance. The court noted the Rule 609(a)(1)(B) factors, but was persuaded by the government's argument that the defendant's credibility would be critical at trial and that some impeaching evidence of his past crimes should come in. That said, the court found that one of the two convictions would be adequate for impeachment if the defendant chose to testify and held that the most recent 2007 conviction for the possession of a controlled substance could be admitted, including the nature of the crime charged.

- **United States v. Wooten, 2010 WL 3614922 (S.D. Ill. 2010):** The defendant was charged with possession with intent to distribute cocaine and sought to preclude the government's use of his felony convictions in 1996 and 1998 to impeach his trial testimony. Because the government did not seek to use the 1996 conviction, the court granted the defendant's motion with respect to that conviction. The defendant had been released from confinement in 2008 for his 1998 conviction for cocaine distribution, making it eligible for admission under Rule 609(a)(1)(B). In analyzing the relevant factors, the court found that all felonies have some impeaching value. The conviction remained sufficiently recent because of the defendant's release from confinement only two years prior to the instant offense. The court noted the similarity of the prior drug crime to the current drug charges and noted the special caution warranted by such similarity. That said, the court stated that similarity did not require exclusion and was only one of several factors to be considered. The court found the defendant's credibility to be extremely important because he would likely contradict other witnesses in his testimony. The court found that the probative value of the prior drug conviction outweighed any prejudice and ruled that it would be admissible to impeach the defendant.

- **United States v. Baker, 2009 WL 3672061 (C.D. Ill. 2009):** The defendant was charged with the possession of crack cocaine with the intent to distribute and the government sought permission to impeach his trial testimony with his 1999 and 2000 felony convictions for narcotics delivery. Without detailed analysis or mention of the similarity between the prior convictions and the charged offense, the court agreed with the government that the prior convictions had impeachment value. The court found that one prior felony was adequate to impeach and allowed the 2000 felony conviction for narcotics delivery to be used with the name of the crime charged.

V. Courts That Defer Ruling on Rule 609 Motions in Limine

Some courts decline to provide any pretrial ruling on the admissibility of a criminal defendant's prior felony convictions pursuant to Rule 609(a)(1)(B). These courts sometimes cite a lack of information regarding the prior convictions themselves or the need to see the defendant's trial testimony before deciding on appropriate impeachment. (Though of course it is extremely

risky for a defendant to take the stand when the trial judge reserves judgment on admissibility until *after* he testifies).

- **United States v. Navarete, 2016 WL 4275794 (W.D. Ark. 2016):** One of two defendants charged with methamphetamine distribution and money laundering moved to prevent use of his prior convictions to impeach his testimony at trial. Without describing the prior felony convictions, the court deferred ruling on their admissibility until defendant's direct testimony, stating that the court could not prejudge the issue until it observed the substance of the defendant's testimony. Thus, the defendant obtained no information regarding the likely admissibility of his prior convictions prior to deciding whether to take the stand.

- **United States v. Burks, 2015 WL 1146011 (W.D. Ky. 2015):** The court declined to rule on the defendant's motion to preclude the prosecution from using his prior felony convictions to impeach his trial testimony in a felon-in-possession case. The court stated that defendant's motion was premature because the court did not yet know the nature or content of the defendant's testimony.

- **United States v. Kimmel, 2015 WL 6872470 (D Nev. 2015):** A defendant charged with being a felon in possession of a firearm, possession of stolen firearms, and drug distribution sought to prevent impeachment with prior felony convictions. Stating that the court had inadequate specifics concerning the prior felonies to decide the issue, the court deferred the decision to trial.

- **United States v. Jackson, 2015 WL 13344069 (D.N.D. 2015):** The district court declined to rule on the admissibility of the defendant's prior convictions in a prosecution for second degree murder and assault with a deadly weapon on Indian land, deferring consideration of prior conviction impeachment to trial *if the defendant chose to testify*.

Note: Could deferring a decision until trial be thought of as a way to easily dispose of an impeachment issue, without having to actually decide it? It seems very unlikely that a defendant will testify and roll the dice on a favorable ruling by the court after the testimony.

- **United States v. Farley, 2015 WL 6871920 (N.D. Cal. 2015):** The defendant was charged with firearms dealing, unlawful possession of stolen firearms, and with possession of a firearm by a felon. The parties stipulated to the defendant's felon status for purposes of the government's case-in-chief and the court deferred any ruling on Rule 609(a)(1)(B) impeachment for trial should the defendant elect to take the stand.

- **United States v. Ramos, 2014 WL 8817652 (C.D. Cal. 2014):** Two defendants were charged with conspiracy to distribute and with distribution of methamphetamine. One of the two defendants sought to exclude evidence of four prior felony convictions to impeach his trial testimony: 1) a 2004 conviction for operation of a chop shop; 2) a 2005 conviction for grand theft; 3) a 2005 conviction for receipt of stolen property; and 4) a 2012 conviction for assault with a firearm involving gang activity. The defendant argued that none of the convictions suggested dishonesty and that the chop shop and gang convictions might cause undue prejudice by suggesting his propensity to distribute goods illegally and to be connected to organized crime. The court found that the 2012 assault with a firearm involving gang activity conviction should be excluded despite its recency and dissimilarity to the charged offense because it was not sufficiently

indicative of credibility. The court deferred ruling on the admissibility of the defendant's three remaining convictions for trial. The court did not explain how it could rule definitively on one conviction but not the others (but perhaps it was thought that the theft-related convictions were more probative and so presented a closer question).

- **United States v. Davis, 2014 WL 5803046 (W.D. Ky. 2014):** In another felon-in-possession prosecution, the defendant sought to preclude impeachment use of his prior felony convictions. This court noted Sixth Circuit precedent requiring cautious application of Rule 609 in felon-in-possession cases due to the fact that such cases will always involve a convicted felon. That said, the court stated that it had inadequate information about the nature and content of the defendant's testimony to balance the Rule 609(a)(1)(B) factors. Emphasizing that it is the prosecution's burden to demonstrate that probative value outweighs any unfair prejudice under Rule 609(a)(1)(B), the court granted the defendant's request to exclude his felonies until the prosecution made the requisite showing. *See also United States v. Parker, 17 F. Supp. 3d 676 (W.D. Ky. 2014) (same).*

TAB 8C

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Article
Jeffrey Bellin^{a1}

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CIRCUMVENTING CONGRESS: HOW THE FEDERAL COURTS OPENED THE DOOR TO IMPEACHING CRIMINAL DEFENDANTS WITH PRIOR CONVICTIONS

This Article spotlights the flawed analytical framework at the heart of the federal courts' approach to one of the most controversial trial practices in American criminal jurisprudence--the admission of prior convictions to impeach the credibility of defendants who testify. As the Article explains, the flawed approach is a byproduct of the courts' reliance on a five-factor analytical framework to implement the governing legal standard enacted by Congress in Federal Rule of Evidence 609. Tracing the evolution of the five-factor framework from its roots in pre-Rule 609 case law, the Article demonstrates that the courts' reinterpretation of the framework in recent years has, by judicial fiat, transformed Rule 609. Rather than the obstacle *290 to the admission of prior convictions that Congress intended, Rule 609 has become a conduit for their routine admission.

The Article concludes by proposing an alternative analytical framework designed to realign the federal case law on this critical subject with the governing congressional intent. In the absence of such a reform, the federal courts' erroneous analysis will continue to alter the course of countless criminal trials by unnecessarily deterring defendants from testifying and improperly penalizing those who do take the witness stand.

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*291 Introduction

One of the most significant rulings in a criminal case is the determination that a defendant who intends to take the witness stand may (or may not) be impeached with a prior conviction.¹ Indeed, when prior conviction² impeachment is permitted, defendants often decline to testify at all, fearing that once the jury is aware of their criminal record, it will conclude the defendant “is the kind of [person] who would commit the crime” or, even worse, “that he ought to be put away without too much concern with present guilt.”³

*292 Commentators have long criticized the practice of impeaching testifying defendants with prior convictions, citing the questionable relevance of past crimes to witness credibility and the virtual certainty that their admission will lead to unfair prejudice.⁴ This chorus of disapproval has had little practical effect, however. The admission of prior convictions is now a well established and virtually routine part of federal (and most state) criminal proceedings in which a defendant with a criminal record takes the witness stand.⁵

*293 As this Article explains, the federal courts are not merely out of step with commentators on this issue, but have also diverged from the intent of Congress. The now-prevailing practice is patently inconsistent with the controlling legal standard—Federal Rule of Evidence 609. On its face, Rule 609 is unflinchingly hostile to the use of prior convictions as impeachment of criminal defendants. The Rule allows the introduction of most convictions only if “the [trial] court determines that the probative value of admitting this evidence outweighs its prejudicial effect.”⁶ This prerequisite to admissibility, an unweighted balancing of prejudice versus probative value, should favor the defense in the overwhelming majority of cases.⁷ Instead, a reflexive approach to admitting defendants’ prior convictions has become the norm.⁸

This Article attempts to explain the pronounced divergence between the federal courts’ routine admission of defendants’ prior convictions and the congressional intent underlying Rule 609 that such evidence be strictly limited.⁹ The Article traces this phenomenon to a three-decade-long trend in the federal courts toward replacing the facially anti-impeachment text of the Rule with a decidedly pro-impeachment, five-factor analytical framework that places an almost insurmountable burden on

defendants attempting to exclude prior convictions.¹⁰ In *294 effect, this judge-created framework designed to interpret Rule 609 has instead supplanted it. As a consequence, the federal approach to prior conviction impeachment has become the opposite of what Congress intended.

Part I of the Article provides the context for the analysis to follow, demonstrating the broad significance of prior conviction impeachment rulings-- one of only a handful of potentially dispositive evidentiary rulings governing criminal trials. Part II sketches the legislative history of Rule 609, depicting Congress's intent that the Rule, as finally enacted, strictly curtail admission of defendants' prior convictions. Part III documents how the federal courts have strayed from congressional intent by relying on a fundamentally flawed, judicially crafted five-factor framework to apply the Rule. Part IV demonstrates that the framework, as currently applied, leads to the virtually automatic admissibility of prior convictions as impeachment. Finally, Part V proposes an alternative analytical approach to the application of Rule 609 that is designed to realign the federal case law with the controlling congressional intent.

I. The Significance of Prior Conviction Impeachment of Criminal Defendants

It has long been established in the vast majority of American jurisdictions that criminal defendants who take the witness stand, like all other witnesses, are subject to general credibility impeachment through the introduction of evidence of their prior convictions.¹¹ This *295 practice of impeaching the credibility of criminal defendants with prior convictions has been aptly characterized as "one of the most controversial in the law of evidence."¹² The controversy stems from the fact that, while the rationale behind the practice is far from compelling, all sides agree that it has a devastating effect on defendants who testify (or decline to do so to avoid impeachment).

Prosecutors routinely fight to preserve their ability to introduce a defendant's prior convictions as impeachment evidence.¹³ In response, criminal defense attorneys endeavor to moot the potential impeachment by convincing defendants with a criminal record to refrain from testifying.¹⁴ These tactical positions reflect the "overwhelming consensus"¹⁵ of legal commentators and practitioners that prior conviction impeachment has an "explosive impact on the jury," "significantly affect[ing] the outcome of criminal trials,"¹⁶ and often "spell[ing] doom for a criminal defendant."¹⁷ The available empirical data support this consensus, demonstrating that admission of a defendant's prior convictions "substantially increase[s] the likelihood that the jury will convict the defendant of the charged crime."¹⁸

*296 Scholarly commentary in the modern era has resolutely derided prior conviction impeachment as a mean-spirited penalty imposed on criminal defendants--nothing more than a thinly veiled effort by prosecutors (condoned by "law and order" courts and legislators) to introduce otherwise prohibited evidence of a defendant's criminal propensities through the back door of credibility impeachment.¹⁹ In light of this strident and often one-sided characterization of prior conviction impeachment,²⁰ it is necessary to situate the practice in its historical context to develop a meaningful appreciation of its place in American jurisprudence.

The roots of the practice of impeachment with prior convictions can be traced to English common law, which categorically barred witnesses previously convicted of a felony (or other "infamous crime") from testifying.²¹ Throughout the late nineteenth and early twentieth centuries, these and other disqualifications of witness classes gradually disappeared in American jurisdictions. This trend culminated in the Supreme Court's pronouncement in 1918, as "the conviction of [the] time," that "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury."²²

The statutory reforms that abolished the testimonial disqualification of felons and other classes of witnesses nevertheless retained some of the spirit of the common law tradition by permitting the credibility of *297 previously disqualified witnesses to be impeached with the once disqualifying factors. In the case of felons, this meant impeachment with their prior convictions.²³ Thus, the practice of impeaching testifying witnesses with prior convictions was not, at least originally, intended to penalize defendants. Instead, it was a byproduct of a progressive reform that removed rather than added to the obstacles facing convicts (including, of course, many criminal defendants) who sought to testify.²⁴

While this history is sufficient to explain the current practice of impeachment with felony convictions, it is not a particularly compelling justification for it. The “conviction of [the present] time”²⁵ leaves little room for admiring the relative liberality of modern practice as contrasted with seemingly archaic witness class disqualifications of English common law. Instead, modern proponents of prior conviction impeachment must rely on its intrinsic merits--that knowledge of a witness’s prior conviction(s) provides insight to the jury in evaluating credibility.²⁶

***298** Indeed, just as the complete disqualification of felons as witnesses seemed sensible to those who crafted the common law, the logic of impeaching witnesses with prior convictions remains plausible today. A jury may draw some useful information from the fact that a witness has a criminal record, particularly, although not exclusively, when a prior crime involved a measure of dishonesty.²⁷ As famously explained by Justice Holmes, evidence that a witness has been convicted of a serious crime suggests a “general readiness to do evil.”²⁸

It is from that general disposition . . . that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has [a] tendency to prove that . . . he has perjured himself, and it reaches that conclusion . . . through the general proposition that he is of bad character and unworthy of credit.²⁹

The same argument has been stated more colloquially, as follows:

[C]onvicted felons are not generally permitted to stand pristine before a jury with the same credibility as that of a Mother Superior. Fairness is not a one-way street and in the search for the truth it is a legitimate concern that one who testifies should not be allowed to appear as credible when his criminal record of major crimes suggests that he is not.³⁰

The justification for impeachment that is embodied in the preceding quotations becomes less forceful, however, when the witness is the accused in a criminal case. Unlike any other witness, “[a] testifying defendant’s credibility is impeached by his interest in the trial’s outcome even before he utters a word.”³¹ Not only is every defendant ***299** (felon or not) subject to this form of impeachment, but the impeachment is quite powerful. Jurors, who generally have little sympathy for a person charged with a crime, are well aware that even otherwise honest defendants have a strong incentive to shade their trial testimony in favor of acquittal.³²

The inherently cumulative nature of impeaching criminal defendants with prior convictions is demonstrated by the common law roots of the modern statutory framework. At common law, a criminal defendant with a prior felony conviction was disqualified from testifying not only as a felon, but also as an interested party--a separate and independent common law ground for disqualification.³³ It stands to reason, then, that because only one ground for disqualification was considered sufficient to bar a witness from testifying at common law, only one ground for impeachment (felon or interested party) should now be necessary to substantially discredit a defendant’s testimony.

The case for admitting prior convictions as impeachment of criminal defendants is further complicated by the fact that jurors will be tempted to consider a defendant’s past criminal acts not just for impeachment, but also as evidence of substantive guilt.³⁴ This is, after ***300** all, the reason that when a defendant does not testify, the prosecution is generally barred from introducing a “defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.”³⁵ As the Supreme Court has explained, this prohibition exists not because the evidence is irrelevant; “on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.”³⁶

To resolve the tension between the general prohibition of evidence of a defendant’s criminal past and the routine admission of such evidence as impeachment of the accused, the courts rely on a so-called “limiting” instruction. Trial courts instruct juries to disregard any inference regarding the defendant’s criminal propensities and to instead limit their consideration of the defendant’s prior record to the narrow issue of credibility.³⁷ The courts assume juries will do so.³⁸

Unfortunately, empirical studies and common sense suggest that a limiting instruction offers little protection against the prejudice inherent in prior conviction impeachment.³⁹ This sentiment is *301 reflected in the sheer number of defendants who simply refrain from testifying rather than rely on the instruction.⁴⁰ The limited effectiveness of a jury instruction in this context is due, in part, to the similarity of the relevant logical paths, or inferential chains, by which a defendant's prior conviction is translated into either permissible impeachment or prohibited propensity evidence. As explained by Justice Holmes, the permitted inferential chain is as follows: (i) a felon has exhibited a character flaw that demonstrates a "general readiness to do evil;"⁴¹ (ii) a failure to testify truthfully is a species of *302 "evil;"⁴² (iii) a person with a general readiness to do evil is more likely to testify falsely than an average witness.⁴³

Whatever the merits of the permitted inferential chain,⁴⁴ it is readily apparent that the links in that chain are almost identical to those in the prohibited inferential chain.⁴⁵ A person beset by a "general readiness to do evil" is not only more likely to commit the evil of perjury, but also more likely to have committed the evil of the charged offense-- particularly to the extent the past crime diverges from the crime of perjury and converges on the charged offense.⁴⁶ For example, a *303 defendant's conviction for vehicular manslaughter introduced in a drunk driving prosecution says little about the defendant's propensity to lie, but speaks volumes about his propensity to drive drunk.⁴⁷ An instruction to ignore the more obvious inference while relying on the more obscure one requires "mental gymnastics" with an astounding degree of difficulty.⁴⁸ The typical juror would have to be forgiven if she felt the legal system is essentially winking at her as the instruction is read.

Finally, the dilemma described above tells only part of the story because it assumes that the jury hears the defendant's testimony and resulting impeachment. In fact, defendants recognize the devastating impact of prior conviction impeachment, and have a trump card to play. By declining to testify at all, a defendant can, and commonly will, eliminate the relevance and admissibility of any proffered impeachment. The cost, however, is high. To play this card, defendants must give up their constitutional right to testify, forfeiting their opportunity to be heard, and depriving jurors of potentially useful information on the ultimate question of the defendant's guilt.⁴⁹

II. Congress Speaks on Impeachment: Federal Rule of Evidence 609

The policy considerations underlying prior conviction impeachment described in the preceding section received a full airing in Congress in the early 1970s when legislators "hotly" debated the legal standard that would govern the admissibility of the accused's prior convictions in the federal courts.⁵⁰ As discussed below, this debate resulted in a *304 legislative compromise that was significantly more favorable to criminal defendants than the legal standard previously recognized in federal law and, as will be discussed in Part IV, considerably more favorable than the judicially crafted approach to prior conviction impeachment that prevails in the federal courts today.

A. The Compromise Embodied in Rule 609

After the statutory abolition of the common law bar to the testimony of felons (and interested parties), courts generally permitted, without reservation, felony conviction impeachment of all witnesses, including criminal defendants.⁵¹ The first notable sign of dissent from this practice came in the 1965 case of *Luck v. United States*.⁵²

In *Luck*, the District of Columbia Circuit interpreted a statutory provision governing proceedings within the District to allow trial courts to exclude an accused's prior convictions due to their potential *305 "prejudicial effect."⁵³ *Luck's* deviation from the accepted practice of automatic admission of prior conviction impeachment was short lived, however. Soon after the decision, Congress amended the District of Columbia statute, nullifying *Luck's* holding.⁵⁴

The Advisory Committee on the Federal Rules of Evidence took notice of Congress's action and shortly thereafter drafted a proposed evidentiary rule to govern prior conviction impeachment in the federal courts.⁵⁵ The Supreme Court forwarded the rule to Congress in 1972 as proposed Federal Rule of Evidence 609.⁵⁶ Proposed Rule 609 directed trial courts to admit

convictions for all crimes “punishable by death or imprisonment in excess of one year” (i.e., felonies) as well as all crimes (felony or misdemeanor) involving “dishonesty or false statement regardless of the punishment” for “the purpose of attacking the credibility of a witness.”⁵⁷ In earlier drafts of the Rule, the Advisory Committee recognized the “troublesome aspect of impeachment by evidence of conviction” when “the witness is himself the accused in a criminal case.”⁵⁸ In the commentary accompanying its final proposal, however, the Committee explained that, “[w]hatever may be the merits” of limits on the impeachment of criminal *306 defendants, the Rule was drafted in accordance with the perceived congressional policy preference (demonstrated by the legislative rejection of Luck) of broadly encouraging prior conviction impeachment.⁵⁹

As the Advisory Committee reporter later noted, “[a]pparently Congress had a change of heart on the matter.”⁶⁰ Upon receipt of the Advisory Committee’s draft Rule 609, Congress prohibited the Rule from taking effect and enacted an alternative Rule 609.⁶¹ As enacted, Rule 609 not only accepted the limitations placed on prior conviction impeachment in Luck (a decision the legislators had only recently rejected), but limited such impeachment to an even greater degree than even the Luck court contemplated.

Congress was not of one mind on the question, however. The Rule as finally enacted, and currently in force, embodies a compromise between “two diametrically opposed positions”⁶²: the position of the Senate (circa 1974) that all felony convictions should be admissible to impeach testifying defendants; and that of the House of Representatives that impeachment should be limited to the narrow subset of so-called *crimen falsi* convictions, crimes involving “proof or admission of an act of dishonesty or false statement.”⁶³

The Conference Committee that drafted the final text of the Rule bridged the broad gap between the two chambers by retaining the general principle that all felonies could potentially be admissible as impeachment. It mandated, however, that any felony outside the *307 “narrow spectrum” of *crimen falsi* convictions⁶⁴ would be admissible only if “the [trial] court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant.”⁶⁵

B. Reading Between the Lines: The Anti-Impeachment Tenor of Rule 609

While on its face appearing to occupy something of a middle ground between the anti-impeachment House and pro-impeachment Senate positions, the balancing test incorporated into the final version of Rule 609 distinctly favors criminal defendants (and thus the House position). As a preliminary matter, the Rule represents a sweeping departure from prior federal law, unequivocally rejecting the automatic admissibility of felony convictions that had previously been *308 the federal norm.⁶⁶ Instead, Congress, like the Luck court before it, granted trial courts broad authority to exclude the vast majority of prior convictions offered as impeachment.⁶⁷ Congress’s action constituted a sharp deviation from “the prevailing doctrine in the federal courts” that was intended to mitigate the “unfair prejudice” caused by prior conviction impeachment and the “deterrent effect” of the practice “upon an accused who might wish to testify.”⁶⁸

Of even greater significance, Congress, while choosing to embrace the general approach suggested by Luck, was not satisfied with Luck’s fairly permissive standard for admitting prior convictions. Instead, the legislators moved beyond Luck in fashioning a significantly more restrictive standard for the bulk of potentially admissible convictions.⁶⁹

Luck held that a trial court could exclude a prior conviction where “the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility”⁷⁰--a formulation that mirrors the catch-all evidentiary provision of Federal Rule of Evidence 403.⁷¹ Congress, while later incorporating a Rule 403 *309 balancing test into Rule 609 with respect to the admission of the felony convictions of all other witnesses,⁷² implicitly rejected that test as too permissive to govern the convictions of the accused. Thus, while Rule 403 calls for the exclusion of otherwise relevant evidence if the danger of unfair prejudice “substantially outweigh[s]” probative value,⁷³ “the special balancing test for the criminal defendant who chooses to testify”⁷⁴ in Rule 609 mandates the exclusion of a felony conviction if its prejudicial effect merely “outweighs” probative value.⁷⁵

Congress also incorporated a second significant deviation from a Rule 403-type formulation into the Rule 609 balancing test.

Under Rule 403 (as well as under the rule announced in *Luck*), the burden of persuasion of establishing that relevant evidence should be excluded falls on the opponent of the evidence.⁷⁶ Under Rule 609(a)(1), however, Congress placed the burden of demonstrating the admissibility of a defendant's convictions on the prosecution.⁷⁷ As *310 other commentators have noted, this shifting of the burden of persuasion "indicates an intent on the part of [Congress] that 'close cases' should be decided in favor of the defendant."⁷⁸

These two critical departures from the Rule 403/*Luck* formula in shaping the balance to be utilized by the trial court become particularly significant when considered in concert with the terminology chosen by Congress with regard to what was to be weighed: "probative value" and "prejudicial effect."⁷⁹ As discussed in Part I, for the vast run of criminal convictions, the probative value of a conviction as impeachment is minimal.⁸⁰ This is because, as the Supreme Court has explained in a related context, the probative value of proffered evidence (as distinct from its relevance) requires a comparison of "evidentiary alternatives" and must be "discount[ed]" when there exists an alternative means of proof with "substantially the same or greater probative value but a lower danger of unfair prejudice."⁸¹ Thus, while prior convictions may generally be relevant to impeach trial witnesses, this evidence will usually have minimal probative value when the witness is the accused.⁸² Even if precluded from introducing prior convictions, prosecutors always have a significantly more compelling and less prejudicial alternative means of *311 discrediting the defendant's testimony--the defendant's abiding interest in the outcome of the case.

Congress's selection of the phrase "prejudicial effect to the accused" for the other side of the balance is also telling, particularly in concert with its omission of any qualifier such as "unfair" (as in Rule 403)⁸³ from the "prejudicial effect" the Rule seeks to avoid.⁸⁴ As discussed in Part I, the introduction of a criminal defendant's prior felony offenses will virtually always have a significant "prejudicial effect to the accused." This proposition is nothing less than a tenet of American evidentiary jurisprudence, which emphasizes, in other contexts, that an accused's prior record will invariably "weigh too much with the jur[ors]" and "overpersuade" them on the question of guilt.⁸⁵ As one court has explained, "[w]hen the defendant is impeached by a prior conviction, the question of prejudice, as Congress well knew, is not if, but how much."⁸⁶

In sum, the legislators' "concerns about the deterrent effect upon an accused who might wish to testify and the danger of unfair prejudice,"⁸⁷ resulted in a Rule that seeks to strictly limit prior *312 conviction impeachment of criminal defendants. By virtue of the legal terminology chosen by Congress ("probative value" and "prejudicial effect"), the placement of these concepts on equal footing in the relevant balance, and the assignment of the burden of persuasion to the prosecution, Rule 609 sets up a contest that is really no contest at all, strongly favoring the defense in most cases.⁸⁸ Consequently, much of the modern scholarly criticism of the perceived unfair prejudice of prior conviction impeachment of testifying defendants should be unnecessary. The critics have already won the policy battle. Rule 609 responds to the charge that prior conviction impeachment of testifying defendants is generally minimally probative and greatly prejudicial by unequivocally requiring the exclusion of the impeachment in any case where this criticism proves true.

III. Implementing Rule 609's Balancing Test: The Five-Factor Framework

While strongly favorable to criminal defendants, Rule 609's general directive that the criminal record of the accused should be excluded unless its probative value outweighs its prejudicial effect is not self-executing. Instead, the Rule relies on trial judges to strike the appropriate balance in particular cases by weighing the "probative value" and "prejudicial effect" of each proffered conviction.

In an apparent attempt to foster uniformity in the district courts, the federal appellate courts crafted a multi-factor analytical framework to govern Rule 609 balancing.⁸⁹ This section explores the origins of that framework and highlights its inherent flaws, which would eventually sabotage the courts' implementation of Rule 609.

A. United States v. Mahone Establishes the Five-Factor Framework

The effort to fill the discretionary void created by Rule 609's balancing test was spearheaded by the Seventh Circuit. Shortly

after *313 Rule 609's enactment, that court, in *United States v. Mahone*, proposed a five-factor analytical framework to govern district courts' evaluation of probative value and prejudicial effect.⁹⁰

Apparently failing to recognize the future reach of its opinion, the totality of Mahone's discussion of the relevant considerations for Rule 609 balancing is as follows:

Some of the factors which the judge should take into account in making [the Rule 609] determination were articulated by then Judge Burger in *Gordon v. United States*[:]

- (1) The impeachment value of the prior crime.
- (2) The point in time of the conviction and the witness' subsequent history.
- (3) The similarity between the past crime and the charged crime.
- (4) The importance of the defendant's testimony.
- (5) The centrality of the credibility issue.⁹¹

Although explicitly enumerating criteria to be applied under Rule 609, Mahone looked to pre-Rule 609 case law and particularly the District of Columbia Circuit case of *Gordon v. United States*⁹² for the relevant considerations.⁹³ Analysis of the Mahone factors, which would soon permeate the federal case law, thus requires a further step backward to the pre-Rule 609 case law from which the factors are derived.

B. The District of Columbia Circuit's Pre-Rule 609 Case Law

Gordon v. United States, an opinion authored by then-Circuit Judge (later Chief Justice) Burger, represents the apogee of the landmark pre-Rule 609 jurisprudence of the District of Columbia Circuit. Its analysis, however, built upon the District of Columbia Circuit's earlier discussion of prior conviction impeachment contained in *Luck v. United States*.⁹⁴

In *Luck*, in addition to the groundbreaking suggestion that trial courts possess some discretion to exclude prior convictions,⁹⁵ the *314 District of Columbia Circuit set out a concise list of potentially pertinent considerations for exercising that discretion: the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction.⁹⁶

The *Luck* court emphasized this last consideration, stating that "[t]he goal of a criminal trial is the disposition of the charge in accordance with the truth" and "[t]he possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective."⁹⁷

Gordon v. United States expanded Luck's discussion by providing further "guidelines" in the form of an exposition intended to help courts weigh the propriety of prior conviction impeachment.⁹⁸ The five considerations discussed in Gordon (considerations that would later become the five Mahone factors) echo those mentioned in Luck. The first three considerations address the probative value of the prior conviction as impeachment and its potential prejudicial effect, specifically: (i) the nature of the prior conviction, that is, whether the conviction "rest[s] on dishonest conduct"; (ii) its "nearness or remoteness" in time; and (iii) whether "the prior conviction is for the same or substantially the same conduct for which the accused is on trial."⁹⁹

Gordon next discussed two other considerations that are less clearly tied to the probative-prejudice dichotomy. With respect to what would become the fourth Mahone factor, "the importance of the defendant's testimony," Gordon states, citing Luck, that: "One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions."¹⁰⁰ The court explained, "[e]ven though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have *315 the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment."¹⁰¹

The Gordon opinion next posited a final consideration that would later be distilled into the fifth Mahone factor, "the centrality of the credibility issue."¹⁰² The court stated that where the trial "had narrowed to the credibility of two persons, the accused and his accuser," the defendant's record becomes particularly significant.¹⁰³ In such circumstances, the Gordon court explained there was a "compelling" need to "explor[e] all avenues which would shed light on which of the two witnesses was to be believed."¹⁰⁴

C. The Implications of Mahone's Reliance on Gordon

The first three factors Mahone draws from the Gordon opinion warrant little analysis as those factors simply reflect the probative-prejudice dichotomy set forth in Rule 609. The more striking facet of the Mahone framework is its unquestioned acceptance of the fourth and fifth considerations enumerated in Gordon, factors that are not explicitly anticipated by the text of Rule 609.¹⁰⁵

Under Rule 609, evidence of a felony conviction is admissible as impeachment if "the probative value of admitting this evidence outweighs its prejudicial effect to the accused."¹⁰⁶ This formulation speaks, at least explicitly, solely to the initial aspect of the calculus *316 considered in Gordon (i.e., the first three Mahone factors)--probative value versus prejudice. There is little in the text of the Rule to suggest that in addition to this balancing, a court should consider whether: (i) permitting impeachment might deleteriously deprive the factfinder of the defendant's testimony (Mahone's fourth factor);¹⁰⁷ or (ii) otherwise improper impeachment should be admitted because of the central role of "credibility" in the case (Mahone's fifth factor). Indeed, one commentator has argued that these last two factors do not address case-specific considerations at all, but rather "embody general concepts" that are "merely restatements of the conflicting interest that Congress balanced in adopting the rule."¹⁰⁸

Were it not for the intervention of Mahone, then, the District of Columbia Circuit's pre-Rule 609 exploration of the proper analytical framework for evaluating whether to permit prior conviction impeachment of a testifying defendant (and particularly Gordon's fourth and fifth considerations) would likely have become a mere historical curiosity. Gordon's exposition on prior conviction impeachment would properly have been subsumed by the enactment of Rule 609 and Congress's implicit decision to impose stricter limits on the admission of prior convictions than the Luck-Gordon line of cases suggested. Instead, Mahone immortalized Gordon in two subtle ways. First, it established (albeit without analysis or explanation) that this pre-Rule 609 case law regarding the admissibility of prior *317 convictions survived the enactment of Rule 609. Second, it distilled the case law, and particularly Gordon's lengthy discussion of the pertinent considerations, into a citation-friendly, albeit facially ambiguous, framework (again without analysis).

Despite its flaws, the Mahone decision was broadly influential. The opinion represents ground zero in a subsequent outbreak of the deceptively simple five-factor framework throughout the federal courts and in numerous state courts.¹⁰⁹ Perhaps largely due to the absence of any competing formulation, the Mahone framework (in various iterations) continues to function today as the primary means of evaluating the admissibility of prior conviction impeachment in virtually every federal jurisdiction and

numerous state jurisdictions as well.¹¹⁰

***318 D. An Inherent Flaw in the Mahone Framework**

Soon after Mahone was decided, a handful of commentators identified an apparent flaw in the five-factor framework that, while initially amounting to little more than an intellectual curiosity, ultimately would have a significant negative impact on the federal courts' application of Rule 609. Commentators noted that Mahone's fourth and fifth factors, "the importance of the defendant's testimony" and "the centrality of the credibility issue," not only lacked explicit legislative authorization,¹¹¹ but also could not be applied in a "principled" manner. In essence, the factors cancel each other out.¹¹² To the extent a defendant's testimony is "important" (for example, if the defendant is the key defense witness), his credibility becomes "central" in equal degree, leading to a curious equipoise. If the defendant's testimony is less important (for example, where other witnesses could provide similar testimony), his credibility becomes less significant, again creating a standstill with respect to the fourth and fifth factors. Thus, the fourth and fifth Mahone factors seemed to have no practical significance at all, existing in a rough state of equipoise that prevented either factor from impacting the *319 overall impeachment calculus.¹¹³ Although this conundrum has been recognized by two state courts in jurisdictions that adopted the Mahone framework,¹¹⁴ it has yet to be acknowledged in the federal courts.¹¹⁵

IV. Modern Application of the Five-Factor Framework

At the same time that the federal courts were assimilating the Mahone framework as the primary rubric for evaluating the admissibility of prior conviction impeachment, the Supreme Court sent shockwaves through the procedural landscape to which the framework applied. As discussed below, it was the procedural ruling of *Luce v. United States*¹¹⁶ that, by exacerbating the flaws in the Mahone framework, ultimately severed the already attenuated connection between the framework and the congressional intent (embodied in Rule 609) that the framework purported to apply.

***320 A. *Luce v. United States* Transforms Appellate Review of Impeachment Rulings**

The Supreme Court's 1984 decision in *Luce v. United States* concerned a mere question of appellate procedure that, ostensibly, had nothing to do with the substantive application of Rule 609. In a brief, almost cursory, opinion, the Court held that henceforth, "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify."¹¹⁷ The Court based this ruling (an exercise of its supervisory authority over the federal judiciary) on practicality, contending that: (i) if the defendant did not testify, it is impossible to properly evaluate the district court's in limine (i.e., pretrial)¹¹⁸ impeachment ruling because to do so, a "court must know the precise nature of the defendant's testimony"; (ii) an in limine ruling is, by definition, an interim, not a final, ruling that can be changed at any time (e.g., after the defendant testifies on direct examination) or be rendered moot (e.g., by the defendant's decision not take the witness stand or by the prosecution's decision to forgo the contested impeachment); and (iii) there is no way for a reviewing court to determine if the trial court's ruling, if erroneous, constituted "harmless error" when a defendant does not testify because "a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify."¹¹⁹

Although barely touched on by the Supreme Court in its opinion, the holding of *Luce* had two implications for the impeachment of testifying defendants, one widely recognized, and the other seemingly unnoticed. The obvious implication was that *Luce* insulated from review a broad set of impeachment rulings--those where the defendant declined to testify after an adverse in limine ruling. Thus, the very cases that constituted the paradigm concern of pre-Rule 609 District of Columbia Circuit case law and the resulting fourth Mahone factor, where the district court's ruling deprived "the jury [of] the benefit of the defendant's version of the case,"¹²⁰ became unreviewable after *Luce*.¹²¹

***321** The second, unheralded implication of the *Luce* decision was that it subtly but irrevocably altered the context of appellate Rule 609 challenges. Prior to *Luce*, appellate courts regularly considered the propriety of impeachment evidence in the context

of challenges to pretrial in limine rulings.¹²² After *Luce*, appellate courts could no longer entertain such challenges. Appellate evaluation of in limine impeachment rulings became improper (even when not procedurally barred) because, as the Supreme Court emphasized in *Luce*, the in limine ruling: (i) is not the final word on impeachment,¹²³ and (ii) takes place before the trial court is presented with crucial information in the form of the defendant's direct examination testimony.¹²⁴ Thus, *322 even when a defendant testifies and subsequent appellate review of an impeachment ruling is permitted, it is not the pretrial in limine ruling (if any)¹²⁵ that is at issue. Rather, the question on appeal is the propriety of the trial court's ruling during the defendant's cross-examination. It is only then, after sitting through the defendant's direct examination testimony and learning "the precise nature of th [at] testimony," that the court makes its final dispositive ruling either permitting or precluding a prosecutor's effort to impeach the defendant with prior convictions.¹²⁶

B. The Fourth and Fifth Mahone Factors Escape From Equipose

Although not recognized in the *Luce* opinion (or any subsequent federal court opinions), the Supreme Court's shift of the salient decision point for prior conviction impeachment rulings was not merely procedural. Rather, it had far reaching implications for the substantive application of the Mahone framework.

By transferring the appellate courts' focus from pretrial in limine decisions to midtrial cross-examination rulings, *Luce* had the most *323 direct impact on the fourth Mahone factor--"the importance of the defendant's testimony." This factor, as originally intended, is rendered meaningless in the wake of *Luce*. At the time of the trial court's cross-examination ruling, the defendant has already testified on direct examination and the question underlying the fourth factor as posited in *Gordon*--"what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions"¹²⁷--is moot.¹²⁸ Even if the trial court considers the defendant's testimony to be of critical importance to the jury, it no longer follows that impeachment should be rejected on that ground. The jury will hear the defendant's testimony (in fact, has already heard that testimony) regardless of whether the trial court admits the impeachment for use in cross-examination.

Luce's impact on the Mahone framework is not limited to its neutralization of the previously anti-impeachment fourth factor. As discussed in Part III.D, *supra*, before *Luce* the fourth Mahone factor served the dual purpose of a generic anti-impeachment consideration and a check on the fifth Mahone factor--"the centrality of the credibility issue." By neutralizing the fourth factor, the *Luce* decision freed the fifth factor from this countervailing force.

In fact, as subsequent federal case law would demonstrate, *Luce*'s procedural holding not only released the fifth Mahone factor from equipose but also pushed it to center stage. After *Luce*, the now-controlling impeachment ruling comes at a time (the defendant's cross-examination) when the "credibility issue" always appears *324 paramount. By taking the witness stand, the defendant has "place[d] himself at the very heart of the trial process,"¹²⁹ transforming the trial into a "credibility contest" with the jury required to choose between the defendant's version of the facts and that of the prosecution witnesses.¹³⁰ The prosecution can forcefully argue in such circumstances that the fifth Mahone factor virtually dictates admission of the defendant's prior convictions so that the jury is allowed, in the words of the *Gordon* court, to "explor[e] all avenues which would shed light on which of the . . . witnesses was to be believed."¹³¹

In sum, *Luce*'s subtle alteration of the context for appellate review of impeachment rulings had a remarkably unsubtle effect on the Mahone framework. *Luce* replaced the preexisting standoff between the fourth and fifth factors with an inherent, pro-impeachment imbalance.

C. Post-Luce Application of the Fourth and Fifth Mahone Factors

The procedural ruling in *Luce* provided a perfect opportunity for the federal courts to revisit the aging Mahone framework. At the very least, the courts could have explained how a framework designed to evaluate pretrial rulings could continue to function in light of *Luce*'s procedural change. The federal courts, however, declined to avail themselves of this opportunity. To date, they have failed to articulate any resolution of the tension between *Luce* and the Mahone framework.

In fact, in a case decided shortly after Luce, the Seventh Circuit was directly confronted with, but failed to address, the inherent contradiction between Luce and Mahone's fourth factor.¹³² In that case, *United States v. Doyle*, the defendant declined to testify after an in limine ruling that he could be impeached with prior burglary, attempted murder, and federal weapons offenses.¹³³ On appeal, the defendant contended that "because of [the trial court's] ruling he did not testify at trial, fearing the prejudicial results his . . . felony convictions would have on the jury," and that the trial court erred "by failing to take into account the importance of the defendant's testimony [(Mahone's fourth factor)] when permitting the use of the prior convictions."¹³⁴ The Seventh Circuit summarily rejected the defendant's argument, without *325 reference to the Mahone framework, on the ground that it "flies in the face of [Luce] and therefore must fail."¹³⁵

Doyle's refusal to take on the inconsistency between Luce and Mahone foreshadowed the federal courts' ultimate approach to this issue. Rather than altering or abandoning the Mahone framework in response to Luce, the courts, without fanfare or explanation, simply sidestepped the shockwaves of the Supreme Court's ruling. To accomplish this, the courts retained the venerable Mahone framework but reinterpreted the fourth and fifth Mahone factors to fit within a post-Luce procedural reality.

The most striking aspect of the federal courts' post-Luce reinterpretation of the Mahone framework is their transformation of the fourth Mahone factor, "the importance of the defendant's testimony." Relying on the latent ambiguity of the factor's phrasing, and hamstrung by the post-Luce procedural context in which prior conviction impeachment challenges now arise, the federal courts simply reversed the fourth factor's meaning.

Prior to Luce, the importance of a defendant's testimony favored exclusion of impeachment. As explained in Gordon, prior convictions could be excluded whenever "it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment."¹³⁶ After Luce, however, the federal courts began to apply this fourth Mahone factor not to preclude impeachment, but to support its admission. In a bizarre and as yet unexplained reversal, the courts began to emphasize the necessity for prior conviction impeachment precisely because the defendant's direct examination testimony was "important," "crucial," "central," "critical" or, most poignantly, "of utmost importance."¹³⁷ Thus, in *United States v. Montgomery*, the Seventh Circuit defended the district court's admission of the defendant's six prior convictions by asserting that the court "correctly recognized that even if some of the *326 Mahone factors were neutral or favored exclusion, the central role of [the defendant's] testimony and the importance of his credibility strongly favored the admission of his prior convictions."¹³⁸ Similarly, the Seventh Circuit, in *United States v. Nururdin*, affirmed the admission of a defendant's prior convictions "in light of the critical nature of [the defendant's] testimony and credibility";¹³⁹ declared, in *United States v. Smith*, that impeachment was proper because "the defendant's testimony was a crucial part of the case";¹⁴⁰ and emphasized, in *United States v. Toney*, the propriety of impeachment on the ground that "[t]he defendant's testimony was of utmost importance."¹⁴¹ The same sentiment controlled in *United States v. Sides*, where the Tenth Circuit asserted that the admission of the defendant's prior convictions was supported by the fact that "both the defendant's testimony and credibility were important";¹⁴² and also in *United States v. Perkins*, where the Ninth Circuit affirmed the admission of prior conviction impeachment because the "defendant's credibility and testimony were central to the case, as [he] took the stand and testified that he did not commit the robbery."¹⁴³

This transformation of the fourth Mahone factor from an anti- to a pro-impeachment consideration is perhaps most strikingly demonstrated in *United States v. Alexander*.¹⁴⁴ In *Alexander*, the defendant ineptly attempted to convince the Ninth Circuit that his convictions should have been excluded because "his [own] trial testimony was not particularly important."¹⁴⁵ Failing to acknowledge the irony of this contention coming from a defendant who proclaimed his innocence at trial, the Ninth Circuit summarily rejected it, stating that when "a defendant takes the stand and denies having committed the charged offense, he places his credibility directly at issue," thus triggering "the related fourth and fifth [Mahone] factors" in favor of admitting the impeachment.¹⁴⁶

*327 As illustrated by these cases and numerous others,¹⁴⁷ the federal courts continue post-Luce to rely on Mahone's fourth factor--whether the defendant's testimony is "important" to the jury. Now, however, they rely on the fourth factor to support admission of prior convictions rather than exclusion.¹⁴⁸ Of course, interpreting the fourth factor in *328 this manner is indefensible in light of its opposite meaning in the case law from which it is derived.¹⁴⁹

In addition, while fitting neatly into the post-Luce procedural paradigm, the retooled fourth factor is essentially meaningless as an analytical consideration. Under the post-Luce federal case law, the courts are engaging in a tautological two-step: (i) whenever a defendant testifies and (as is to be expected) either contradicts government witnesses or denies guilt, his testimony is deemed “important”; and (ii) the importance of this testimony ipso facto justifies prior conviction impeachment. The rhetorical force of this reasoning appears to have blinded the courts to the fact that it represents a generally applicable policy argument rather than a means of evaluating the probative value and prejudicial effect under Rule 609 of a particular conviction in a particular case. The courts’ strained logic dictates that the fourth Mahone factor will always apply when a defendant testifies (or seeks to testify) and always favors impeachment. In effect, the courts have taken what was once a factor to be applied in weighing the admissibility of proffered impeachment and used it to transform the Rule 609 balance itself.

Not all the federal courts have been able to swallow the rhetorical reversal of the fourth factor exemplified by the Alexander decision. Some have adopted a more subtle approach to post-Luce interpretation of the Mahone framework that avoids the awkwardness of a complete reversal of the fourth Mahone factor, but results in essentially the same judicial tinkering with the Rule 609 balance. The courts following this alternative generally list the five Mahone factors in setting forth the familiar framework for review of impeachment rulings, but then decline to apply the fourth factor, implicitly assuming that it is inapplicable on the facts of the case (as it is, if properly construed, in every post-Luce appeal). These courts then highlight the fifth factor (“the centrality of the credibility issue”) as the primary consideration in the analysis, without acknowledging that this factor, as now interpreted, will always support the admission of prior convictions.¹⁵⁰

***329** For example, in *United States v. Brito*,¹⁵¹ after briefly discussing the first three Mahone factors, the First Circuit bypassed the fourth factor to seize on the fifth as justification for admitting the defendant’s three prior convictions. The court explained that “[p]erhaps most important, this case hinged on a credibility choice; the jury had to decide whether to believe the appellant or the police officers” and consequently “[t]he salience of the credibility issue weigh[ed] in favor of admitting the prior convictions.”¹⁵² This analysis produces the same effect as in *Alexander*--essentially combining the fourth and fifth factors into one predominant factor present in every case that will always favor the admission of impeachment.

***330 D. Implications of the Modern Application of the Five-Factor Framework**

As the preceding discussion makes clear, it is not the congressional policy directive that the Mahone framework purports to implement, but rather the Mahone framework itself that best explains why courts applying Rule 609 routinely permit prior conviction impeachment of criminal defendants. Regardless of the facts of the case or the nature of the prior conviction(s), support for the admission of impeachment can always be found by reference to the “related” fourth and fifth Mahone factors.¹⁵³ In effect, these last two judicial factors establish a legal presumption of the admissibility of a testifying defendant’s prior convictions, despite the fact that the text of Rule 609 supports, if anything, the opposite presumption.¹⁵⁴

This pro-impeachment presumption (i.e., the presence of two always applicable, one-sided considerations in every impeachment calculus) is ***331** particularly powerful because the balance of the Mahone factors will rarely be decisive. The courts have long accepted that all felony convictions are somewhat probative of dishonesty (factor one),¹⁵⁵ and need only have occurred within roughly the past decade to “satisfy” the remoteness criteria (factor two).¹⁵⁶ Thus, these first two factors are essentially place holders in the impeachment analysis--mere checkboxes that the courts tick off on their way to an almost inevitable conclusion. The sole significant obstacle to admissibility, then, is the third Mahone factor, in the circumstance where the prior offense and pending charge are the same or substantially similar. This obstacle, even when present, however, is easily overcome. The case law is replete with statements to the effect that such similarity is “not dispositive.”¹⁵⁷ Consequently, factors four and five, which are essentially merged into a conglomerate super-factor representing “the importance of the defendant’s credibility,” hold great ***332** sway as ready-made and rhetorically compelling considerations favoring the admission of impeachment in every case.¹⁵⁸

While the prospects for criminal defendants seeking to exclude prior convictions under the current case law are bleak in the trial court,¹⁵⁹ ***333** they become even less promising on appeal. Appellate courts review impeachment rulings under the

deferential “abuse of discretion” standard¹⁶⁰ and, as noted above, the Mahone framework itself guarantees that any ruling permitting impeachment will be supported by at least two of the five Mahone factors. Thus, even when review is available,¹⁶¹ appellate courts rarely side with the defendant.¹⁶² At both *334 the trial and appellate level, the Mahone framework is now better understood as a means of justifying the admission of impeachment, rather than as a mechanism for determining whether that impeachment is proper in the first place.

One of the more surprising aspects of the federal courts’ failure to faithfully implement the congressional policy directive embodied in Rule 609 is the absence of dissent. The sweeping judicial transformation of prior conviction impeachment law, most appreciable in the post-Luce era, has engendered little controversy in either appellate opinions or scholarly literature. Instead, the federal courts and most commentators have simply accepted the post-Luce approaches to the Mahone framework without comment. This creates an anomalous circumstance where the courts continue to apply a body of case law that not only cannot be defended, but for which no one (scholar or judge) has even bothered to articulate a rationale.

From a separation of powers perspective, the courts’ modern prior conviction impeachment case law represents the fruit of a perfect (institutional) crime. Despite congressional action in the 1970s to require federal courts to severely restrict prior conviction impeachment of the accused, the courts have steered persistently back toward their traditional pro-impeachment jurisprudence. Now, with a fortuitous assist from the Supreme Court’s procedural ruling in Luce, the federal courts have arrived, full circle, back at the law in effect prior to the enactment of Rule 609.¹⁶³ But for the occasional citation to Rule 609 itself, one would suspect that the Rule had been rescinded.¹⁶⁴

This de facto invasion of the legislative sphere is not merely a matter of intellectual concern, but has grave real world implications. The unavoidable result of federal case law that now essentially dictates admission of prior convictions is twofold. First, defendants in criminal courts across the country are deterred from testifying based *335 on erroneous rulings (or anticipated rulings) as to the admissibility of their prior convictions. Second, many of those who do testify suffer devastating prejudice from the introduction of past crimes that Rule 609 should exclude.

These consequences of the federal courts’ over-admission of prior convictions do not inhere solely to criminal defendants, but serve, in particular cases, to undermine the reliability and legitimacy of the criminal justice system itself.¹⁶⁵ As the District of Columbia Circuit recognized decades ago, the cause of justice suffers when defendants with important stories to tell are deterred by the prospect of impeachment from presenting their testimony to the jury.¹⁶⁶ Further, the recent wave of post-conviction, DNA-based exonerations has laid to rest any claim that American jury trials are immune to serious error.¹⁶⁷ This reality counsels that courts should decrease, not increase, their reliance on a form of evidence that American jurisprudence has long recognized as exacerbating the potential for wrongful convictions.¹⁶⁸ Of course, these concerns for the proper functioning of the criminal justice system motivated Congress to enact Rule 609 in the first instance. Thus, it is no surprise to see the same concerns resurface when the courts, in essence, put the Rule out to pasture.

V. An Alternative Analytical Framework for Applying Rule 609

The silver lining in the rather glum assessment of the federal case law described in Parts III and IV is that unlike many criminal procedure dilemmas, the solution, or at least an interim solution, is readily apparent: the federal courts can simply discard Mahone’s *336 antiquated five-factor framework. Replacement of the five-factor inquiry with a direct focus on the legislative history and text of Rule 609 is easily preferable to the status quo.

The creation of an alternative analytical framework to govern the application of Rule 609 is a more complicated issue. While it is tempting to conclude that the federal courts’ erroneous interpretation of Rule 609 can be remedied by simply lopping off the fourth and fifth Mahone factors, that solution would likely result in only incremental change.¹⁶⁹ The federal courts’ failure to faithfully interpret Rule 609 may stem not only from flaws in the fourth and fifth Mahone factors, but also from a methodological flaw inherent in the courts’ reliance on a malleable, multi-factored analytical framework. Stated another way, it may be that simply by shifting the focus from the straightforward balancing test set forth in Rule 609(a)(1) to an amorphous litany of non-specific factors, the analytic exercise devolved, almost inevitably, into something of a Rorschach test. The federal

courts, steeped in a long pre-Rule 609 tradition of automatically admitting the felony convictions of testifying witnesses, were generally able to locate support for admission of impeachment somewhere in the multi-factored analysis, even when Congress would have intended the opposite result. Thus, while there are undoubtedly serious substantive flaws in the fourth and fifth Mahone factors, the excision of these factors would leave more subtle underlying flaws untouched. A three-factor Mahone framework, like its five-factored antecedent, would permit the courts to revert to a pattern of routinely admitting prior convictions regardless of the ultimate balance of probative value and prejudicial effect.

A more promising avenue for reintroducing the courts to the text of Rule 609 is to set aside Mahone's multi-factor analysis entirely. Starting on a clean slate unencumbered by the Mahone factors, a trial court, evaluating the admissibility of a defendant's prior convictions as impeachment, could focus on the task at hand: identifying the aspects of each conviction and the facts of the particular case that could potentially justify the counterintuitive conclusion that a prior conviction's "probative value" as impeachment outweighs its "prejudicial effect to the accused."¹⁷⁰

First, focusing on a conviction's probative value, the trial court must recognize that the defendant's credibility as a witness is always minimal, even without impeachment evidence. Consequently, the first question *337 under Rule 609 is not whether a prior conviction has some relevance as impeachment, but rather: what will the introduction of the defendant's prior conviction add to the jury's evaluation of the defendant's testimony? For a conviction to be considered more than marginally probative under this analysis, its evidentiary significance must be based on something more than a speculative "readiness to do evil." That consideration is easily subsumed by the more compelling fact of the defendant's abiding interest in acquittal. Rather, the analysis must rest on the specific facts of the case or of the conviction itself. For example, a conviction would be more than marginally probative when the defendant, on direct examination, attempts to create an impression of having led a law abiding life (i.e., trying to appear as "a Mother Superior");¹⁷¹ makes some claim that is directly inconsistent with the existence of a prior conviction (e.g., "I have never seen drugs before in my life," or "I am not a crook"); or where the defense utilizes prior convictions to impeach government witnesses, creating a false contrast between the defendant and his accusers.¹⁷²

With respect to the prejudice inquiry, the trial court should ask a similar case-specific question, recognizing that the admission of the defendant's prior offenses as impeachment will virtually always result in some "prejudicial effect to the accused."¹⁷³ Specifically, the court must inquire: why is the prejudicial effect of the prior conviction diminished (or enhanced) in this case? A diminished risk of prejudice might be present when a relatively minor conviction (e.g., theft) is offered to impeach a defendant charged with a dissimilar and significantly more serious crime (e.g., murder); where the evidence introduced at trial has already identified the defendant as a prior offender (e.g., a crime committed in prison); or where the defendant's prior conviction will be admitted for other purposes (e.g., to establish an element of the offense). In contrast, in circumstances where prejudicial effect is unusually high, such as where a prior conviction is for an identical or particularly infamous crime (e.g., child molestation), the trial court must begin with a presumption of inadmissibility under Rule 609 due to the sheer *338 implausibility that the probative value of such evidence could ever outweigh its prejudicial effect.¹⁷⁴

In the vast run of cases, where the above analysis does not reveal any case-specific factors that enhance a proffered felony conviction's probative value and diminish its prejudicial effect, Rule 609 dictates exclusion. A straight comparison of: (i) the prejudicial effect of the jury's learning of a defendant's criminal past; against (ii) the probative value of informing the jury that the defendant has slightly less credibility than his status as an interested party already suggests, strongly favors exclusion, particularly in light of the fact that the burden of persuasion lies with the prosecution.¹⁷⁵

*339 While it is miles from the current state of the federal case law, the analytical approach emphasized here is by no means revolutionary. Soon after the enactment of Rule 609, an analogous approach was suggested by the en banc Ninth Circuit, which stated, in long-since discarded dicta, that "[n]ormally the court should err on the side of excluding a challenged prior conviction, with a warning to the defendant that any misrepresentation of his background on the stand will lead to admission of the conviction for impeachment purposes."¹⁷⁶

While the case-specific analysis suggested above (much like the Ninth Circuit's now quaint sounding dicta) may seem to tilt the balance against the admission of impeachment of the vast bulk of criminal defendants' convictions, this is merely a reflection of the text of Rule 609. The Rule requires exclusion of most convictions (i.e., those not rendered automatically

admissible as *crimen falsi*) when their prejudicial effect is equivalent to or infinitesimally greater than probative value, and places the burden on the prosecution to establish *340 the counterintuitive proposition that this balance favors admission in particular cases. The analysis proposed above recognizes this reality; the federal courts' current analytical framework does not.

Conclusion

While reasonable people can disagree (and have for decades) about the policy merits of the practice of impeaching criminal defendants with prior convictions, there can be no dispute, given the tremendous significance of such impeachment, that federal courts must scrupulously adhere to the policy ultimately chosen by Congress. Unfortunately, this has not been the case. Instead, the modern federal case law lends a prophetic air to the District of Columbia Circuit's warning, in a case decided shortly after Rule 609's enactment, that judicial balancing under the Rule "must not become a ritual leading inexorably to admitting the prior conviction into evidence."¹⁷⁷ That is precisely what has occurred. A flawed, judicially created analytical framework has supplanted the text of Rule 609 as the governing legal standard for prior conviction impeachment and, in so doing, has decisively skewed the impeachment calculus in favor of admitting prior convictions.

Despite this indictment of the modern federal case law, there are no villains in this story. The courts do not appear to have consciously undermined Congress based on a competing policy preference. Instead, judges simply succumbed to the incurious application of a long-established body of case law that, over time, came to rest on a decayed foundation. Indeed, it is likely that the exceedingly gradual decay of the Mahone framework's underpinnings contributed to its remarkable ability to avoid both judicial and scholarly scrutiny.¹⁷⁸

Motives aside, once the requisite analytical scrutiny is applied, it becomes clear that the five-factor Mahone framework can no longer be justified in light of the vast chasm separating that framework from the *341 legislative intent it purports to implement.¹⁷⁹ By circumventing Rule 609, application of the Mahone framework constitutes a raw exercise of judicial power that has improperly altered, and continues to alter, the course of countless criminal trials.¹⁸⁰ To stanch the bleeding, the federal courts must recognize the flaws in their current approach to Rule 609 and devise a new way forward. The first, and by far the easiest, step on this path is to abandon the antiquated Mahone framework. The courts must then develop a new analytical framework derived, not from the pre-Rule 609 case law, but, as suggested in Part V, *supra*, from the text of the Rule itself.

Footnotes

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¹ See Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. Rev. 637, 639 (1991) (recognizing that "prosecutors offer ... [prior conviction impeachment] evidence very frequently, and both sides recognize its potency and often litigate its admissibility with great vigor"); Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 Cardozo L. Rev. 2295, 2297, 2310 n.74 (1994) (ascribing "the extraordinary amount of congressional interest" in federal rule governing impeachment of testifying defendants to fact that impeachment decision "significantly affects the outcome of criminal trials"); Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 Vill. L. Rev. 1, 1-2(1997) (noting that "[i]f the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically"); L. Timothy Perrin, *Pricking Boils, Preserving Error: On The Horns of a Dilemma After Ohler v. United States*, 34 UC Davis L. Rev. 615, 651-52 (2001) (noting that "[t]he available empirical data demonstrate that the admission of a prior conviction has an explosive impact on the jury, substantially increasing the likelihood that the jury will convict the defendant of the charged crime," and consequently "the admission at trial of a criminal defendant's prior convictions often spells doom for a criminal defendant").

² The phrase "prior conviction" has been criticized as redundant in this context because any potentially admissible conviction will

necessarily have occurred prior to a witness's testimony. See James Duane, *Prior Convictions and Tuna Fish*, 7 *Scribes J. Legal Writing* 160, 161(2000). While there is some merit to this criticism, this Article sacrifices potential style points for clarity in utilizing the arguably redundant phrasing, which is, after all, "lodged in our legal lexicon." *Id.* at 162. The standard formulation, while at times rhetorical overkill, eliminates ambiguity that might arise when a qualifier (e.g., "prior," "felony," or "criminal") is omitted. For example, a Quaker on trial for heresy or a sociopath attempting to avoid the death penalty would wisely endeavor to suppress evidence of their "convictions" (i.e., fixed or strong beliefs, see *American Heritage Dictionary* 292 (New College ed. 1976)), despite not having any criminal record.

³ *Loper v. Beto*, 405 U.S. 473, 482 n.11 (1972) (quoting 1 McCormick on Evidence § 43, at 93 (1954)); see also Donald Dripps, Akhil Amar on Criminal Procedure and Constitutional Law: Here I Go Down That Wrong Road Again, 74 N.C. L. Rev. 1559, 1632 (1996) ("The principal reason why defendants refuse to take the stand is that they fear impeachment with prior convictions--a fear with strong support from the empirical evidence."); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 *Wm. & Mary L. Rev.* 15, 58 (1981) (arguing that "innocent defendants in many American jurisdictions are deterred from testifying by the unjust practice of allowing prior convictions to be routinely admitted to impeach a defendant's credibility"); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 *Notre Dame L. Rev.* 403, 482 (1992) (noting that "[t]he threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand" and citing empirical evidence that "a defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not"); cf. *Ohler v. United States*, 529 U.S. 753, 759 (2000) (recognizing that potential use of prior convictions as impeachment "may deter a defendant from taking the stand").

⁴ See James Beaver & Steven Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 *Temp. L.Q.* 585, 604 (1985); Teree E. Foster, *Rule 609(A) in the Civil Context: A Recommendation for Reform*, 57 *Fordham L. Rev.* 1, 1-2(1988) (stating that "[n]o rule of evidence has provoked commentary so passionate or profuse as that which permits impeachment of a testifying witness in a criminal case by introducing that witness' previous convictions"); Gold, *supra* note 1, at 2295-96 ("No provision of the Federal Rules of Evidence has sparked more controversy than Rule 609, which deals with the admissibility of convictions to impeach a witness."); Hornstein, *supra* note 1, at 10; Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 *W. Va. L. Rev.* 391, 394 (1980) (recognizing practice of impeaching criminal defendant with prior conviction as "one of the most seriously debated issues of evidence law"); Perrin, *supra* note 1, at 652; discussion *infra* Part I. The Supreme Court has identified Dean Ladd's 1940 article criticizing the impeachment of criminal defendants (and other witnesses) with prior convictions as a "seminal article" in this area. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 512 n.11(1989) (citing Mason Ladd, *Credibility Tests--Current Trends*, 89 *U. Pa. L. Rev.* 166, 176, 191 (1940)).

⁵ See Beaver & Marques, *supra* note 4, at 591 (stating that despite passage of Federal Rules, "[p]rior crime impeachment of criminal defendant-witnesses continues essentially unabated" and noting famed study by Harry Kalven, Jr. and Hans Zeisel that "nationwide, juries learn of defendants' criminal records in seventy-two percent of the cases in which defendants testify in their own behalf"); John Blume, *The Dilemma of the Criminal Defendant with a Prior Record--Lessons from the Wrongfully Convicted*, 5 *J. Empirical Legal Stud.* 477, 484-86 n.28 (forthcoming 2008), available at <http://ssrn.com/abstract=1014181> (explaining that state and federal rules limiting prior conviction impeachment are "honored in the breach" and that any required balancing of probative value versus prejudice "is routinely struck in favor of impeachment"); Mirjan R. Damaska, *Propensity Evidence in Continental Legal Systems*, 70 *Chi.-Kent L. Rev.* 55, 59 (1994) (contrasting continental European jurisdictions with "common law jurisdictions ... where prior convictions are routinely used to impeach the accused who decides to testify in his own defense"); Greenawalt, *supra* note 3, at 58 (decrying "the unjust practice" in American jurisdictions "of allowing prior convictions to be routinely admitted to impeach a defendant's credibility"); Hornstein, *supra* note 1, at 4-5 (recognizing that "the lower courts more or less routinely admit[] [prior convictions] for impeachment" of testifying criminal defendants); Nichol, *supra* note 4, at 394, 399 (stating that despite "academic fervor" criticizing practice of prior conviction impeachment of criminal defendants has been "largely unabated under the provisions of the Federal Rules of Evidence"); *infra* Part IV (canvassing federal case law applying Rule 609).

⁶ Fed. R. Evid. 609(a)(1).

⁷ See *infra* Part II.B.

8 See *infra* Part IV.C; *infra* note 162.

9 See Fed. R. Evid. 609 (indicating congressional intent that prior convictions should only be used in limited circumstances); *infra* Part II.

10 As discussed in greater detail below, the federal appellate courts instruct district courts as follows:
[I]n determining whether the probative value of admitting a prior conviction outweighs its prejudicial effect, the court should consider: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue.'

United States v. Gant, 396 F.3d 906, 909 (7th Cir. 2005); see also *infra* Part III (discussing this five-factor framework); cases cited *infra* note 110 (cataloging use of this framework in federal circuits).

11 See *United States v. Martinez*, 555 F.2d 1273, 1275(5th Cir. 1977) (recognizing "criticism" of practice of impeaching criminal defendants with prior convictions, but noting that it "is firmly entrenched in our jurisprudence"); *United States v. Garber*, 471 F.2d 212, 215-16 (5th Cir. 1972) (emphasizing that although prior conviction impeachment has been "persistently criticized" it is "firmly entrenched in criminal justice procedures" and "generally accepted as fair and proper"); 1 McCormick on Evidence § 42, at 198 (Kenneth S. Broun et al. eds., 6th ed. 2006) (noting argument that impeachment of accused must be permitted because "it is misleading to permit the accused to appear as a witness of blameless life" has "prevailed widely"); Nichol, *supra* note 4, at 391 (recognizing practice as "time-honored tenet of our evidentiary jurisprudence").

The Supreme Court of Hawaii holds a contrary view and has ruled that "to convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused's constitutional right to testify in his own defense." *State v. Santiago*, 492 P.2d 657, 661 (Haw. 1971). A handful of states have adopted Hawaii's approach in generally barring impeachment of testifying defendants with prior convictions. See Robert D. Dodson, What Went Wrong with Federal Rule Of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence, 48 Drake L. Rev. 1, 51 (1999) (citing Hawaii, Pennsylvania, Kansas, Georgia, and Montana as sole jurisdictions that depart from general rule permitting such impeachment).

12 See Foster, *supra* note 4, at 1-2.

13 See 1 McCormick on Evidence, *supra* note 11, § 42, at 198 (noting that "[m]ost prosecutors argue" that impeachment should be permitted because "it is misleading to permit the accused to appear as a witness of blameless life"); Friedman, *supra* note 1, at 639 (recognizing that "prosecutors offer ... [prior conviction impeachment] evidence very frequently, and both sides recognize its potency and often litigate its admissibility with great vigor"); Mason Ladd, Credibility Tests--Current Trends, 89 U. Pa. L. Rev. 166, 190 (1940) (asserting that potential to introduce defendant's criminal record as impeachment "is something never missed by the prosecuting attorney").

14 See Beaver & Marques, *supra* note 4, at 606 (reporting survey of defense attorneys finding that 98% "believed that it was impossible for the limiting instruction" requiring juries to consider prior convictions solely as impeachment "to be effective"); Van Kessel, *supra* note 3, at 482 (noting that defendants with criminal record are almost three times more likely to refuse to testify).

15 Beaver & Marques, *supra* note 4, at 604.

16 See Gold, *supra* note 1, at 2297 n.74.

17 Perrin, *supra* note 1, at 651; see also Hornstein, *supra* note 1, at 1-2 ("If the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically."); Ladd, *supra* note 13, at 186 (arguing that admission of prior conviction "may be the turning point of the case to the untrained mind").

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- ¹⁸ Perrin, *supra* note 1, at 651-52; see also Beaver & Marques, *supra* note 4, at 604-06 (summarizing juror studies and concluding that “[e]mpirical data ... indicate that the admission of evidence of prior crimes is so highly prejudicial that it often may be decisive in determining the jury’s verdict”).
- ¹⁹ See, e.g., Beaver & Marques, *supra* note 4, at 607, 619 (arguing that permitting impeachment “effectively allows the government to influence the jury on the issue of guilt with evidence that is inadmissible as a matter of law” and advocating abolition of practice); Nichol, *supra* note 4, at 403, 409 (noting perception that “prosecutors often use past conviction evidence hoping that jurors will be unable to follow the instructions of the court” and contending that “[p]rior crime impeachment ... serves no legitimate interest in the conduct of federal criminal trials”); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. Pa. L. Rev. 845, 868 (1982) (suggesting that “the impeachment rubric is a hoax, merely a cover for the admission of evidence bearing on propensity-- which is what the rule’s defenders are probably seeking”).
- ²⁰ Even some commentators who generally believe that criminal defendants are “surrounded with excessive safeguards” and “treat[ed] ... too leniently” find the practice of impeachment with prior convictions “insupportable.” Beaver & Marques, *supra* note 4, at 587.
- ²¹ See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511(1989) (“At common law a person who had been convicted of a felony was not competent to testify as a witness.”); Ladd, *supra* note 13, at 174 (explaining that common law precluded testimony from persons convicted of “infamous crimes under the laws of England, generally enumerated as treason, felony and the *crimen falsi*”).
- ²² *Rosen v. United States*, 245 U.S. 467, 471(1918).
- ²³ See *Green*, 490 U.S. at 511-12 (“As the law evolved, th[e] absolute bar gradually was replaced by a rule that allowed such witnesses to testify in both civil and criminal cases, but also to be impeached by evidence of a prior felony conviction or a *crimen falsi* misdemeanor conviction.”); *Rogers v. Balt. & Ohio R.R. Co.*, 325 F.2d 134, 137 (6th Cir. 1963) (recognizing admissibility of prior conviction impeachment as “a carry-over from the common law”); Hornstein, *supra* note 1, at 22 (noting that “[t]ypically, when a jurisdiction abolished the disqualification of witnesses who had been convicted of a crime, it permitted the conviction to be used to impeach the testimony of the witness” and that “[n]o distinction was made between the garden variety witness and the criminal defendant testifying in her own behalf, despite what now seems the obviously greater prejudicial impact on the latter”).
- ²⁴ Indeed, criminal defendants were among the classes of witnesses wholly disqualified from testifying under the common law tradition. See *Nix v. Whiteside*, 475 U.S. 157, 164 (1986) (“Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case.”). Of course, with respect to criminal defendants and other interested parties, the fact of their interest needed no specific authorization to be admissible as impeachment once the statutory disqualifications were repealed. See Fed. R. Evid. 601 advisory committee’s note (commenting with respect to abolition of witness disqualifications that “[i]nterest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses”).
- ²⁵ *Rosen*, 245 U.S. at 471.
- ²⁶ See *People v. Castro*, 696 P.2d 111, 118 (Cal. 1985) (recognizing that “while the historical basis for felony impeachment may well be the common law rule that a person convicted of any felony was totally incompetent as a witness ..., the modern justification for the practice must be that prior felony convictions may, somehow, be relevant to the witness’ veracity”).
- ²⁷ Fed. R. Evid. 609 advisory committee’s note to 1972 Proposed Rules (“There is little dissent from the general proposition that at least some crimes are relevant to credibility.”).

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- ²⁸ Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78(1884); see also Green, 490 U.S. at 508 n.4; Ladd, supra note 13, at 176.
- ²⁹ Gertz, 137 Mass. at 78; see also Green, 490 U.S. at 508 n.4.
- ³⁰ United States v. Lipscomb, 702 F.2d 1049, 1077 (D.C. Cir. 1983); see also 1 McCormick on Evidence, supra note 11, § 42, at 198 (“Most prosecutors argue forcefully that it is misleading to permit the accused to appear as a witness of blameless life, and this argument has prevailed widely.”).
- ³¹ James L. Kainen, The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics, 44 Stan. L. Rev. 1301, 1313 (1992); see also United States v. Gaines, 457 F.3d 238, 248 (2d Cir. 2006) (saying “[n]othing could be more obvious, and less in need of mention to a jury, than the defendant’s profound interest in the verdict”); Hornstein, supra note 1, at 62-63 (explaining “whatever probative value prior conviction evidence may have on the believability of a defendant’s testimony, it is likely to pale in the face of the defendant’s obvious interest in the outcome of the case, an interest that will cause the jury to be cautious in its assessment of the defendant’s testimony”); cf. Brown v. United States, 370 F.2d 242, 244 (D.C. Cir. 1966) (emphasizing that “[o]ne need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record”); Gold, supra note 1, at 2326 (arguing that prior convictions generally have little probative value because, on question of defendant credibility, they tell jurors “nothing they do not already know”).
- ³² Brown, 370 F.2d at 244 (“We can expect jurors to be naturally wary of the defendant’s testimony, even though they may be unaware of his past conduct.”); Michael E. Antonio & Nicole E. Arone, Damned if They Do, Damned if They Don’t: Jurors’ Reaction to Defendant Testimony or Silence During a Capital Trial, 89 Judicature 60, 66 (Sept.-Oct. 2005) (reporting results of juror interviews showing that jurors generally view defendant testimony as untrustworthy); Beaver & Marques, supra note 4, at 614 (recognizing “natural distrust that members of a jury undoubtedly have for one who is charged with a criminal offense”); Nichol, supra note 4, at 408 (“Greater incentive to deceive can hardly be imagined [than a defendant’s interest in acquittal] and this motive and propensity are well understood and recognized by each member of the jury.”).
- ³³ See Nix v. Whiteside, 475 U.S. 157, 164 (1986).
- ³⁴ See Loper v. Beto, 405 U.S. 473, 482 n.11 (1972) (“The sharpest and most prejudicial impact of the practice of impeachment by conviction ... is upon one particular type of witness, namely, the accused in a criminal case who elects to take the stand”).
- ³⁵ Michelson v. United States, 335 U.S. 469, 475(1948); see Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).
- ³⁶ Michelson, 335 U.S. at 476; Ladd, supra note 13, at 186 (arguing that introduction of past offenses “helps the jury to be satisfied with much less proof than they otherwise would demand for conviction” and “makes them less critical in their effort to be sure that they have rightly convicted, finding solace from the possibility of error in the fact that after all the defendant is a bad man”).
- ³⁷ A typical instruction reads: “Th[e] [defendant’s] earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. You cannot use it for any other purpose. It is not evidence that he is guilty of the crime that he is on trial for now.” O’Malley, Grenig & Lee, 1A Federal Jury Practice & Instructions § 15.08, at 427 (5th ed. 2007) (listing this instruction from Sixth Circuit and providing other examples by Circuit).
- ³⁸ See, e.g., United States v. Castillo, 140 F.3d 874, 884(10th Cir. 1998) (“A central assumption of our jurisprudence is that juries follow the instructions they receive.”); cf. Richardson v. Marsh, 481 U.S. 200, 207 (1987) (noting reliance on related instructions in various contexts, including that “evidence of the defendant’s prior criminal convictions could be introduced for the purpose of sentence enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt”).

³⁹ See Beaver & Marques, *supra* note 4, at 602, 607 (arguing that despite limiting instruction, “[f]ew academicians believe ... that jurors consider past crimes solely for impeachment purposes and not as proof of the defendant’s likelihood of having committed the charged offense” and reporting empirical data that suggest that juries do not, in fact, follow instruction); Dodson, *supra* note 11, at 31, 32 (reporting results of juror studies revealing that “jurors do use prior conviction evidence to infer criminal propensity and frequently ignore or fail to understand limiting instructions”); Nichol, *supra* note 4, at 403 (“Practicing attorneys almost universally concede that the limiting instruction fails to achieve its goal.”); see also *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction.”) (citations omitted); *United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983) (“Limiting instructions of this type require the jury to perform ‘a mental gymnastic which is beyond, not only their powers, but anybody’s else.’”) (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932)); *Gordon v. United States*, 383 F.2d 936, 939 (D.C. Cir. 1967) (recognizing that when prior conviction evidence is admitted “it is admittedly difficult to restrict its impact, by cautionary instructions, to the issue of credibility”).

⁴⁰ The empirical evidence suggests that up to half of all criminal defendants decline to testify in their defense. See Blume, *supra* note 5, at 16 & n.49 (noting that “available evidence indicates that approximately one half of all criminal defendants testify at their trials” and citing supporting studies); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 Val. U. L. Rev. 311, 329-30 (1991) (describing study of trials in Philadelphia in 1980s revealing that 49% of felony defendants and 57% of misdemeanor defendants chose not to testify); Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 Ind. L. Rev. 925, 950-51 (2002) (summarizing studies dating back to 1920s and concluding that “with increasing frequency defendants are not taking the stand at trial as they once did” and “the extent of refusals to testify varies from one-third to well over one-half [of defendants] in some jurisdictions”). While it is impossible to discern from these numbers exactly why any particular defendant chooses not to testify, “[t]he primary factor ... in the decision not to take the stand is undoubtedly fear of the use of prior crimes to impeach.” Nichol, *supra* note 4, at 400; see also Blume, *supra* note 5, at 17-19 (analyzing data regarding defendants cleared by post-conviction DNA testing and determining that 39% of apparently innocent defendants did not testify and 91% of those who did not testify had prior convictions); Dripps, *supra* note 3, at 1632 (postulating “[t]he principal reason why defendants refuse to take the stand is that they fear impeachment with prior convictions—a fear with strong support from the empirical evidence”); Van Kessel, *supra* note 3, at 482 (citing empirical evidence that “a defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not”).

⁴¹ *Gertz v. Fitchburg R.R. Co.*, 137 Mass. 77, 78(1884).

⁴² Cf. Fed. R. Evid. 603 (requiring “every witness” to “declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so”).

⁴³ See *United States v. Headbird*, 461 F.3d 1074, 1078(8th Cir. 2006) (holding that prior convictions are “highly probative of ... credibility ‘because of the common sense proposition that one who has transgressed society’s norms by committing a felony is less likely than most to be deterred from lying under oath’”); *Lipscomb*, 702 F.2d at 1061 (quoting Senate Judiciary Committee as explaining that “prior conviction[s] for ... serious crimes are not totally irrelevant as to whether the witness is telling the truth, since they do reflect his attitude toward the rules of the game”); *Gertz*, 137 Mass. at 78; see also Fed. R. Evid. 609 advisory committee’s note, reprinted in 46 F.R.D. 161, 297(1969) (“A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony.”).

⁴⁴ See Ladd, *supra* note 13, at 178 (questioning on “logical grounds” contention that “convictions-at-large of crimes-at-large satisfy the needs of relevancy to the task which they are assigned to perform”). Ladd provides an oft-cited example of a man convicted of murder after dueling with another who called him a liar: “‘The man prefers death to the imputation of a lie--and the inference of the law is, that he cannot open his mouth but lies will issue from it.’” *Id.* at 178-79.

⁴⁵ See Charles Alan Wright & Victor James Gold, 28 Federal Practice & Procedure Evidence § 6134, at 243-44 (2007) (emphasizing

that “before the jury can draw the permitted inference concerning lack of truthfulness, it must first conclude that the accused’s character is that of a law breaker” which “is the same inference that leads juries to improperly conclude that an accused is a bad person who probably committed the offense charged or who deserves to be punished in any case”); cf. *United States v. Harding*, 525 F.2d 84, 89(7th Cir. 1975) (“The fact that the defendant has sinned in the past implies that he is more likely to give false testimony than other witnesses; it also implies that he is more likely to have committed the offense for which he is being tried than if he had previously led a blameless life. The law approves of the former inference but not the latter.”).

⁴⁶ See *United States v. Barnes*, 622 F.2d 107, 109(5th Cir. 1980) (recognizing that impeaching conviction is relevant as “evidence of the defendant’s criminal nature from which the jury could infer a propensity to falsify testimony” and consequently “there is a danger the jury will consider that same criminal nature as evidence that the defendant acted illegally on the occasion in question”); Hornstein, *supra* note 1, at 13 (noting that inference “from character to conduct” required to support relevance of prior conviction as impeachment “is precisely the inference the law of evidence forbids” with respect to defendant’s underlying guilt).

⁴⁷ Nichol, *supra* note 4, at 398 (criticizing current state of federal law where juries are “able to consider past offenses for heroin distribution for purposes of determining whether the defendant is a liar, but not whether he is a heroin distributor”).

⁴⁸ Lipscomb, 702 F.2d at 1062; *United States v. Franicevich*, 471 F.2d 427, 430(5th Cir. 1973) (Goldberg, J., dissenting).

⁴⁹ See Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. Cin. L. Rev. 851, 854-59, 881 (2008) (arguing that criminal justice system suffers not only when juries are deprived of defendants’ truthful direct examination testimony, but also when they are deprived of false defendant testimony that is tested, and exposed, by cross-examination and rebuttal evidence); Hornstein, *supra* note 1, at 1-2, 20 (noting that “[t]ypically, the defendant may keep the jury from learning of prior convictions only by waiving the right to testify” and, consequently, “important evidence will be sacrificed by the refusal of the witness to submit to such impeachment”).

⁵⁰ *United States v. Smith*, 551 F.2d 348, 360-61 (D.C. Cir. 1976) (describing “[t]he labyrinthine history of Rule 609” and stating that “Rule 609 was one of the most hotly contested provisions in the Federal Rules of Evidence” and “unquestionably the product of careful deliberation and compromise”); Gold, *supra* note 1, at 2297, 2310 n.74 (highlighting “extraordinary amount of congressional interest” in rule governing impeachment of testifying defendants); Nichol, *supra* note 4, at 392 (describing Rule 609 as “one of the most vigorously debated sections of the federal evidence code”).

⁵¹ See Advisory Committee Comments to Proposed Rule 609, 51 F.R.D. 315, 393 (1971) (recognizing that prior to 1965, “slight latitude was recognized for balancing probative value against prejudice” of prior convictions in federal system “though some authority allowed or required the trial judge to exclude convictions remote in point of time”); Advisory Committee’s Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 299(1969) (proposing that all felony convictions be admissible as impeachment and explaining that proposed “rule adheres to the traditional practice of allowing the witness-accused to be impeached by evidence of conviction of crime, like other witnesses”); Ladd, *supra* note 13, at 187 (recognizing in 1940 that “the right of the state to prove convictions of a crime is almost universally admitted as a test of veracity”); see, e.g., *United States v. Villegas*, 487 F.2d 882, 883(9th Cir. 1973) (“To date, this court has shown no disposition to abandon its long-standing rule that proof of any prior felony conviction may be given by the adversary to impeach any witness, including a defendant who elects to testify in a criminal trial.”); Schwab v. *United States*, 327 F.2d 11, 16(8th Cir. 1964) (noting that when defendant “took the stand he voluntarily put his character in issue and, for impeachment purposes, could then be asked questions about prior convictions”); *United States v. Pennix*, 313 F.2d 524, 529(4th Cir. 1963) (“[I]t is settled that when a defendant tenders himself as a witness, his credibility, like that of any other witness, may be questioned by asking him as to previous convictions.”); *United States v. Ziemer*, 291 F.2d 100, 102(7th Cir. 1961) (recognizing introduction of defendant’s past conviction as “a well-established method of impeachment”); *Taylor v. United States*, 279 F.2d 10, 12(5th Cir. 1960) (noting that when defendant “took the stand he voluntarily put his character in issue and, for impeachment purposes, could then be asked questions about prior convictions”); *United States v. Howell*, 240 F.2d 149, 158 (3d Cir. 1956) (same).

- ⁵² Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).
- ⁵³ Id. at 768; Lewis F. Powell, Jr., In Memoriam: Judge Carl McGowan, 56 Geo. Wash. L. Rev. 681, 681 (1988) (noting that Judge McGowan's 1965 opinion in Luck was first substantial challenge to "the fairness of impeachment of criminal defendants who testified by automatically introducing evidence of their prior crimes" that "generally was the rule throughout the nation").
- ⁵⁴ See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 514(1989) (stating that "in 1970 Congress amended the District of Columbia Code to provide that both prior felony and crimen falsi impeaching evidence 'shall be admitted'" as opposed to "may" be admitted as statute read when Luck was decided). Interestingly, while Congress later limited the admissibility of prior convictions in the federal courts, it did not amend the statute governing criminal proceedings in the courts of the District of Columbia, which continues to mandate admission of prior convictions without balancing. See D.C. Code § 14-305(b)(1) (2008); Leslie Lawlor Hayes, Comment, Prior Conviction Impeachment in the District of Columbia: What Happened When the Courts Ran Out of Luck?, 35 Cath. U. L. Rev. 1157, 1163-64 (1986).
- ⁵⁵ Green, 490 U.S. at 517 (chronicling legislative history of Rule 609).
- ⁵⁶ Id.
- ⁵⁷ Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 269(1973). Exceptions were made for convictions where 10 years had passed since the later of the witness's release from prison or expiration of the period of probation or parole on "his most recent conviction," certain juvenile convictions, and convictions for which the witness received a pardon or equivalent post-conviction relief. Id. at 269-70.
- ⁵⁸ Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 393 (1971). An earlier draft of proposed Rule 609 included as its "most significant feature" a balancing test precluding such impeachment if "the judge determines that its probative value is outweighed by the danger of unfair prejudice." Id.
- ⁵⁹ Advisory Committee Notes to Proposed Rule 609, 56 F.R.D. 183, 270 (1973).
- ⁶⁰ 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 609App.01[4], at 12.1 (Joseph M. McLaughlin ed., 2d ed. 2008) (quoting Advisory Committee reporter, Professor Daniel Capra).
- ⁶¹ Fed. R. Evid. 609; see Green, 490 U.S. at 517.
- ⁶² See Roderick Surratt, Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the 'Balancing' Provision of Rule 609(a), 31 Syracuse L. Rev. 907, 920 (1980) (discussing diametrically opposed positions); see also Gold, supra note 1, at 2296 ("Ultimately, no one side in this legislative battle prevailed entirely; the Rule strikes a compromise between sharply conflicting policies."); Irving Younger, Three Essays on Character and Credibility Under the Federal Rules of Evidence, 5 Hofstra L. Rev. 7, 11 (1976) (describing Rule 609(a) as "political compromise" between "those who argued for unlimited use of convictions to impeach" and "those who urged strict limits" on such impeachment); cf. Green, 490 U.S. at 520 (chronicling legislative history of Rule 609); United States v. Kiendra, 663 F.2d 349, 355 (1st Cir. 1981) ("Rule 609(a) received extensive scrutiny in both chambers of Congress and underwent many modifications before the final compromise was struck in Conference Committee.").
- ⁶³ Fed. R. Evid. 609(a)(1); Green, 490 U.S. at 509; Surratt, supra note 62, at 917-20.

⁶⁴ This “narrow spectrum of crimes” (felony or misdemeanor) subject to automatic admissibility under Rule 609(a)(2) includes only crimes such as “perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretenses.” Surratt, *supra* note 62, at 922; see also Fed. R. Evid. 609 advisory committee’s note to 1990 and 2006 amendments. Significantly, this category does not include property crimes such as theft, or crimes that do not inherently involve dishonesty (e.g., murder), even if the specific facts of the crime evidenced dishonest acts on the part of the defendant. See *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982) (recognizing that “crimes of violence, theft crimes, and crimes of stealth do not involve ‘dishonesty or false statement’ within the meaning of rule 609(a)(2)”; 4 Weinstein & Berger, *supra* note 60, §§ 609.04[2][b] to -[3][c], at 24.1.

⁶⁵ Fed. R. Evid. 609(a)(1); Surratt, *supra* note 62, at 922. As originally enacted, Rule 609(a) stated:
For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted ... but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
See Surratt, *supra* note 62, at 907 n.1, 919 n.54. This rhetorical formulation was later altered so that the “but only” phrasing was removed; in notes to the amendment, the Advisory Committee emphasized, however, that “[t]he amendment does not disturb the special balancing test for the criminal defendant who chooses to testify.” Fed. R. Evid. 609 advisory committee’s note to 1990 Amendments. As amended, the Rule also replaced the term “the defendant” with “the accused,” the pronoun “he” with the gender neutral phrase “the witness,” and clarified the language of subsection (a)(2) so as “to give effect to the [original] legislative intent” as expressed in the Conference Report that the subsection be construed narrowly. See Fed. R. Evid. 609 advisory committee’s note to 1990 and 2006 Amendments; see also Green, 490 U.S. at 509.

⁶⁶ See sources cited *supra* note 51.

⁶⁷ Fed. R. Evid. 609(a)(1) (establishing statutory authority for trial courts’ use of discretionary balancing test, similar to that used in Luck).

⁶⁸ H.R. Rep. No. 93-650, at 11 (1973); see, e.g., 4 Weinstein & Berger, *supra* note 60, § 609App.01[3], at 10 (recognizing that House Judiciary Committee’s changes to rule were motivated by concern that existing text did not “adequately protect[] an accused who wished to testify”).

⁶⁹ Prior to Rule 609’s enactment, even commentators who advocated complete abolition of prior conviction impeachment accepted that, as more significant restrictions on the practice were not a “realistic possibility,” “[t]he Luck approach ... seems to be the most effective means of reform.” Robert G. Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DePaul L. Rev. 1, 23 (1968); see also Ladd, *supra* note 13, at 178 (advocating abolition of prior crime impeachment of criminal defendants, but noting that “this method of impeachment is so generally recognized that it will probably be difficult to change in the future”).

⁷⁰ *Luck v. United States*, 348 F.2d 763, 768 (D.C. Cir. 1965) (emphasis added). Similarly, in following Luck (prior to its abrogation by Congress), the Advisory Committee promulgated an early draft of proposed Rule 609 that included, as its “most significant feature,” a “particularized application of [Federal Rule of Evidence] 403(a).” Advisory Committee Comments to Proposed Rule 609, 51 F.R.D. 315, 393 (1971). This early draft (which was never forwarded to Congress) permitted exclusion of a defendant’s prior convictions if “the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.” *Id.* at 391 (emphasis added); see Green, 490 U.S. at 515-16 (1989).

⁷¹ Fed. R. Evid. 403 (permitting exclusion of relevant evidence where danger of unfair prejudice “substantially outweigh[s]” probative value). Luck and Rule 403, thus, would support exclusion of relatively few convictions. In fact, Luck itself concerned an unusually prejudicial prior offense that was identical to the charged offense and minimally probative (because it was a juvenile adjudication), but the District of Columbia Circuit nevertheless ruled that it could not find “reversible error in permitting this appellant to be asked about his prior conviction.” Luck, 348 F.2d at 769; see Fed. R. Evid. 609(d) (barring admission of juvenile adjudications as impeachment of accused). The Luck court stated only that, because the case would be remanded on another issue, the trial judge

should “feel free to approach the problem... as one to be decided according to his best judgment” in the event of a new trial. Luck, 348 F.2d at 769.

⁷² See Fed. R. Evid. 609(a)(1) (as amended 1990).

⁷³ Fed. R. Evid. 403 (emphasis added).

⁷⁴ Fed. R. Evid. 609 advisory committee’s note to 1990 Amendments.

⁷⁵ In fact, the Rule also mandates exclusion even if probative value and prejudicial effect are equally balanced. See Fed. R. Evid. 609(a)(1) (counseling exclusion of convictions unless “probative value ... outweighs ... prejudicial effect”); *United States v. De La Cruz*, 902 F.2d 121, 123(1st Cir. 1990) (recognizing that “internalized balancing test” in Rule 609(a)(1) “is somewhat stricter” than balancing test in Rule 403); *United States v. Ross*, 44 M.J. 534, 535-36(A.F. Ct. Crim. App. 1996) (conveying same recognition of stricter balancing test in Rule 609).

⁷⁶ *United States v. Tse*, 375 F.3d 148, 164(1st Cir. 2004) (noting that “[t]he burden under Rule 403 is on the party opposing admission”); *Gordon v. United States*, 383 F.2d 936, 939 (D.C. Cir. 1967) (determining prior to Rule 609 that “[t]he burden of persuasion [under Luck] ... is on the accused”); *Surratt*, supra note 62, at 923 (explaining “[u]nder the Luck doctrine, the burden of persuasion was on the defendant”).

⁷⁷ See Fed. R. Evid. 609 advisory committee’s note to 1990 Amendments (“Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.”); *United States v. Smith*, 551 F.2d 348, 359 (D.C. Cir. 1976) (“[T]he language of Rule 609(a)(1), as enacted, manifests an intent to shift the burden of persuasion with respect to admission of prior conviction evidence for impeachment.”); cf. *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995) (same); *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (“Rule 609 places the burden of proof on the government.”).

⁷⁸ *Surratt*, supra note 62, at 924 n.64. Congress’s appreciation of the significance of shifting the burden to the prosecution is evidenced by comments of the legislators during debate. *Gold*, supra note 1, at 2324; *Surratt*, supra note 62, at 924 n.64. .

⁷⁹ Fed. R. Evid. 609.

⁸⁰ A prior conviction may be probative on other points (for example as evidence of a criminal propensity). Nevertheless, “probative value” under Rule 609 speaks solely to the conviction’s relevance as impeachment--its use “[f]or the purpose of attacking the character for truthfulness of a witness.” Fed. R. Evid. 609(a); Fed. R. Evid. 609 advisory committee’s note to 1990 Amendments (explaining that “it was unnecessary to add to the rule language stating that, when a prior conviction is offered under Rule 609, the trial court is to consider the probative value of the prior conviction for impeachment, not for other purposes” because proposition was inescapable from “the title of the rule, its first sentence, and its placement among the impeachment rules”) (emphasis added); see also *United States v. Valencia*, 61 F.3d 616, 619 (8th Cir. 1995) (emphasizing that “[t]he probative character of evidence under Rule 609 has to do with credibility of a witness”); *United States v. Martinez*, 555 F.2d 1273, 1276 (5th Cir. 1977) (explaining that “the probative value of ... prior conviction evidence” is “the tendency of the ... evidence to persuade the jury that defendant [i]s not a credible person”).

⁸¹ *Old Chief v. United States*, 519 U.S. 172, 184(1997) (contrasting “probative value” with “relevance” as used in Federal Rules of Evidence).

82 See sources cited supra note 31.

83 Fed. R. Evid. 403 (permitting exclusion of evidence where probative value is substantially outweighed by danger of “unfair prejudice”).

84 See *id.*; Fed. R. Evid. 609; see also *United States v. Tse*, 375 F.3d 148, 163(1st Cir. 2004) (observing that “while a court must weigh all potential ‘prejudicial effect’ to the defendant when deciding whether to admit a prior conviction of the accused, it must weigh only the kind of prejudice that can be deemed ‘unfair’ when deciding whether to admit the prior conviction of a government witness” under Rule 403); 4 Weinstein & Berger, supra note 60, § 609.05[3][a], at 609-36 (emphasizing “contrast” between Rule 403 and Rule 609(a)(1)). The significance of the absence of the “unfair” qualifier itself, while certainly consistent with a congressional intent to favor the defense side of the balance, should not be overstated. Congress could not have meant by this omission that the courts should consider even the intended prejudicial effect (the harm done to the defendant’s credibility) as this intended prejudice will always be exactly equal to the probative value of the evidence and would, consequently, render the balancing exercise meaningless. See *Wright & Gold*, supra note 45, § 6134, at 39 (Supp. 2008) (noting absence of qualifier “unfair” but acknowledging that “the phrase ‘prejudicial effect’ as employed in Rule 609(a)(1) must be referring to prejudice that is ‘unfair’ in the same sense intended by Rule 403”).

85 Fed. R. Evid. 404; *Michelson v. United States*, 335 U.S. 469, 475-76(1948); supra note 35.

86 *United States v. Lipscomb*, 702 F.2d 1049, 1062(D.C. Cir. 1983); see *Wright & Gold*, supra note 45, § 6134, at 243 (stating “conviction evidence offered against an accused will almost always cause prejudice”); supra Part I.

87 *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 518(1989) (quoting from House Judiciary Committee Report); *United States v. Smith*, 551 F.2d 348, 361 (D.C. Cir. 1976) (noting that in “forging a consensus,” Conference Committee that drafted rule was “aware of the substantial sentiment in both chambers for limiting impeachment by prior conviction, especially in the criminal defendant-as-witness context”).

88 See *Wright & Gold*, supra note 45, § 6134, at 243 (“Where conviction evidence is offered against an accused, a serious effort to balance in light of the burden assigned to the prosecution usually should lead to the conclusion that the evidence is inadmissible.”); *Impeachment Under Rule 609(a): Suggestions for Confining and Guiding Trial Court Discretion*, 71 Nw. U. L. Rev. 655, 661 (1977) [hereinafter *Impeachment*] (recognizing in text of Rule “a bias against the restraining and destructive nature of impeachment evidence”).

89 See *Impeachment*, supra note 88, at 661 (contending shortly after enactment of Rule that federal courts “have been unable to ascertain what criteria to use in balancing probative value against unfair prejudice”).

90 *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976).

91 *Id.*

92 383 F.2d 936, 941 (D.C. Cir. 1967).

93 *Mahone*, 537 F.2d at 929 (citing *Gordon*, 383 F.2d at 940).

94 348 F.2d 763, 766 (D.C. Cir. 1965).

95 See supra Part II.A.

96 Luck, 348 F.2d at 769.

97 Id.

98 Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967) (citing Luck, 348 F.2d at 768).

99 Id. at 940.

100 Id. (citing Luck, 348 F.2d at 768).

101 Id. The Gordon court reiterated this consideration in a footnote, stating that the trial court must consider “whether the defendant’s testimony is so important that he should not be forced to elect between staying silent--risking prejudice due to the jury’s going without one version of the facts--and testifying--risking prejudice through exposure of his criminal past.” Id. at 941 n.11; see also Luck, 348 F.2d at 769 (requiring trial courts to consider “above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant’s story than to know of a prior conviction”).

102 United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976).

103 Gordon, 383 F.2d at 940.

104 Id. at 941.

105 This is, of course, a more significant criticism of the Mahone decision, which was ostensibly interpreting Rule 609, than it is a criticism of the Gordon decision, which predated the Rule. The District of Columbia Circuit has, both before and after Mahone, recognized that “the inquiry to be conducted by the trial court under Rule 609(a) differs significantly from that mandated by Luck and its progeny.” United States v. Crawford, 613 F.2d 1045, 1052(D.C. Cir. 1979); United States v. Smith, 551 F.2d 348, 357(D.C. Cir. 1976) (recognizing that “[d]espite substantial surface similarity,” inquiry established by Luck/Gordon line of cases predated the adoption of Rule 609 and remanding, with respect to one defendant, for further proceedings based on trial court’s reliance on pre-Rule 609 case law to determine admissibility of prior conviction).

106 Fed. R. Evid. 609(a)(1).

107 In fact, at the outset of the Luck opinion, the D.C. Circuit set this factor out as a consideration distinct from the balancing of probative value against prejudice, stating:

[1] There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant’s story than by the defendant’s foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. [2] There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility.

Luck v. United States, 348 F.2d 763, 768 (D.C. Cir. 1965) (emphasis added).

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- ¹⁰⁸ Surratt, *supra* note 62, at 943; see also *Jackson v. State*, 668 A.2d 8, 16 (Md. 1995) (“Factors four and five are restatements of the considerations that underlie the Rule.”). Interestingly, the Advisory Committee Notes to the proposed Rule 609 summarized Gordon without reference to either the fourth or fifth factor, stating: “Judge, now Chief Justice, Burger suggested in Gordon various factors to be considered in making the determination: the nature of the crime, nearness or remoteness, the subsequent career of the person, and whether the crime was similar to the one charged.” Advisory Committee Notes to Proposed Rule 609, 51 F.R.D. 315, 393(1971); see also Surratt, *supra* note 62, at 918 (chronicling legislative history of Rule 609 and noting concerns regarding ““deterrent effect [of prior convictions] upon an accused who might wish to testify””).
- ¹⁰⁹ See, e.g., *United States v. Hernandez*, 106 F.3d 737, 739(7th Cir. 1997) (citing Mahone for “five-part test to guide the district court in the exercise of its discretion in determining whether the probative value of the conviction outweighs its prejudicial effect”); *United States v. Cook*, 608 F.2d 1175, 1185 n.8 (9th Cir. 1979) (en banc) (citing Mahone for five factors “to assist district judges confronted with a request for a ruling”); *United States v. Sims*, 588 F.2d 1145, 1149 (6th Cir. 1978) (discussing Mahone and listing five factors as restated in Mahone, but crediting Gordon); *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992) (relying on Mahone factors in applying state impeachment rule); see also Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 *Emory L.J.* 135, 197-98 (1989) (“The standards usually set forth in 609(a)(1) cases are laid down in *United States v. Mahone*.”); cf. cases cited *infra* note 110. The courts also rely on the Mahone factors in interpreting the related balancing test set forth in Rule 609(b). See 4 Weinstein & Berger, *supra* note 60, § 609.06[1], at 609-45 to -46.1.
- ¹¹⁰ Mahone’s five-factor framework, or a close variant, governs review of impeachment rulings in 10 of the 12 federal circuits that consider criminal appeals, excepting only the Fourth and Eighth Circuits. For representative cases from each federal circuit (except those noted above), see the following: First Circuit, *United States v. Brito*, 427 F.3d 53, 64 (1st Cir. 2005); Second Circuit, *United States v. Hawley*, 554 F.2d 50, 53 n.5 (2d Cir. 1977); *Haynes v. Kanaitis*, No. Civ.A.3:99CV2551, 2004 WL 717115, at *2 (D. Conn. Mar. 3, 2004); Third Circuit, *Gov’t of V.I. v. Bedford*, 671 F.2d 758, 761 n.4 (3d Cir. 1982); *United States v. Davis*, 235 F.R.D. 292, 296 (W.D. Pa. 2006); *United States v. Butch*, 48 F. Supp. 2d 453, 464 (D.N.J. 1999); Fifth Circuit, *United States v. Acosta*, 763 F.2d 671, 695 n.30 (5th Cir. 1985); *United States v. Preston*, 608 F.2d 626, 639 n.17 (5th Cir. 1979); Sixth Circuit, *United States v. Moore*, 917 F.2d 215, 234 (6th Cir. 1990); *United States v. Sims*, 588 F.2d 1145, 1149 (6th Cir. 1978); Seventh Circuit, *United States v. Montgomery*, 390 F.3d 1013, 1015 (7th Cir. 2004); Ninth Circuit, *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004); *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995); *United States v. Cook*, 608 F.2d 1175, 1185 n.8 (9th Cir. 1979) (en banc); Tenth Circuit, *United States v. Sides*, 944 F.2d 1554, 1560 (10th Cir. 1991); *United States v. Cueto*, 506 F. Supp. 9, 13 (W.D. Okla. 1979); *United States v. Brewer*, 451 F. Supp. 50, 53 (E.D. Tenn. 1978); Eleventh Circuit, *United States v. Pritchard*, 973 F.2d 905, 909 (11th Cir. 1992); D.C. Circuit, *United States v. Jackson*, 627 F.2d 1198, 1209 (D.C. Cir. 1980); and *United States v. Pettiford*, 238 F.R.D. 33, 41(D.D.C. 2006); see also 1 McCormick on Evidence, *supra* note 11, § 42, at 187 n.10; 4 Weinstein & Berger, *supra* note 60, § 609.05[3][a], at 609-36 to -39. Because the United States Court of Appeals for the Federal Circuit does not review criminal cases, there is no case law regarding impeachment of criminal defendants in that circuit. Similar or identical five-factor tests are also applied in many state jurisdictions that are governed by evidentiary analogues to Rule 609. See, e.g., *Jackson v. State*, 668 A.2d 8, 14 (Md. 1995) (highlighting Mahone factors as “a useful aid to trial courts in performing the balancing exercise mandated by” Maryland law); *Settles v. State*, 584 So. 2d 1260, 1264 n.2 (Miss. 1991) (noting adoption under Mississippi law of “five factor list enunciated by the federal courts for Rule 609 determinations”); *State v. Lucero*, 648 P.2d 350, 352-53 (N.M. Ct. App. 1982) (relying on Mahone and Luck for factors to apply under New Mexico law, leading to so-called State v. Lucero factors); *State v. McClure*, 692 P.2d 579, 590-91 (Or. 1984) (applying Mahone factors in review of evidentiary ruling under Oregon law); *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992) (reciting Mahone factors for analysis under Texas law, leading to so-called Theus factors).
- ¹¹¹ See *supra* Part III.C.
- ¹¹² Ordovery, *supra* note 109, at 199 (noting that fourth and fifth factor “are linked”; “[w]here the defendant has important factual information to give, he should be encouraged to testify ... [h]is credibility then, of course, becomes a major issue.”); Surratt, *supra* note 62, at 943, 945 (observing that “it appears that as one of these factors increases in importance in a particular case, so does the other” and “there appears to be no principled way to determine which factor should prevail”); Impeachment, *supra* note 88, at 662 (recognizing that fourth and fifth factors give no clear answer in any case “where the witness is the defendant in a criminal trial” because “the more important the defendant’s testimony, the more apt credibility will be central to the resolution of the issues”).

¹¹³ See Surratt, *supra* note 62, at 942-45.

¹¹⁴ See Settles, 584 So. 2d at 1264 (asserting that fourth and fifth factors “tend to offset each other” because “as the importance of the witness’ testimony tends to rise so does the centrality of the credibility issue”); McClure, 692 P.2d at 591 (recognizing that “factors (4) and (5) ... usually offset”). California state courts, relying directly on Gordon, developed a four factor framework that omits the fifth Mahone factor, and downplays the importance of the fourth, which the courts characterize as “what effect admission would have on the defendant’s decision to testify.” See *People v. Castro*, 696 P.2d 111, 118 (Cal. 1985); *People v. Beagle*, 492 P.2d 1, 8 (Cal. 1972) (emphasizing that trial courts should use “caution” in relying on fourth factor so that defendant cannot “blackmail” court in order to obtain “a false aura of veracity”). It appears that the drafters of the Oregon Evidence Code similarly merged the fourth and fifth Mahone factor into one factor favoring exclusion of impeachment in providing commentary to that Code, but the Oregon courts have deemed this commentary to be “in error” and rely on Mahone for the traditional five-factor framework. See McClure, 692 P.2d at 585 (noting that “the commentary, referring to a four-factor test contained in *Gordon v. United States* ... is partially in error” because “[i]n *Gordon*, Judge Burger set forth five factors to be considered by trial courts in admitting evidence” and reciting and applying factors as set forth in Mahone).

¹¹⁵ There are, however, at least two federal district courts that have explicitly recognized that, in the case being considered (“in this case”), the factors cancelled out. See Cueto, 506 F. Supp. at 14 (“Factors four and five seem to counterbalance each other in this case. While Defendant’s testimony may be of some importance, a factor favoring nonadmission, at the same time his credibility may be a central issue in this case, a factor favoring admission.”); Brewer, 451 F. Supp. at 54 (same).

¹¹⁶ 469 U.S. 38 (1984).

¹¹⁷ *Id.* at 43.

¹¹⁸ An “in limine” ruling is more precisely a ruling on a “motion, whether made before or during trial, to exclude anticipated prejudicial evidence” (or to permit potentially objectionable evidence) “before the evidence is actually offered.” *Id.* at 40 n.2. The term in limine itself simply means “[o]n or at the threshold; at the very beginning; preliminarily.” *Id.* (citing Black’s Law Dictionary 708 (5th ed. 1979)).

¹¹⁹ *Id.* at 41-43.

¹²⁰ *Gordon v. United States*, 383 F.2d 936, 940-41 (D.C. Cir. 1967); *Luck v. United States*, 348 F.2d 763, 769 (D.C. Cir. 1965) (emphasizing that in deciding whether to permit impeachment, district court must consider “above all, [the] extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant’s story than to know of a prior conviction”).

¹²¹ Interestingly, although Chief Justice Burger had, as a circuit judge, authored *Gordon*, his five-page opinion in *Luce* fails to reference any of the themes recognized in that case or the other D.C. Circuit cases regarding the problematic nature of prior conviction impeachment of an accused.

¹²² At the time the Supreme Court decided *Luce*, all but one of the federal circuits that had addressed the issue (six explicitly and four implicitly) had determined that in limine rulings on the admissibility of prior convictions were reviewable on appeal even if the defendant did not testify. See *United States v. Washington*, 746 F.2d 104, 106 n.2 (2d Cir. 1984) (collecting cases); cf. *Luce*, 469 U.S. at 40 & n.3 (recognizing that “[s]ome other Circuits have permitted review in similar situations”). The sole exception was the Sixth Circuit in a case that the Supreme Court ultimately reviewed, resulting in the *Luce* decision. See *Washington*, 746 F.2d at 106 n.2.

¹²³ *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000) (noting that “in limine rulings are not binding on the trial judge, and the judge

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may always change his mind during the course of a trial”); Luce, 469 U.S. at 41-42 (“Even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling.”); *United States v. Turner*, 960 F.2d 461, 465(5th Cir. 1992) (affirming district court’s admission of prior convictions as impeachment despite earlier in limine ruling excluding convictions).

Justice Brennan, concurring in Luce, emphasized that the opinion did not resolve the “broader questions of appealability vel non of in limine rulings that do not involve Rule 609(a).” Luce, 469 U.S. at 44 (Brennan, J., concurring). But see *United States v. Bond*, 87 F.3d 695, 700 (5th Cir. 1996) (noting that “courts have refused to limit Luce to Rule 609(a) cases and have instead applied its principles to analogous contexts”).

¹²⁴ Ohler, 529 U.S. at 758 (emphasizing that prosecution need not “make its choice” as to whether to impeach defendant “until the defendant has elected whether or not to take the stand in her own behalf and after the Government has heard the defendant testify”); Luce, 469 U.S. at 41 & n.5 (emphasizing that trial court’s impeachment ruling depends on “the precise nature of the defendant’s testimony,” which cannot be obtained from mere “proffer of testimony” because “trial testimony could, for any number of reasons, differ from the proffer”); *United States v. Williams*, 939 F.2d 721, 724 (9th Cir. 1991) (reflecting that “Luce teaches that the admissibility of a prior conviction for impeachment depends to a great extent on the nature of the defendant’s testimony”).

¹²⁵ See *United States v. Martinez*, 76 F.3d 1145, 1151-52 (10th Cir. 1996) (holding that trial court could properly decline to rule on admissibility of defendant’s prior conviction until after hearing defendant’s testimony).

¹²⁶ Luce, 469 U.S. at 41 (stating that had defendant “testified and been impeached by evidence of a prior conviction, the District Court’s decision to admit the impeachment evidence would have been reviewable on appeal” because reviewing court “would then have ... a complete record detailing the nature of [the defendant’s] testimony, the scope of the cross-examination, and the possible impact of the impeachment on the jury’s verdict”); *United States v. Griffin*, Nos. 85-1992, 85-2003, 1988 WL 9164, at *2 (6th Cir. Feb. 9, 1988) (refusing to review trial court’s in limine ruling because defense introduced prior conviction on defendant’s direct examination and “the trial court was entitled to evaluate the probative value and prejudicial effect of the prior conviction under the actual circumstances which developed at trial”); cf. *United States v. Mejia-Alarcon*, 995 F.2d 982, 987 n.2 (10th Cir. 1993) (holding that defendant must renew objection raised in in limine motion when impeachment is actually offered at trial or objection is forfeited, because “any final determination as to admissibility under Rule 609(a)(1) rests on a balancing ... that could only properly be performed after an assessment of the evidence that had come in up to the point of its admission”).

The Supreme Court’s extension of Luce in Ohler is consistent with this analysis. In Ohler, the Court held that a defendant also cannot challenge the admission of prior conviction impeachment if, after an adverse in limine ruling, the defense introduces the evidence itself on direct examination to “remove the sting” of the impeachment. Ohler, 529 U.S. at 758, 760. In such circumstances, the district court is deprived of the opportunity to rule on the admissibility of the impeachment during the defendant’s cross-examination, and no appellate review is permitted.

¹²⁷ *Gordon v. United States*, 383 F.2d 936, 940-41 (D.C. Cir. 1967).

¹²⁸ See Wright & Gold, supra note 45, § 6134, at 234 n.67 (recognizing that “[t]he Supreme Court’s decision in Luce v. U.S., ... logically precludes future consideration” of fourth Mahone factor because “the federal courts cannot consider the loss of evidence if the defendant does not testify since the issue of admissibility cannot be raised unless he takes the stand”). In fact, the Luce decision only limits appellate review of district court rulings, theoretically leaving the lower courts’ impeachment analysis unaffected. Thus, a district court is free, after Luce, to indulge a defendant with an in limine impeachment ruling and, in so ruling, could also apply the fourth Mahone factor as originally intended--considering the potential detriment to the jury’s effort to determine the facts if the defendant is deterred from testifying. However, this is increasingly unlikely because, as discussed in Part IV.B, infra, the appellate courts have not simply discarded the fourth Mahone factor in response to Luce, but reinterpreted it. Inevitably, then, in applying the fourth factor going forward, district courts will adopt the meaning given to that factor in the appellate opinions that bind them, even though the district courts are not themselves constrained by the procedural ruling (Luce) that animates the appellate courts’ analysis. See cases cited infra note 159 (listing cases that illustrate district courts’ adoption of fourth factor as reinterpreted by appellate courts).

¹²⁹ *Perry v. Leeke*, 488 U.S. 272, 283 (1989).

130 Gordon, 383 F.2d at 938.

131 Id. at 941.

132 United States v. Doyle, 771 F.2d 250, 251 (7th Cir. 1985).

133 Id. at 254.

134 Id.

135 Id. (“The defendant’s argument flies in the face of the Supreme Court’s most recent decision on the use of Federal Rule of Evidence 609(a), and therefore must fail.” (citing *Luce v. United States*, 469 U.S. 38 (1984))).

136 Gordon, 383 F.2d at 940; see 4 Weinstein & Berger, *supra* note 60, § 609.05[3][e], at 609-43 to -44; *supra* Part III.B.

137 See *United States v. Montgomery*, 390 F.3d 1013, 1016 (7th Cir. 2004) (“central role of [defendant’s] testimony”); *United States v. Smith*, 131 F.3d 685, 687 (7th Cir. 1997) (“crucial”); *United States v. Toney*, 27 F.3d 1245, 1253 (7th Cir. 1994) (“of utmost importance”); *United States v. Nururdin*, 8 F.3d 1187, 1192 (7th Cir. 1993) (“critical”); *United States v. Sides*, 944 F.2d 1554, 1560 (10th Cir. 1991) (“important”); *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991) (“central”).

138 *Montgomery*, 390 F.3d at 1016.

139 *Nururdin*, 8 F.3d at 1192.

140 *Smith*, 131 F.3d at 687.

141 *Toney*, 27 F.3d at 1253.

142 *Sides*, 944 F.2d at 1560.

143 *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991).

144 48 F.3d 1477, 1489 (9th Cir. 1995).

145 Id.

146 Id. (emphasis added); see also *United States v. Thomas*, 79 F. App’x 908, 914 (7th Cir. 2003) (rejecting defendant’s contention “that the fourth and fifth factors weigh against admissibility because his testimony was unimportant and his credibility was not at issue” on ground that defendant’s “denial that he robbed the banks was directly contradicted by the testimony of numerous eyewitnesses identifying him as the robber” and “[t]he government therefore was entitled to impeach his veracity with the fact that he is a convicted

felon”).

¹⁴⁷ See, e.g., *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004) (affirming district court ruling permitting impeachment with prior conviction even though trial court “did little more than ‘recognize [] the centrality of the credibility issue and the defendant’s testimony’” in justifying its ruling (quoting *United States v. Jimenez*, 214 F.3d 1095, 1098 (9th Cir. 2000))); *United States v. Cuevas*, 82 F. App’x 546, 547 (9th Cir. 2003) (holding that defendant’s prior “conviction was ... admissible under Rule 609(a)(1) because it reflects on [his] veracity and is dissimilar to the charged conduct, and because [his] testimony and credibility were critical at trial”); *Thomas*, 79 F. App’x at 914 (holding that fourth and fifth factors did not prevent government’s use of prior convictions to impeach defendant’s testimony denying guilt in bank robbery); *United States v. Cannady*, No. 95-50207, 1995 WL 216942, at *2 (9th Cir. Apr. 11, 1995) (affirming district court’s admission of defendant’s convictions because “the only factor weighing against admission of the two prior convictions was the similarity factor” and emphasizing that defendant’s “credibility and testimony were central to the case on such issues as motive to commit the robbery”); *United States v. Coon*, No. 89-1489, 1991 WL 37830, at *6 (6th Cir. Mar. 19, 1991) (emphasizing propriety of impeachment because defendant’s “testimony, if believed, constituted a complete defense to the charge”); *United States v. Rein*, 848 F.2d 777, 783 (7th Cir. 1988) (district court’s findings that “the defendant’s testimony was important” and “the defendant’s credibility was ‘extremely important’” supported admission of prior drug trafficking conviction despite similarity of prior offense to charges at trial); *United States v. Browne*, 829 F.2d 760, 764 (9th Cir. 1987) (emphasizing “the importance of the defendant’s testimony” in upholding admission of prior convictions for impeachment); see also cases cited *infra* note 160.

¹⁴⁸ See *Blume*, *supra* note 5, at 11 (criticizing federal courts “[e]ngaging in what would seem to be complete anti-logic” by treating importance of defendant’s testimony as factor favoring impeachment); *Ordovery*, *supra* note 109, at 199-200 (“Where the defendant’s testimony is crucial to the defendant, one might expect that the courts would give serious attention to the Rule 609(a)(1) balancing test that places the burden on the prosecution and favors the defense. Yet, what seems to occur is that courts will acknowledge that the defendant’s evidence is important; that credibility is the central issue; and, therefore, the prior conviction must be admitted to impeach the defendant’s credibility. This is the opposite of the policy expressed by the line of authority that led to the adoption of Rule 609(a).”); *Ed Gainor*, Note, *Character Evidence by Any Other Name ...: A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 *Geo. Wash. L. Rev.* 762, 783 (1990) (noting that there “appears to be confusion among some courts regarding the weight to be given to the importance of the defendant’s testimony in the balancing process,” and “some courts appear to have weighed the importance of the defendant’s testimony in favor of admissibility of prior conviction evidence”).

¹⁴⁹ See *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (citing *Gordon* as source of fourth factor); *Gordon v. United States*, 383 F.2d 936, 940-41, 941 n.11 (D.C. Cir. 1967) (announcing that trial court should consider “what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions” and “whether the defendant’s testimony is so important” that otherwise admissible impeachment should be foregone to encourage its presentation to jury); *supra* Part III.B.

¹⁵⁰ For examples of this approach, see discussion in text, *infra* Part IV.C. and *United States v. Arhebamen*, 197 F. App’x 461, 467 (6th Cir. 2006) (listing *Mahone* factors, and then affirming ruling that, despite availability of four other convictions as impeachment under 609(a)(2), conviction for “absconding” was admissible because “even though it was similar to the charged crime of failure to appear for sentencing,” conviction “was highly probative because Defendant’s credibility was a central issue at trial”); *United States v. Ramirez-Krotky*, 177 F. App’x 746, 749 (9th Cir. 2006) (affirming admission of impeachment on principal ground that defendant’s “credibility was a central question”); *United States v. Gant*, 396 F.3d 906, 909-10 (7th Cir. 2005) (recognizing “the importance of the defendant’s testimony” as *Mahone*’s fourth factor, but ignoring it in application and ruling that because defendant’s “testimony that he possessed a pipe, not a firearm, directly contradicted the testimony of [the] government witnesses,” defendant’s “credibility was a crucial part of the trial” and thus “[t]he district court did not abuse its discretion in admitting [the] prior conviction for impeachment purposes”); *United States v. Hernandez*, 106 F.3d 737, 740 (7th Cir. 1997) (reciting five *Mahone* factors and affirming without reference to fourth factor despite similarity of prior crime to charged offense “given the importance of the credibility issue in this case”); *United States v. Blackburn*, No. 92-1131, 1993 WL 204241, at *2 (6th Cir. June 8, 1993) (listing factors and affirming admission of prior conviction where “district court dealt with several of these factors” but not fourth factor and “[a] central issue at trial was which witness to believe, the defendant or [a] prosecution witness”); and *United States v. Moore*, 917 F.2d 215, 234-35 (6th Cir. 1990) (reciting five *Mahone* factors, but ignoring fourth factor and affirming admission of prior armed robbery conviction based on trial court’s findings that “the probative value of the nine-year conviction outweighed any prejudicial effect since [the defendant’s] credibility was ‘very much in contention’” and because “[t]he prior conviction went to credibility, and had impeachment

value"); see also *Rodriguez v. United States*, 286 F.3d 972, 984(7th Cir. 2002) (determining by reference to Mahone factors that defense counsel reasonably advised defendant his prior convictions would be admissible if he took stand, and emphasizing - while ignoring fourth factor - that prior conviction was "an important factor in determining [the defendant's] credibility if he took the stand" and thus "the prior conviction's probative value for determining credibility would outweigh its prejudicial value for his propensity to commit the charged crime").

151 427 F.3d 53, 64 (1st Cir. 2005).

152 *Id.* at 64.

153 See, e.g., *Brito*, 427 F.3d at 64 (ignoring fourth factor and highlighting fifth as "[p]erhaps most important" of court's considerations in affirming admission of impeachment); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088(9th Cir. 2004) (affirming district court ruling permitting impeachment with prior conviction even though trial court "did little more than 'recognize[] the centrality of the credibility issue and the defendant's testimony'" in justifying its ruling).

There is an almost imperceptible ripple against this tide in the federal case law as evidenced by a handful of cases addressing the exclusion of convictions under Rule 609(b)--a provision of the Rule that prohibits impeachment with a prior conviction over 10 years old unless the probative value of the conviction "substantially outweighs" its prejudicial effect--but this contrary sentiment has not yet triggered any recognition of the flaws in the modern interpretation of the Mahone framework. See *United States v. Bensimon*, 172 F.3d 1121, 1126-27(9th Cir. 1999) (recognizing that "this and other courts have held that the probative value of impeachment evidence is enhanced where the defendant's testimony is pitted against that of the government witnesses, thereby making the credibility of the defendant an important issue," but ruling that "while [the defendant's] credibility was certainly an important issue to the government's case, this fact does not change the probative value of [his] seventeen-year-old conviction for mail fraud"); *Am. Home Assurance Co. v. Am. President Lines, Ltd.*, 44 F.3d 774, 779(9th Cir. 1994) (rejecting challenge to exclusion of prior conviction impeachment of witness in civil case despite assertion that witness's credibility was "critical" to case, because "the probative value of [the witness's] conviction is measured by how well it demonstrates his lack of trustworthiness, not how badly [the other side] wants to impeach him"); *United States v. Acosta*, 763 F.2d 671, 695 (5th Cir. 1985) (acknowledging in 609(b) context that "the mere fact that the defendant's credibility is in issue" is weak justification for permitting impeachment because it is "a circumstance that occurs whenever the defendant takes the stand").

154 See *United States v. Lipscomb*, 702 F.2d 1049, 1063 (D.C. Cir. 1983) (stressing that "there can be no legal presumption of admissibility"; "[t]o the contrary, ... the burden is on the government to show that the probative value of a conviction outweighs its prejudicial effect to the defendant"); discussion *supra* Part II.B.

155 *Brito*, 427 F.3d at 64 (asserting that all felony convictions "have some probative value for impeachment purposes"); *Lipscomb*, 702 F.2d at 1062 ("[A]ll felony convictions are probative of credibility to some degree."); see also *supra* Part I.

156 See *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995) (recognizing that second factor was "satisf[ie]d" because 10-year period from release had not elapsed as per Rule 609(b)); *United States v. Pritchard*, 973 F.2d 905, 909(11th Cir. 1992) (affirming district court's admission of 13-year-old burglary conviction despite similarity to charged crime based on "the government's need for the impeaching evidence" and fact that "crux of this case was a credibility issue"); *United States v. Walker*, 817 F.2d 461, 464(8th Cir. 1987) (evaluating remoteness of prior conviction by stating that it "was within the ten-year time limit prescribed by this rule"); see also Fed. R. Evid. 609(b) (prescribing stricter balancing test with respect to impeachment of any witness "if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction" (whichever is later); admission is prohibited "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect").

157 See, e.g., *United States v. Hernandez*, 106 F.3d 737, 740(7th Cir. 1997) (acknowledging that similarity of prior conviction to charged offense was "a factor that requires caution" but concluding that it was outweighed by "the importance of the credibility issue in this case"); *Alexander*, 48 F.3d at 1488 (stating prior conviction was "not inadmissible per se, merely because the offense involved was

identical to that for which [the defendant] was on trial,” rather “[w]hat matters is the balance of all five factors”); *United States v. Cannady*, No. 95-50207, 1995 WL 216942, at *2 (9th Cir. Apr. 11, 1995) (affirming admission of two prior convictions despite fact that “similarity factor” “weigh[ed] against admission,” because defendant’s “credibility and testimony were central to the case”); *United States v. Causey*, 9 F.3d 1341, 1344(7th Cir. 1993) (noting that substantial similarity of prior conviction to charged offense and limited impeachment value while “important factors” were “not dispositive”); *Beaver & Marques*, supra note 4, at 616 (noting prevalence of rulings allowing defendants to be impeached with crimes similar to charged offense).

¹⁵⁸ This point is neatly summed up by *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991), which explains that “the admission under Rule 609 of a bank robbery conviction in a bank robbery trial is not an abuse of discretion when the conviction serves a proper impeachment purpose, such as when the defendant’s testimony and credibility are central to the case.” See also *Martinez-Martinez*, 369 F.3d at 1088 (affirming district court ruling permitting impeachment with prior conviction even though trial court “did little more than ‘recognize[] the centrality of the credibility issue and the defendant’s testimony’” in justifying its ruling).

¹⁵⁹ In line with the natural passage of legal principles from the appellate courts to the trial courts, it is no surprise that the federal district courts have adopted the flawed analysis that first emerged in post-Luce Rule 609 appellate case law. See, e.g., *United States v. Dismuke*, No. 07-81, slip op. at 2 (E.D. Wis. Nov. 7, 2007) (applying Mahone factors in written ruling on in limine motion, and ruling four prior convictions admissible, in part, because “defendant’s testimony and credibility would be important in this case” and consequently jury will “be called upon to make a determination of his credibility, which may be the critical issue in the case”); *United States v. Hearn*, No. 06-30040, slip op. at 2 (C.D. Ill. Aug. 4, 2006) (concluding based on substance of defendant’s proposed testimony that “fourth factor weighs in favor of admitting evidence of the drug convictions” for impeachment); *United States v. Grimes*, No. 05-30161, slip op. at 2 (S.D. Ill. June 2, 2006) (“agree[ing] with the Government’s assertions as to the importance of [the defendant’s] testimony and the centrality of the credibility issues” and that these factors favor admission of impeachment because his “testimony will likely become a central issue in this case”); *United States v. Vargas*, No. 05-20007, slip op. at 5 (C.D. Ill. May 31, 2006) (reciting five Mahone factors and ruling that impeachment was proper because, inter alia, “there is no dispute that Defendant’s testimony will be important in this case and that Defendant’s credibility will be the central issue if Defendant elects to testify”); *Commonwealth v. Taitano*, No. 01-017, slip op. at 7 (N. Mar. I. Dec. 14, 2005) (“The fourth and fifth factors are the importance of appellant’s testimony and his credibility. If a defendant’s credibility is the central issue of a case, ‘a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater.’”); *United States v. Chesteen*, No. 03-20036, slip op. at 4-5 (W.D. Tenn. June 23, 2003) (discussing in limine ruling permitting impeachment where, after listing five factors, court notes that “[f]rom all indications ... [defendant] will deny knowledge of the drug manufacturing activities in his house if he takes the stand” and consequently “[e]vidence of [defendant’s] prior drug convictions would be particularly relevant and probative as impeachment evidence”); *Crocker v. Dretke*, No. 7:01-087-R, slip op. at 6 (N.D. Tex. Oct. 16, 2003) (concluding in evaluating petition for writ of habeas corpus that “the fourth and fifth factors would have weighed in favor of admitting the ... prior convictions” because when defendant “profess[es] his innocence” “importance of the defendant’s testimony and his credibility escalates as does the need for the State to be afforded the opportunity to impeach his credibility”); *United States v. Jackson*, No. 95-155, slip op. at 2 (N.D. Ill. May 31, 1995) (concluding in in limine ruling that “the importance of [the defendant’s] testimony makes the issue of his credibility equally critical and supports the admission of potentially impeaching evidence”); see also supra note 128.

¹⁶⁰ See *Lipscomb*, 702 F.2d at 1068 n.69 (“[A]ll [circuits] agree that the ultimate standard of review under Rule 609(a)(1) is whether the district court has abused its discretion.”).

¹⁶¹ As discussed in Part IV.A, supra, the Luce decision precludes review, much less reversal, whenever the defendant is deterred from testifying by potential impeachment.

¹⁶² A rough survey of appellate case law evaluating post-Luce district court rulings admitting defendants’ prior convictions under Rule 609(a) reveals only one case (a particularly extreme case at that) during the 13-year span in which a federal appeals court concluded that a district court abused its discretion by admitting a prior conviction. See *United States v. Wallace*, 848 F.2d 1464, 1473(9th Cir. 1988) (holding trial court abused its discretion in admitting remote conviction for heroin trafficking in heroin trafficking prosecution where defendant could be alternatively impeached with prior perjury conviction and trial court “considered expressly only two of the five factors” and “[a]s to one of the factors it considered, the district court incorrectly assumed that the similarity of the prior conviction and the present charges weighed in favor of admissibility”). I was able to locate 47 reported post-Luce appellate opinions

that reached the merits of such trial rulings. In 45 of the cases, the appeals courts concluded that the trial court did not abuse its discretion in admitting challenged convictions. In one other case, the appeals court found no error in the admission of the defendant's conviction, but nevertheless concluded that the district court erred when it made a bungled effort to "sanitize" the conviction by ordering it referred to as a "felony involving a firearm." *United States v. Jimenez*, 214 F.3d 1095, 1096, 1099 (9th Cir. 2000) (reversing because trial court's "attempt to ameliorate the prejudice of the assault with a deadly weapon conviction" by referring to it as "felony involving a firearm" had "the reverse effect"; court's "ruling inadvertently exacerbated [the prejudice] by gratuitously informing the jury that the 'deadly weapon' involved in the defendant's prior conviction was, indeed, a firearm"; and "the main issue in the present case was whether or not the defendant possessed a firearm"); see also 4 Weinstein & Berger, *supra* note 60, § 609.23, at 609-65 (noting that appellate courts "generally affirm the trial court's determination as long as there is some indication that the trial court exercised its discretion by weighing the probative value of the prior conviction against its prejudicial effect"); Wright & Gold, *supra* note 45, § 6134, at 241 (emphasizing that in most cases, where trial courts "at least claimed" to have "considered both probative value and prejudice" "appellate courts usually defer to the decision of the trial court if there is any way to rationalize the balance struck"); Nichol, *supra* note 4, at 397 (arguing that "appellate review of" rulings permitting credibility impeachment "has been limited to cursory determinations that no abuse of discretion has occurred"); Perrin, *supra* note 1, at 656 (asserting that under federal case law, defendants challenging "the admission of [a] prior conviction on appeal" are often "met with a narrow, half-hearted application of Rule 609(a)(1) and a near certain affirmance"); Gainor, *supra* note 148, at 780 (arguing that "[f]ederal courts of appeals have rarely reversed a trial judge's decision to admit evidence of prior convictions for impeachment").

¹⁶³ Cf. Gold, *supra* note 1, at 2298, 2325 (contending that in interpreting Rule 609, "the courts have substituted their own political judgments for those of Congress" and because of careful congressional consideration received by Rule 609, this improper judicial application of Rule "not only distorts the notion of judicial discretion but also inappropriately intrudes upon legislative domain").

¹⁶⁴ Beaver & Marques, *supra* note 4, at 591 (arguing that despite passage of Federal Rules, "[p]rior crime impeachment of criminal defendants continues essentially unabated"); Nichol, *supra* note 4, at 394, 399 (stating that despite "academic fervor" criticizing practice, prior conviction impeachment of criminal defendants has been "largely unabated under the provisions of the Federal Rules of Evidence").

¹⁶⁵ See Bellin, *supra* note 49, at 854-59 (discussing how criminal justice system suffers when large numbers of defendants decline to testify); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1450-51 (2005) (explaining that defendant testimony "has personal, dignitary, and democratic import beyond its instrumental role within the criminal case" as well as "systemic implications for the integrity of the justice process").

¹⁶⁶ *Gordon v. United States*, 383 F.2d 936, 940 & n.11 (D.C. Cir. 1967).

¹⁶⁷ See, e.g., Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 56 (2008) (reporting results of empirical study of 200 post-conviction DNA exonerations in rape and murder cases, and noting that these results provide strong counterpoint to famous suggestion of Judge Learned Hand that "the ghost of the innocent man convicted" is an "unreal dream").

¹⁶⁸ See *Loper v. Beto*, 405 U.S. 473, 482 n.11 (1972); Blume, *supra* note 5, at 17-19 (analyzing data regarding defendants cleared by post-conviction DNA testing and determining that in 39% of those cases defendant did not testify, and 43% of those who did testify were subject to impeachment with prior convictions); *supra* Part I.

¹⁶⁹ This is the approach suggested by one early commentator. See Surratt, *supra* note 62, at 950-51.

¹⁷⁰ Fed. R. Evid. 609(a)(1).

¹⁷¹ *United States v. Lipscomb*, 702 F.2d 1049, 1077 (D.C. Cir. 1983) (MacKinnon, J., concurring specially); 1 McCormick on Evidence, *supra* note 11, § 42, at 198 ("Most prosecutors argue forcefully that it is misleading to permit the accused to appear as a witness of

blameless life, and this argument has prevailed widely.”).

¹⁷² The defense had, in fact, impeached a key government witness with a prior conviction in Gordon, perhaps triggering the amorphous reasoning in that case that led to the centrality of the credibility issue factor. *Gordon v. United States*, 383 F.2d 936, 938-39 (D.C. Cir. 1967); see also *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (funneling Gordon’s analysis into five-factor framework).

¹⁷³ Fed. R. Evid. 609(a)(1).

¹⁷⁴ Application of this presumption would dictate that the severe prejudice inherent in a prior conviction of this type could not be overcome by weak countervailing considerations such as that the conviction is recent or because the defendant’s credibility is important. See, e.g., *United States v. Hernandez*, 106 F.3d 737, 740 (7th Cir. 1997) (recognizing that similarity of prior conviction to charged offense was “a factor that requires caution,” but concluding that factor was outweighed by “the importance of the credibility issue in this case”); *United States v. Walker*, 817 F.2d 461, 464 (8th Cir. 1987) (concluding that prior arson conviction was admissible because it “was within the ten-year time limit prescribed by this rule, and [the defendant’s] credibility was an important factor in the case”); see also *Wright & Gold*, supra note 45, § 6134, at 232 (noting that prejudice will be high “[i]f the crime involved particularly depraved and offensive acts, such as wanton violence or sexual immorality”). Similar or infamous offenses could be rendered less prejudicial as impeachment if “sanitized” so that they are referred to at trial in a generic fashion (e.g., a “prior felony” rather than a “prior child molestation conviction”). Sanitizing convictions to render them admissible is not contemplated by the text of Rule 609, however. See *United States v. Estrada*, 430 F.3d 606, 616 (2d Cir. 2005) (recognizing “overwhelming weight of authority” for proposition that under Rule 609, “inquiry into the ‘essential facts’ of the conviction, including the nature or statutory name of each offense, its date, and the sentence imposed is presumptively required” although “subject to balancing under Rule 403”); *Wright & Gold*, supra note 45, § 6134, at 224 (noting that admitting only “mere fact” of generic felony conviction is difficult to reconcile “with the language and structure of Rule 609”); see also Fed. R. Evid. 609(a) (referencing Rule 403 with respect to admission of convictions for all witnesses except criminal defendants). Consequently, sanitizing a conviction to omit its nature or statutory name (absent agreement of the parties) is more properly viewed as an application of Rule 403 (not Rule 609) and, as such, should be undertaken only after a trial court determination that the conviction is admissible under Rule 609.

¹⁷⁵ In addition, the trial courts may, under Rule 609, consider the fourth Mahone factor (in its original incarnation)--the significance to the trier of fact if the defendant is deterred from testifying by the prospect of impeachment. The “prejudicial effect” in such cases is the notable absence of the defendant’s side of the story from the evidence presented at trial. See *United States v. Oakes*, 565 F.2d 170, 173 (1st Cir. 1977) (analyzing legislative history of Rule 609, and concluding that “Congress plainly felt that justice in certain cases would be advanced if the defendant was not demoralized from taking the stand by fear that a prior conviction would overshadow the positive aspects of his testimony”); *Bellin*, supra note 49, at 890-96 (arguing that district courts should consider value of defendant’s testimony to factfinder in ruling on, inter alia, admission of prior conviction impeachment, and contending that courts possess authority under existing law to exclude impeachment on this ground). Of course, this final consideration is solely relevant at the pretrial stage of the proceedings (where the defendant has not yet testified) and thus would not come into play in cases where a trial court reserves ruling until the defendant’s cross-examination, and will also be inapplicable (per Luce) on appeal. For a discussion of how the significance of this factor would vary based on the defendant’s proposed testimony in any particular case, see *Bellin*, supra note 49, at 895.

¹⁷⁶ *United States v. Cook*, 608 F.2d 1175, 1187(9th Cir. 1979) (en banc), disapproved on other grounds by *Luce v. United States*, 469 U.S. 38, 40 n.3 (1984) (recognizing that where defendant intended to “palm himself off as a peace-loving member of the American Friends Service Committee with interest in prison reform and social protest,” trial court was understandably unwilling to force “the government to sit silently by, looking at a criminal record which, if made known, would give the jury a more comprehensive view of the trustworthiness of the defendant as a witness”); see also *United States v. Bagley*, 772 F.2d 482, 488(9th Cir. 1985) (ruling that district court abused its discretion in admitting impeachment (pre-Luce) because, in part, “the record is devoid of any evidence that [the defendant] intended to misrepresent his character or to testify falsely as to his prior criminal record” and “[t]hus, the impeachment value of [the] prior robbery convictions was quite low”). The relatively anti-impeachment Cook decision, which was decided five years prior to Luce, presents a vivid contrast with the Ninth Circuit’s more recent pro-impeachment rulings. See *United States v.*

**Capra, Daniel 3/23/2018
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Martinez-Martinez, 369 F.3d 1076, 1088 (9th Cir. 2004); *United States v. Alexander*, 48 F.3d 1477, 1489 (9th Cir. 1995). The last federal citation to the Cook dicta quoted in the text appears in a 1981 (pre-Luce) case in the Seventh Circuit. See *United States v. Fountain*, 642 F.2d 1083, 1092(7th Cir. 1981) (citing Cook for “general rule” that “a court should err on the side of excluding a challenged prior conviction”).

¹⁷⁷ *United States v. Lipscomb*, 702 F.2d 1049, 1063 (D.C. Cir. 1983).

¹⁷⁸ An analogous unintentional, but nevertheless flawed, evolution of federal case law is depicted in Richard Posner’s book, *How Judges Think*. Judge Posner chronicles the evolution of an erroneous formula employed by numerous federal courts in interpreting the Fair Labor Standards Act. Posner explains that “[b]ecause so many cases had recited” the formula it became “natural for lawyers and judges to treat it as gospel”; the phrases used by earlier courts were “garbled,” the “garbled form repeated, and the original meaning forgotten.” Richard Posner, *How Judges Think* 243-44 (2008). Posner goes on to urge that judges remain “alert to the possibility that a current legal doctrine may be a mere vestige of historical circumstances and should be discarded.” *Id.* at 247-48.

¹⁷⁹ Cf. *supra* Part II (summarizing legislative intent); *supra* Parts III-IV (critiquing framework).

¹⁸⁰ See *supra* Part IV.

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TAB 9

TAB 9A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Rule on Illustrative Aids and the Treatment of “Demonstrative Evidence”
Date: April 1, 2018

Attached to this memo is an article that proposes an amendment to the Evidence Rules that would specifically treat “demonstrative” or illustrative evidence. The article uses as its poster child case for the need for reform a 2013 opinion from the 7th Circuit, *Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 703 (7th Cir. 2013) (Hamilton, J.). In *Baugh*, the trial court allowed an “exemplar” of the ladder involved in the accident at issue to be presented at trial, but only for the purpose of helping the defense expert to illustrate his testimony. Over objection, the trial court allowed the jury to inspect and walk on the ladder during deliberations. The Seventh Circuit found that while allowing the ladder to be used for illustrative purposes was within the court’s discretion, it was error to allow it to be provided to the jury for use in its deliberations. The court drew a line between exhibits admitted into evidence to prove a fact, and demonstrative exhibits used only to illustrate a party’s argument or a witness’s testimony; it stated that the “general rule is that materials not admitted into evidence simply should not be sent to the jury for use in its deliberations.”

The *Baugh* court hypothesized that the problem it faced might have been caused by the vagueness of the term “demonstrative evidence”:

The term “demonstrative” has been used in different ways that can be confusing and may have contributed to the error in the district court. In its broadest and least helpful use, the term “demonstrative” is used to describe any physical evidence. See, e.g., *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1231 (7th Cir.1996) (using “demonstrative evidence” as synonym for physical exhibits). When the term is used in this way, demonstrative exhibits may range from Shakespeare’s version of Marc Antony’s funeral oration displaying the bloody toga in *Julius Caesar*, as noted in *Finley*, to the knife in *Twelve Angry Men*. As jurors have become more visually oriented, counsel in modern trials seek to persuade them with an ever-expanding array of objects, maps, charts, displays, summaries,

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video reconstructions, computer simulations, and so on. *See United States v. Burt*, 495 F.3d 733, 740 (7th Cir.2007).

As Professors Wright and Miller lament, the term, “demonstrative” has grown “to engulf all the prior categories used to cover the use of objects as evidence.... As a result, courts sometimes get hopelessly confused in their analysis.” 22 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 5172 (2d ed.); see also 5 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 9:22 (3d ed.) (identifying at least three different uses and definitions of the term “demonstrative” evidence, ranging from all types of evidence, to evidence that leaves firsthand sensory impressions, to illustrative charts and summaries used to explain or interpret substantive evidence). The treatises struggle to put together a consistent definition from the multiple uses in court opinions and elsewhere. See 2 McCormick on Evidence § 212 n. 3 (Kenneth S. Broun ed., 7th ed.) (recognizing critique of its own use of “single term ‘demonstrative evidence,’” noting that this approach “joins together types of evidence offered and admitted on distinctly different theories of relevance”).

The *Baugh* court declined to “reconcile” all the definitions of “demonstrative” evidence but did delineate the distinction between exhibits that are admitted into evidence to prove a fact and those that are introduced only to illustrate a witness’s opinion or a party’s presentation.

[If nomenclature might be helpful, the categories could be broken down into (substantive) demonstrative evidence – such as a product demonstration to prove causation or the lack of it – and *illustrative aids* that do just that – illustrate a witness’s testimony or a party’s presentation, e.g., closing argument, summation, etc. That is the line that will be followed in this memo, and in the discussion draft of an amendment discussed below.]

The article uses the *Baugh* case as a springboard for an argument that the Federal Rules of Evidence should address the topic of “demonstrative” evidence on two fronts: 1. The rule should provide a uniform terminology for this evidence, as the term “demonstrative evidence” is currently subject to varying definitions that cover both admissible evidence and illustrative information; and 2. The rule should clarify what can and cannot be submitted to the jury for deliberations (the specific question addressed by the *Baugh* court).

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The authors do not actually propose text for a rule amendment, nor do they specifically suggest where the rule should be located.¹ But they do note that one state, Maine, has a rule that governs “illustrative aids.”

This memo consists of four parts. Part One provides a short description of the case law on “demonstrative evidence” and illustrative aids; it includes a section on the confusion of some courts in distinguishing between summaries (covered by Rule 1006) and illustrative aids. Part Two sets forth Maine Rule 616 and provides some comment on it. Part Three provides a short discussion of the costs and benefits of an amendment and where it might be placed. Part Four sets forth a drafting alternative. Familiarity with the attached article is presumed.

This memo is intended to be an introduction to the subject. If the Committee is interested in further consideration of a possible amendment, a supporting memo with a more formal proposal will be submitted for the next meeting.

I. Federal Case Law on “Demonstrative Evidence” and “Illustrative” Evidence

As indicated by the court in *Baugh*, and by the authority it cites, there is no single definition for the term “demonstrative” evidence; and it is of course not optimal to have a term bandied about to cover a number of different evidentiary concepts – everything from physical evidence in the case, to evidence offered circumstantially to prove how an event occurred, to information offered as an illustrative aid, i.e., a pedagogical device to assist the jury in understanding a witness’s testimony or a party’s presentation. The fluidity of

¹ At one point the authors suggest an addition to Rule 403 – a subdivision (b) that would provide a balancing test for whether exhibits should be submitted to the jury. But messing around with Rule 403 to deal with the narrow problem of illustrative evidence seems like rulemaking heresy. At another point they suggest a Committee Note, that could be added to some rule, without accompanying rule text. That option is definitely rulemaking heresy. It is contrary to 28 U.S.C. §2073(d), which contemplates that committee notes are to be issued only in accompaniment with rule changes.

At another point the authors suggest that a provision be added, presumably to Rule 101, to define “evidence” – because illustrative aids are not, in their opinion, currently within any definition of “evidence.” But a proposal to define what is “evidence” seems to be a project that is way too late in the game; it could also could lead to the need to amend other rules, such as Rule 611(a), which refers to the court’s authority to control the presentation of “evidence” but which has been used more broadly to allow trial court control over information that is not directly admissible as evidence, such as pedagogical charts, and questioning by jurors. *See, e.g., United States v. Stiger*, 371 F.3d 732 (10th Cir. 2004) (presentation of summary charts, not admissible under Rule 1006, was permissible under Rule 611(a) because they assisted the jury in synthesizing testimony in a complex trial); *United States v. Bush*, 47 F.3d 511 (2d Cir. 1995) (relying on Rule 611(a), stating that trial court has discretion to allow jurors to ask questions, but imposing limitations on the practice).

the nomenclature can certainly lead to problems like that found in *Baugh*, where the trial court started out on the right path in allowing the ladder to be introduced to help illustrate the expert’s testimony, but then switched tracks and treated it as “demonstrative” evidence of a fact.

A. General Description of the Case Law

What follows is a general description of the case law on “demonstrative evidence” and “illustrative aids”:

1. For evidence offered to prove a disputed issue of fact, it must 1) withstand a Rule 403 analysis of probative value balanced against prejudicial effect; 2) satisfy the hearsay rule; and 3) be authenticated. Rule 403 is usually the main rule that comes into play when the term “demonstrative” is used. The question will be whether the demonstration is similar enough to the facts in dispute that it withstands the dangers of prejudice and jury confusion it presents. If the evidence satisfies Rule 403 and it is in tangible or electronic form, it will be submitted to the jury for consideration as substantive evidence during deliberations.

2. For information offered only for pedagogical or illustrative purposes, the trial judge has discretion to allow it to be presented, depending on how much it will actually assist the jury in understanding a witness’s testimony or a party’s presentation; that assessment of assistance value is balanced against how likely the jury might misuse the information as evidence of a fact as well as other factors such as confusion and delay. This balance is conducted by most courts explicitly under Rule 403, but some courts also cite Rule 611(a), providing the trial court the authority to exercise “reasonable control over the mode and order of examining witnesses and presenting evidence.” It is clear, however, that Rule 403 prevents the court from admitting a pedagogical aid where the risk of prejudice, confusion and delay substantially outweigh its helpfulness in understanding a witness’s testimony or a party’s presentation. That is because Rule 403 runs underneath all the rules of evidence, including Rule 611(a), unless its application is specifically altered or prohibited.² The bottom line is that the aid cannot be unfairly representative, as that could lead the jury to confusion or to draw improper inferences.

² The authors intimate that Rule 403 is not applicable to illustrations and pedagogical devices because they are not “evidence” and even if they were, they would not be “relevant” to prove a fact in dispute and so they are not admissible under Rule 401. But that is surely a hypertechnical view that gets you nowhere. Rule 611(a) is grounded in the presentation of “evidence” as well. So the conclusion from this view is that there is no rule that regulates the presentation of information offered to illustrate a point. If a party wants to bring a circus in to illustrate a breach of contract, the court is powerless to respond. That just cannot be, and as will be seen below, the courts have not at all considered themselves hamstrung in regulating information offered for pedagogical or illustrative purposes.

If the information satisfies this balancing test, it is presented at trial, but, as the court held in *Baugh*, it may not be given to the jury for use in deliberations. Though if you ask individual judges, you will find that many believe they have the discretion to allow the jury to use pedagogical aids, powerpoints, etc. in their deliberations. And as seen below, there is some dispute in the courts on this point.

3. There is another related type of evidence that raises the substantive/pedagogical line: summaries and charts. Here, the line is the same though there is an additional rule involved: Rule 1006 covers summaries if they are to be admitted substantively. The conditions for admission under Rule 1006 are: 1) the underlying information must be substantively admissible; 2) the evidence that is summarized must be too voluminous to be conveniently examined in court; 3) the originals or duplicates must be presented for examination and copying by the adversary. Rule 1006 summaries of the evidence are distinct from illustrative aids, which are not offered into evidence to prove a fact. *See, e.g., United States v. Posada-Rios*, 158 F.3d 832, 835 (5th Cir. 1998) (“Since the government did not offer the charts into evidence and the trial court did not admit them, we need not decide whether ... they were not admissible under Fed. R. Evid. 1006 Where, as here, the party using the charts does not offer them into evidence, their use at trial is not governed by Fed. R. Evid. 1006.”); *White Indus. v. Cessna Aircraft Co.*, 611 F. Supp. 1049 (W.D. Mo. 1985) (“[T]here is a distinction between a Rule 1006 summary and a so-called ‘pedagogical’ summary. The former is admitted as substantive evidence, without requiring that the underlying documents themselves be in evidence; the latter is simply a demonstrative aid which undertakes to summarize or organize other evidence already admitted.”). Summaries offered for non-substantive purposes are admissible subject to Rule 611(a) and 403. That is to say they may be considered by the factfinder so long as they are consistent with the evidence and not misleading. *See, e.g., United States v. Wood*, 943 F.2d 1048 (9th Cir. 1991) (in a complex tax fraud case, the trial court allowed a government witness to testify to his opinion of Wood’s tax liability, as summarized by two charts, but prohibited the defendant’s witness from using his own charts; Rule 1006 was not applicable, because the charts were pedagogical devices and not substantive evidence; the court found no error in allowing the use of the prosecution’s chart but prohibiting the use of the defense’s chart, because the prosecution’s chart was supported by the proof, while the chart prepared by the defense witness was based on an incomplete analysis). *See also United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991) (the defendant’s summaries were properly excluded because they did not fairly represent the evidence).³

³ The court in *United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998), gives some helpful guidance on the use of pedagogical aids, as distinct from summaries that are admitted under Rule 1006:

We understand the term “pedagogical device” to mean an illustrative aid such as information presented on a chalkboard, flip chart, or drawing, and the like, that (1)

But as stated in *Baugh*, when summaries are offered only for illustration, the general rule is that they should not be submitted to the jury during deliberations. *See, e.g., Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 421 (5th Cir. 1985) (distinguishing between summaries that are admitted under Rule 1006 and “other visual aids that summarize or organize testimony or documents that have already been admitted in evidence”; concluding that summaries admitted under Rule 1006 should go to the jury room with other exhibits but the other visual aids should not be sent to the jury room without the consent of the parties).

B. Areas of Confusion or Disagreement⁴

One area of confusion and disagreement is over whether the court ever has discretion to send an illustrative aid to the jury over a party’s objection. The *Baugh* court finds that it was error to do so. *See also United States v. Harms*, 442 F.3d 367, 375 (5th Cir.2006) (stating that illustrative aids “should not go to the jury room absent consent of the parties”); *United States v. Janati*, 374 F.3d 263, 272–73 (4th Cir. 2004) (pedagogical devices are considered “under the supervision of the district court under Rule 611(a), and in the end they are not admitted as evidence”). But *United States v. Robinson*, 872 F.3d 760, 779–80 (6th Cir. 2017), suggests some confusion in the courts about the discretion of the trial judge to send unadmitted exhibits to the jury room. In that case, the defendant argued that that district court abused its discretion when it sent illustrative aids to the jury during deliberations that had been displayed to the jury during the testimony of a government witness, but had not been admitted into evidence. Over a defense objection, the district court sent these aids to the jury in response to the jury’s request to have them, but also read a pattern jury instruction stating that “[the demonstrative aids] were offered to assist in the presentation and understanding of the evidence” and “[were] not evidence [themselves] and must not be considered as proof of any facts.” The Sixth Circuit stated that “the law is unclear as to whether it is within a district court's discretion to provide a

is used to summarize or illustrate evidence, such as documents, recordings, or trial testimony, that has been admitted in evidence; (2) is itself not admitted into evidence; and (3) may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary’s proponent. This type of exhibit is more akin to argument than evidence since it organizes the jury’s examination of testimony and documents already admitted in evidence. Trial courts have discretionary authority to permit counsel to employ such pedagogical-device “summaries” to clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury. This court has held that Fed.R.Evid. 611(a) provides an additional basis for the use of such illustrative aids, as an aspect of the court’s authority concerning the mode of interrogating witnesses and presenting evidence.

⁴ Thanks to Professor Richter for her research and assistance on this section.

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deliberating jury with demonstrative aids that have not been admitted into evidence.” The court found it unnecessary to decide this point because any error was harmless given that the summaries sent to the jury merely reiterated evidence already admitted at trial. But the court in *Trebmal Constr., Inc. v. Dover Elevator Co.*, No. 89-4126, 1991 WL 165659, at *2 (6th Cir.) suggests that trial judges have discretionary authority to send unadmitted demonstrative aids to the jury room during deliberations.⁵

Beyond the case law, discussion with individual trial judges seems to show disagreement about whether illustrative aids can be sent to the jury over a party’s objection. I’ve spoken to about 20 judges on this matter, and more than half said that they have on occasion submitted illustrative aids to the jury – sometimes after a jury’s request.

The second area of confusion regards the distinction between summaries of evidence under Rule 1006 and illustrative aids. Professor Richter states that “some district courts struggle with the basic distinctions between summaries admitted under Rules 611(a) and 1006 and the requirements that must be satisfied for the application of each rule.” *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013), for example, suggests that the trial court was confused about the distinction between a Rule 611(a) summary and a Rule 1006 summary when it instructed the jury that an admitted Rule 1006 summary was “not evidence.” The court stated that the instruction was appropriate for a Rule 611(a) summary, not a Rule 1006 summary – as discussed above, Rule 1006 charts are most certainly evidence.

United States v. Milkiewicz, 470 F.3d 390, 395–98 (1st Cir. 2006), also suggests that there has been confusion in the trial courts with respect to the basic distinction between Rule 611(a) pedagogical aids and Rule 1006 summaries. In that case, the trial court refused to admit a summary that otherwise would have qualified under Rule 1006 because many of the underlying documents had been admitted at trial. The First Circuit held that the admission of underlying documents does not foreclose use of Rule 1006 if all the requirements of the Rule are otherwise satisfied. The court went to great lengths to clarify the distinction between Rule 611(a) summaries and Rule 1006 summaries, as follows:

In deciding whether-and how-to admit the Transactions and Tax summaries offered by the government, the district judge carefully reviewed our precedent on summary evidence and, during a lengthy explanation from the bench, admitted that he was perplexed. * * * Noting that “this is an area

⁵ In *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F. Supp. 2d 136, 140 (E.D.N.Y. 2004), Judge Jack Weinstein also suggested that pedagogical devices and summaries not within Rule 1006 could be admitted into evidence and sent to the jury room in appropriate cases. He states that increased flexibility in the use of educational devices “will probably result in courtroom findings more consonant with truth and law” and so whether designated as “pedagogical devices” or “demonstratives,” this material “may be admitted as evidence when it is accurate, reliable and will assist the factfinder in understanding the evidence.”

where it would be helpful for the Court to provide some clarification to district judges,” he urged the First Circuit to consider “a slightly different approach” than he believed our case law required. Having done our own review, we agree that our precedent is somewhat opaque—a reflection, we believe, of the intricacies of the law generally—and we further agree with the district court’s assessment of the correct approach to Rule 1006 summaries. Also, a proper understanding of the evidentiary rules applicable to summaries is important because the basis for admission can affect how a summary is used, including whether a jury may rely on it as primary evidence and whether it is allowed in the jury room during deliberations.

* * *

In a case where voluminous underlying records are involved, the key difference between these various approaches appears to be the purpose for which the summaries are offered. Charts admitted under Rule 1006 are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently, they must fairly represent the underlying documents and be “accurate and nonprejudicial.”

By contrast, a pedagogical aid that is allowed under Rule 611(a) to illustrate or clarify a party’s position * * * may be less neutral in its presentation. Record support is necessary because such devices tend to be “more akin to argument than evidence,” and “may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary’s proponent.” In some cases, however, such pedagogical devices may be sufficiently accurate and reliable that they, too, are admissible in evidence, even though they do not meet the specific requirements of Rule 1006.

In sum, while the distinction between demonstrative evidence and illustrative aids can be clearly stated, there remains some confusion about whether an illustrative aid can be sent to the jury. And while the distinction between an illustrative aid and a Rule 1006 summary can be articulated, there are some problems in line-drawing.

II. Maine Rule 616

Maine Rule of Evidence 616 is the only rule of evidence in the country that is specifically designed to treat any aspect of “demonstrative” evidence. Specifically it is designed to regulate the use of evidence referred to in this memo as “illustrative” or

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“pedagogical” i.e., offered to assist the jury in understanding a witness’s testimony or a party’s argument. Rule 616 is entitled “Illustrative Aids”; and its placement as Rule 616 indicates an attempt to place it close to Rule 611(a), the rule that many courts have cited as a source of authority for admitting illustrative information.⁶

Maine Rule 616 provides as follows:

Rule 616. Illustrative Aids

- (a) Otherwise inadmissible objects or depictions may be used to illustrate witness testimony or counsel’s arguments.
- (b) The court may limit or prohibit the use of illustrative aids as necessary to avoid unfair prejudice, surprise, confusion, or waste of time.
- (c) Opposing counsel must be given reasonable opportunity to object to the use of any illustrative aid prepared before trial.
- (d) The jury may use illustrative aids during deliberations only if all parties consent, or if the court so orders after a party has shown good cause. Illustrative aids remain the property of the party that prepared them. They may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.

Comment: This seems to be a helpful and clear statement about how illustrative evidence should be treated. It could be improved in a few ways, however:

- 1) Subdivision (b) could more clearly track the Rule 403 test, e.g., “the court may limit or prohibit the use of an illustrative aid if its value in assisting the jury is substantially outweighed by the risk of unfair prejudice, confusion or delay.”
- 2) The last three sentences of subdivision (d) should be a separate subdivision as they are about a different matter than the first sentence. The first sentence is about allowing the jury to use the aid in deliberation. That should be a separate point. The remaining three sentences are about procedural details.

⁶ If placement near Rule 611(a) was the goal, one might think a better choice would have been to make it part of Rule 611(a) itself. That possibility is explored for a Federal Rule in the next section.

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- 3) If you’re going to all the trouble to write a specific rule, you should include a requirement that the court must upon request give a limiting instruction as to the proper use of the illustrative aid.
- 4) Under federal rulemaking, the subdivisions would each need a caption.

Maine Rule 616 contains a substantial and detailed Committee Note. It’s as if the Rule, which is relatively spare and pretty obvious, was an excuse for a “best practices” Committee Note.

The Committee Note to Maine Rule 616 provides as follows:

This rule is intended to authorize and regulate the use of “illustrative aids” during trial.

Objects, including papers, drawings, diagrams, the blackboard and the like which are used during the trial to provide information to the finder of fact can be classified in two categories. The first category, admissible exhibits, are those objects, papers, etc., which in themselves have probative force on the issues in the case and hence are relevant under Rule 401. Such objects are admissible in evidence upon laying the foundation necessary to establish authenticity and relevancy and to avoid the strictures of the hearsay rule and other evidentiary screens. Usually the jury is permitted to take these objects with them to the jury room, to study them and to draw inferences directly from them relating to the issues in the case.

The second class of objects are those objects which do not carry probative force in themselves, but are used to assist in the communication of facts by a lay or expert witness testifying or by counsel arguing. These may include blackboard drawings, pre-prepared drawings, video recreations, charts, graphs, computer simulations, etc. They are not admissible in evidence because they themselves have no relevance to the issues in the case. Their utility lies in their ability to convey relevant information which must be provided directly from some actual evidentiary source, whether that source be witness or exhibit which is admissible in evidence. The ultimate credibility and scope of the information conveyed is that of the source, not that of the illustrative media.

This latter group of objects can be referred to as “illustrative aids.” Sometimes they have been referred to as “demonstrative exhibits” or even “chalks.”

Frequently voluminous evidentiary data is summarized in tabular, or even graphic form, and is offered as a summary under Rule 1006. A summary which presents the data substantially in its original form would be admissible in evidence. A summary which presents the data in a tabular or graphic form to “argue” the case or support specific inferences would be an illustrative aid and would be governed by this rule.

While such aids do not have evidentiary force in themselves, they can be extremely helpful in assisting the trier of fact to visualize evidentiary material which is otherwise difficult to understand. For the same reason, illustrative aids can also be subject to abuse. Sometimes the form of the illustrative may be grossly or subtly distorted to “improve” upon the underlying testimony, to oversimplify, or to provide subliminal messages. The opportunity for inventiveness and creativity in illustrative aids may exaggerate the effect of disparities in financial resources between parties.

The proposed rule addresses some of the most common issues associated with the use of illustrative aids.

First of all, Rule 616(a) permits the use of illustrative aids for the purpose of illustrating the testimony of witnesses or the arguments of counsel. In the case of witness testimony, the foundation for the use of an illustrative aid would be testimony to the effect that the aid would assist the witness in illustrating her testimony. It is clear that the object need not be admissible in evidence to be useful as an illustrative aid. Thus there is no need to establish the authenticity of an illustrative aid or even its accuracy as long as it has no probative force beyond that of illustrating a witness’s testimony.

Paragraph (b) of the proposed rule makes clear, however, that the court retains the discretion to condition, restrict or exclude the use of any illustrative aid in order to avoid the risk of unfair prejudice, surprise, confusion or waste of time. This is similar to the discretion exercised by the court under Rule 403 in dealing with objects which are admissible in evidence. Because of the multiplicity of potential problems which may be encountered, it is deemed wiser to allow the court a measure of discretion in applying general standards rather than to establish a legal test for utilization of these media.

Some of the problems associated with the use of illustrative aids can include the following:

1. Cases where the illustrative aid is so crafted as to have probative force of its own. Few people would attribute much probative force to a blackboard drawing which is used to illustrate a witness’s testimony. However, with a precisely drawn chart, or even more a computer video display, the perceived quality of the media may impart to the information conveyed a degree of authority, accuracy and credibility much greater than the source from which the information originally came. If the court finds that the use of illustrative aids results in a “dressing up” of testimony to a level of perceived dignity, accuracy or quality greater than it deserves and this works an unfair prejudice, the aid could be limited or excluded under Rule 616(b).

2. Sometimes illustrative aids are used to take advantage of and heighten a disparity in economic resources. The entertainment quality of certain media may give an edge to a wealthy litigant which is entirely unjustified by the actual facts.

3. There is risk that the jury may draw inferences from the illustrative aids different from those for which the illustrative aid was created and offered. This is especially likely to be a risk if the jury takes the aids with them in the jury room to experiment with or scrutinize.

4. Use of illustrative aids often makes a more informative visual presentation which is difficult to capture on an oral record. Problems of ownership and control of the aids may make it impossible to document in the transcript a meaningful record on appeal.

5. Ordinary discovery procedures concentrate on the actual information possessed by the witnesses and known exhibits. Illustrative aids as such are not usually subject to discovery and often are not prepared far enough in advance of trial. Their sudden appearance at trial may not give sufficient opportunity for analysis, particularly if they are complex, and may cause unfair surprise.

Illustrative aids may themselves become issues in the case leading to waste of time quibbling over the fairness of the illustrative aid, or battles between opponents marking up each other’s illustrative aid, and the like.

One of the primary means of safeguarding and regulating the use of the illustrative aids is to require advance disclosure. The rules proposes that illustrative aids prepared before use in court be disclosed prior to use so as to permit reasonable opportunity for objection. The rule applies to aids prepared before trial or during trial before actual use in the courtroom. Of

course, this would not prevent counsel from using the blackboard or otherwise creating illustrative aids right in the courtroom.

“Reasonable opportunity” for objection means reasonable under the circumstances. In a case where the aid is simple and is generated shortly before or even during trial, disclosure immediately before use would allow reasonable opportunity for the opponent to check out the aid. On the other hand counsel proposing to use a computer simulation or other complex illustrative media should be expected to make the aid and any information necessary to check its accuracy available sufficiently far in advance of use so as to permit a realistic appraisal and understanding of the proposed aid. The idea is to permit opposing counsel the opportunity to raise any issues of fairness or prejudice with the court out of the presence of the jury and before the jury may have been tainted by the use of the illustrative aid. This requirement of prior disclosure should be applied to both prosecution and defense in criminal cases consistent with constitutional rights of criminal defendants. The rule also provides that illustrative aids are not to go to the jury room unless all parties agree or unless the court orders. In many cases, it is likely that the parties will agree that certain illustrative aids might go to the jury room to aid the jury in their understanding of the issues. In other cases, it is possible that, despite the protest of one party, the court may determine that the jury’s consideration of the issues might be so aided by an illustrative aid used during the trial that it should go with the jury to the jury room. But in the absence of such agreement or specific order, the residual rule would be that illustrative aids may be used in the courtroom only.

A recurrent problem with the use of illustrative aids arises from the fact that these are often proprietary items prepared by a particular party to give that party an advantage in the courtroom presentation. However, when a witness has relied heavily on an illustrative aid in giving her testimony, it is often impossible to cross-examine that witness effectively without the use of the same illustrative aid. Similarly, if an illustrative aid has been important in the presentation of one side, the other side ought to have access to that illustrative aid in meeting the testimony illustrated. “Use” of an illustrative aid does not mean despoiling it. Mutual courtesy and respect, reinforced if necessary by court supervision and aided by mylar overlays and the like, should suffice to preserve each party’s illustrative aids from detracting markings by opposing counsel or witnesses.

The authorization here provided for the use of non-admissible “illustrative aids” does not prevent a party from using an actual probative exhibit also as an illustrative aid. For instance, a witness might be asked to indicate by marking on a photograph the location of an object which was

not present at the time the photograph was taken. The photograph, as an exhibit, would be probative in itself. The jury could draw inferences directly from it. But the marks added by the witnesses would be a visual form of witness testimony. The preservation of that particular testimony in visual form for later inspection by the jury during deliberations might give that testimony undue weight and durability under the circumstances. Thus the court would have the discretion under this rule to withhold from the jury room an exhibit to which illustrative markings had been added if the markings would give undue weight to a witness’s testimony on a disputed issue or otherwise would have some unfairly prejudicial effect.

The court would also have the discretion under this rule to restrict or prohibit marking on an evidentiary exhibit if the effect would be to remove the exhibit from the jury room during deliberations. Thus, if a counsel wishes to mark or to enhance an admitted exhibit or add additional material as an illustrative aid, it probably should be done on another counterpart of the exhibit or with a mylar overlay or some other suitable removable means so that the exhibit could be considered in the jury room in its original state.

Reporter Comments

This Committee Note is pretty darned helpful, though much more detailed than Federal Notes have been in recent years. If an amendment is thought to be necessary to cover “demonstrative” evidence and illustrative aids, there is much from this Note that could be used. The text and the Note together seem helpful in working out some of the nomenclature – differentiating “demonstrative” evidence writ large and vaguely, and the more particularized problem that is at the heart of the cases, which is regulating illustrative information and preventing it from going into the deliberation room if it is introduced at trial.

The authors of the article criticize Rule 616 as being “analytically infirm” because it allows “irrelevant” information to be presented at trial, despite the bar of Rule 402. The proper criticism is not that supposed analytical infirmity, but that the note simply has it wrong in concluding that an illustrative aid is “irrelevant.” Relevance is defined as evidence that has any tendency to make a fact more or less probable than it would be without the evidence. An illustrative aid, to the extent it assists the jury in understanding the testimony of a witness or the presentation of a party, does exactly that – it makes it more likely than without the information that the jury will find a fact in favor of the party who presents the illustration. Everybody knows that the definition of “relevance” under Rule 401 is intended to be broad, so why shouldn’t it cover illustrative evidence that improves the offering party’s presentation of facts in dispute? The Committee Note to

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Rule 401 clearly supports a conclusion that illustrative aids can be relevant even though not offered directly to prove a fact in dispute. The Committee Note states:

Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs * * * and many other items of evidence fall into this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.

So instead of using the term “irrelevant” the Maine Committee Note would have been better off saying something like “not offered to prove directly any fact in dispute.”

The authors of the article keep getting stuck by the technicality that illustrative evidence is declared at the outset to be “not admissible” because “irrelevant” but then it is subject to a second, “shadow Rule 403” test to determine whether it can be admitted anyway – but not formally so, and not for purposes of jury deliberation. In fact this seems all perfectly understandable in terms of what we mean by “relevant” – speaking broadly as the rule intends – and by the fact that the Rule 403 balancing always works differently depending on the purpose for which the evidence is offered. If it is offered to prove a fact in dispute, the question is its probative value in proving that fact, balanced against the risk that the jury will be confused or unfairly prejudiced. Generally in the case of demonstrative evidence of a fact in dispute the prejudice will mean that the jury will make more of the evidence than it is really worth (because, for example, there are differences between the demonstration and the actual event that the jury might gloss over, as in *Fusco*).⁷ If the information is offered for illustrative purposes only, then the Rule 403 balance is to figure out probative value (how helpful it is to the jury in understanding a witness’s testimony or a party’s argument) against the risk of prejudice or confusion (which in this instance is likely to mean that the jury may actually consider the information as proof of a fact asserted in it).⁸

There seems to be no reason to get hung up on the theoretical question of “what is evidence” and “what is relevance”? Certainly the courts are not doing that kind of evidentiary navel-gazing. So the question of adding a rule on demonstrative evidence is

⁷ But there could also be unfair prejudice from the demonstration itself in some cases involving extreme or inflammatory conduct. See, e.g., *United States v. Gaskell*, 985 F.2d 1056, 1063 (11th Cir. 1993) (in a case involving shaken baby syndrome, the trial court erred in allowing an expert to shake a doll with a higher degree of force than would have been necessary to cause the syndrome in a real baby).

⁸ And again, there might be unfair prejudice from the presentation itself. For example, the presentation in *Gaskell*, note 6 supra, purported to be a scientific illustration on how shaken baby syndrome occurs.

instead whether it would be helpful to solve a real problem. If so, Maine Rule 616 would appear to be a good starting point toward a rule, with the provisos discussed above, and recasting the problem as one not of “irrelevant” evidence but rather as evidence not offered to prove any fact that is asserted in the presentation.

III. Costs and Benefits of a Rule on Demonstrative Evidence

The costs and benefits of an amendment would definitely depend on what the amendment would be trying to do. If the intent is to define “evidence” and resolve the supposed conundrum of making “irrelevant” evidence admissible, then there is little benefit balanced against the general costs of an amendment – i.e., transaction costs of learning the new rule. The benefit of such an amendment is slight because the courts are definitely not being tripped up by the supposed conceptual difficulties that haunt the authors. And the courts are rightly not being tripped up because Rule 401’s broad definition of relevance comfortably accommodates illustrative evidence that is helpful to the jury’s understanding.⁹

On the other hand, if the goal is to try to provide some clarity and procedural regulation – and user-friendliness – to the use of illustrative aids, then it is possible to conclude that an amendment could well be helpful. It would be a clarification, and creation of a convenient location for standards, as opposed to a change in the law. It would certainly help the neophyte figure out the limits of Rule 1006 and the distinction between summaries admissible under that rule and illustrative aids. And it would mean that the neophyte would not have to master the case law distinguishing “demonstrative evidence” offered to prove causation from other demonstrations that are offered only to illustrate an expert’s opinion or the party’s argument. Finally, while the courts are generally hewing to the line between substantive evidence and illustrative aids, it is undeniable that the terms used are often slippery and vague, and that mistakes are sometimes made, as in *Baugh*. And as noted above, there are some contrary cases providing that illustrative aids can be sent to the jury over an objection. So in particular it might be valuable to provide in a rule that if information is admitted only for illustrative purposes, it cannot be provided to the jury in deliberation unless all parties agree. That limiting principle would not only be a helpful statement but would also resolve whatever conflict exists in the case law. Moreover, that limiting principle is already found in Rules 803(5) and 803(18) – which are both designed

⁹ It should be noted that the original Advisory Committee Note to Rule 611(a) states that the rule is a source of authority for regulating “the use of demonstrative evidence” and it seems clear that by the citation to McCormick the Advisory Committee was thinking of evidence that is used for illustrative purposes. If that is so, was the Advisory Committee just plain wrong in thinking that a court should be allowed to admit “irrelevant” evidence? That seems unlikely. The point is that the Advisory Committee saw nothing inconsistent with Rule 401 and the possibility of admitting helpful illustrative information. That is especially so given the Rule 401 Committee Note indicating that “illustrative” evidence could be found relevant even though not offered to prove a fact in dispute.

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to prevent the jury from being more influenced by the information than should be permitted given the purpose for which it is offered (in those cases the hearsay is offered as trial testimony, which is not provided to the jury in deliberations). Thus, a rule preventing use of certain evidence by jurors in deliberations is not foreign to the Evidence Rules.

(Though of course all this presumes that the principle is correct on the merits, i.e., that a court should not have the discretion to send an illustrative aid into the jury room. There appears to be some disagreement on that question among district judges. In which case the value of an amendment would lie in resolving the question on the merits and providing a uniform result).

The cost of such an amendment is not zero – because an amendment by definition imposes transaction costs. But there is an upside in providing guidance in what courts and commentators have recognized is a difficult and complex area.

Assuming an amendment to address illustrative aids would be a worthwhile addition, the question is where to put it. As stated above, adding a Rule 616 is an understandable move, but perhaps a better place is Rule 611(a) itself. That is where the Advisory Committee thought the court’s authority to admit illustrative information would lie.¹⁰ That is where the federal courts have found the authority to regulate summaries that are offered only as pedagogical aids rather than proof of the underlying records. As seen below, adding a new subdivision to Rule 611(a) would require renumbering/relettering of the existing rule. But that should not be too much of a disrupting factor to electronic searches and the like. For one thing, Rule 611(a) is rarely cited. For another, the current enumeration within Rule 611(a) has only been in effect for 6 years – it was a part of the Restyling effort.

Application in the Maine Laboratory – Costs and Benefits?

The Maine practice under Rule 616 might give some indication of whether a similar amendment to the Federal Rules would be useful. There is an intangible, though: the effect would not be in result as much as in nomenclature and user-friendliness. With that proviso, here is a discussion of the handful of reported decisions on Maine Rule 616:

Irish v. Gimbel, 743 A.2d 736 (Me. 2000): In a medical malpractice case, the trial judge allowed the defendant to use a two foot by three foot blowup of the finding of a medical malpractice panel. The court held that under Rule 616, this blowup could be used by counsel in argument, but could only be put up while counsel was referring to it. In the previous trial in this case, the court had found error under Rule 616 when the blowup was

¹⁰ See Advisory Committee Note to Rule 611(a), discussed in Note 8, *supra*.

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left facing the jury during the entirety of the trial. The case did not present the question of submitting the illustrative aid to the jury during deliberations.

Merrill v. Sugarloaf Mtn. Corp., 745 A.2d 378 (Me. 2000): The plaintiff was injured on a ski slope and brought an action against the ski resort. The defendant was allowed to use an illustrative aid depicting unrelated areas of the ski slope for the purpose of educating the jury on the difference between groomed and ungroomed snow conditions. The court found no error, saying only that under Rule 616, “use of an illustrative aid is within the trial court's discretion.” There was no issue about submitting the aid to the jury.

State v. Irving, 818 A.2d 204 (Me. 2003): The defendant was charged with vehicular manslaughter. At trial the government was allowed to put up the high school graduation photo of the victim during its opening argument. It was a blowup placed on an easel and it was taken down after the opening. The court found no error under Rule 616 and had this to say:

An illustrative aid is a depiction or object which illustrates testimony or argument. M.R. Evid. 616(a). It does not go into the jury room unless counsel agree or by order of the court for good cause. While it does not have to meet the requirements of admissibility, *id.* 616(a), it has to be related to the testimony or argument which it illuminates. When used to illustrate argument, the aid must not be used for an improper purpose just as an opening statement or closing argument cannot contain improper references. * * * An illustrative aid used during argument that diverts a jury from the evidence or injects a risk of unfair prejudice would be improper.

Because there is no transcript of the State's opening statement, there is nothing in the record that demonstrates that the State did not relate its display of the photograph to its statement. Furthermore, on this record, neither an improper purpose for displaying the photograph nor a risk of unfair prejudice is apparent. Irving argues that the photograph risked sidetracking the jury into comparing the defendant and the victim, but nothing in this record supports that assertion. By allowing the State a narrowly restricted use of Massey's photograph, the court did not abuse its discretion. The court obviously retained control over the manner in which the State used the photograph and could have restricted its use further if the State's comments about it during the opening statement gave the court concern about improper use or unfair prejudice.

Thus the court made clear that the decision to allow an illustrative aid is a question to be decided under Rule 403-type principles.

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Jacob v. Kippax, 10 A.3d 1159 (Me. 2011): In a medical malpractice action, as in *Irish, supra*, defense counsel used a blowup of the medical malpractice panel opinion, this time during closing argument. The court found no error, stating that “the display of the enlargement for limited periods during Kippax’s closing * * * was permissible pursuant to *Irish* and M.R. Evid. 616, which allows the use of illustrative aids in certain circumstances.”

State v. Corbin, 759 A.2d 727 (Me. 2000): In a trial on charges of theft and tax evasion, the government used a summary chart that was an enlargement of a list of several checks used by the defendant to embezzle funds. That chart was allowed into the jury room for deliberations. The court found no error because the chart was offered as evidence of acts of the defendant. So as it was not being used as an illustrative aid, and Rule 616 was inapplicable.

Summary Comment on Maine Cases

It appears that since 1997, when Rule 616 was enacted, there has been very little (reported) litigation over its meaning or application. This may be due to the fact that the line between illustrative aid and demonstrative evidence that is substantive proof is one that can be fairly easily understood, and also because the Rule serves more to clarify and provide a location for the law on the subject, rather than to change it.

The Committee has “sources” in Maine that can be tapped to see how the rule is working at the trial court level. If the Committee wishes to proceed further with considering an amendment like Maine Rule 616, those sources will be contacted before the next meeting.

IV. A Draft for Consideration

What follows is a possible draft and Committee Note for a new Rule 611(a)(2). It could also be a freestanding rule, as in Maine, but as discussed above it would seem to be best placed in Rule 611(a) itself.

The draft uses Maine Rule 616, and its extensive Committee Note, as a model, but it makes a number of changes in light of the comments and suggestions strewn throughout this memo.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes.

(1) In General. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

~~(1)~~**(A)** make those procedures effective for determining the truth;

~~(2)~~**(B)** avoid wasting time; and

~~(3)~~**(C)** protect witnesses from harassment or undue embarrassment.

* * * * *

(2) Illustrative Aids. Any kind of information may be used as an illustrative aid for a witness’s testimony or the proponent’s presentation if:

(A) its utility in helping the jury to understand the testimony or presentation is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence;

(B) all adverse parties are notified in advance of its use and given a reasonable opportunity to object to its use; and

(C) it is not provided to the jury during deliberations unless all parties consent.

Comments

1. Maine Rule 616 talks in terms of illustrative aids as being “otherwise inadmissible” but that is what gets everyone confused. The benefit of a new rule would be to get courts and parties thinking directly about a different kind of “evidence” – offered only to illustrate – the consequence of which is that the information is presented only for that purpose at trial and then is kept from the jury during deliberations. (In the same way that lawyers and witnesses are kept from the jury during its deliberations).

2. Subparagraph (2)(A) basically tracks the Rule 403 test. So why not just say “Rule 403”? Because the whole innovation is that Rule 403 has a different focus when it comes to illustrative aids – the “probative value” to be considered is whether it assists the

jury in understanding a witness or a party’s presentation. It is not an assessment of how far it proves a substantive fact based on the information contained in the presentation. In this way the test is articulated like the one added to Rule 703 in 2000 – which tracked (albeit in reverse) the Rule 403 balancing test but went further and described what the evidence was supposed to be probative for. That articulation received good reviews, and the above proposal applies the same kind of articulation of probative value.

3. The last three sentences of the Maine provision are deleted. Those were procedural details, and they are best placed in the Committee Note.

Draft Committee Note

The amendment establishes a new subdivision within Rule 611(a) to provide standards for the use of illustrative aids in a jury trial. The new rule is derived from Maine Rule of Evidence 616. The term “illustrative aid” is used instead of the term “demonstrative evidence,” as that latter term is vague and has been subject to differing interpretation in the courts.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the jury can be classified in two categories. The first category is evidence that is offered to prove a disputed fact; admissibility for such evidence is dependent upon laying the foundation necessary to establish authenticity and relevancy and to avoid the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this evidence to the jury room, to study it and to use it to help determine the disputed facts.

The second category—the category covered by this Rule—is information that is offered for the narrow purpose of illustrating a witness’s testimony or a party’s argument or presentation, thus assisting the jury to understand what is being communicated to them by the witness or party. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, computer simulations, etc. These kinds of presentations, referred to in the Rule as “illustrative aids,” have also been labelled “pedagogical devices” and sometimes (and less helpfully) “demonstrative presentations”—that latter term being unhelpful because the purpose for presenting the information is not to “demonstrate” how an event occurred but rather to assist in the presentation of another source of evidence or argument.

There is thus a distinction, as the courts have recognized, between a summary of voluminous, admissible information to prove a fact and a summary of evidence or argument that is offered solely to assist the jury in

evaluating the evidence. The former is subject to the strictures of Rule 1006. The latter are illustrative aids, which the courts have regulated pursuant to the broad standards of Rule 611(a), and which are now to be regulated by the more particularized requirements of this Rule 611(a)(2).

While an illustrative aid is by definition not offered directly to prove a fact in dispute, this does not of course mean that it is free from regulation by the court. Experience has shown that illustrative aids can be subject to abuse. It is possible that the illustrative aid may be grossly or subtly prepared to distort the testimony or argument, to oversimplify, to stoke unfair prejudice, or to provide subliminal messages. The Rule requires the court to assess the value of the substantive aid in assisting the jury to understand the witness’s testimony or the proponent’s presentation. Cf. Fed.R.Evid. 703; *see* Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403. If those dangers substantially outweigh the value of the aid in assisting the jury, the trial court should exercise its discretion to prohibit or limit the presentation of the illustrative aid. And if the court does allow the aid to be presented at trial, the adverse party has a right to have the jury instructed about the limited purpose for which the illustrative aid may be used. *See* Rule 105.

One of the primary means of safeguarding and regulating the use of the illustrative aids is to require advance disclosure. The Rule provides that illustrative aids prepared before use in court must be disclosed in advance in order to allow a reasonable opportunity for objection. The rule applies to aids prepared before trial or during trial before actual use in the courtroom.

Because an illustrative aid is not offered directly to prove a fact in dispute, and is only admissible in accompaniment with testimony or presentation by the proponent, the Rule provides that illustrative aids are not to go to the jury room unless all parties agree. This rule is consistent with the holdings of the vast majority of federal and state courts. Allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or presentation, runs the serious risk that the jury may confuse the import, usefulness, and purpose of the illustrative aid. *See* Fed.R.Evid. 803(5), (18).

The Rule does not prevent a party from using evidence offered to prove a disputed fact as an illustrative aid. For instance, a witness might be asked to indicate by marking on a photograph the location of an object

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which was not present at the time the photograph was taken. The photograph, if properly authenticated and probative of a fact, could be admissible as substantive evidence. The jury could draw inferences directly from it. But the marks added by the witnesses would be a visual form of witness testimony. The preservation of that particular testimony in visual form for later inspection by the jury during deliberations might give that testimony undue weight and durability under the circumstances. Thus the court would have the discretion under this Rule to withhold from the jury room an exhibit to which illustrative markings had been added if the markings would give undue weight to a witness’s testimony on a disputed issue or otherwise would have some unfairly prejudicial effect. The court would also have the discretion under this rule to restrict or prohibit marking on an evidentiary exhibit if the effect would be to remove the exhibit from the jury room during deliberations.

Illustrative aids remain the property of the party that prepared them, but they may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.

TAB 9B

88 Temp. L. Rev. 513

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BRINGING DEMONSTRATIVE EVIDENCE IN FROM THE COLD: THE ACADEMY'S ROLE IN DEVELOPING MODEL RULES

To this day, judges and advocates struggle with the definition and use of “demonstrative evidence.” The ambiguity of this term (or its close cousins “illustrative evidence” and evidence offered “for illustrative purposes only”) infects the judicial process with uncertainty, hindering advocates when preparing for trial and, in some cases, producing erroneous verdicts. For example, the Seventh Circuit recently reversed a case for improper use of a demonstrative exhibit, and on retrial the result swung from a defense verdict to an \$11 million plaintiff’s victory.

Uncertainty about the admission and use of demonstrative evidence has festered for decades. Lawyers innovate in presenting their cases, forcing judges to make case-by-case rulings. This is increasingly significant as technology becomes commonly used throughout trial practice. Law professors in turn solidify this unpredictable practice by teaching subsequent generations that the admission of demonstrative evidence is subject only to the unbounded discretion of the trial court.

*While this confusion has been long acknowledged and ably documented, it has not galvanized reform. Trial advocacy and evidence professors should meet at this intersection of their respective areas of scholarship and teaching; they should capitalize on their collective knowledge and influence and propose to the Advisory Committee on the Federal Rules of Evidence a set of uniform, analytically sound *514 Model Rules for Demonstrative Evidence. Until evidence rules are amended to address the problem, professors should teach the Model Rules alongside the current unpredictable, ad hoc practice. Exposure to such standardized criteria during law school will influence a generation of future lawyers and judges, promoting consistency in the handling of demonstrative evidence in the courtroom.*

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*515 INTRODUCTION

"You never change things by fighting the existing reality. To change something, build a new model that makes the existing model obsolete."

- R. Buckminster Fuller

Sixty years ago, seeds of an evidence revolution were sown by mavericks in the trenches of trial practice. Chicago trial lawyer Joseph H. Hinshaw wrote:

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Many texts have been written on rules of evidence, and our casebooks are full of decisions which have turned upon points of evidence alone. On the other hand, there is little in the books which furnishes a guide for the proper supervision of the introduction and use of many new forms of demonstrative evidence.¹ Hinshaw understood that clarification of the law of demonstrative evidence was necessary for trial lawyers to adequately evaluate and prepare their cases. Six decades later, however, litigants and their lawyers continue to face settlement negotiations and trials unprepared, having to gamble on the admissibility and use of evidence that may or may not be classified by a court as demonstrative. Too frequently, predicting a court's ruling is tantamount to flipping a coin. In the 2015 case of plaintiff John Baugh, it was an \$11 million coin flip -- and he ultimately won.

It was a products liability case. John Baugh was working on his house in the summer of 2006 and used his Cuprum ladder to reach the gutters. Or at least he tried. Baugh was found sitting in his driveway, bleeding, with his ladder lying dented beside him. Baugh sued Cuprum, alleging defective design, but, tragically, in his fall Baugh suffered severe brain injuries rendering him unable to testify. There were no other eyewitnesses to Baugh's fall.²

The case proceeded to trial. Two years after discovery had closed, and only three months before trial, Cuprum informed Baugh that it intended to use an exemplar of the ladder used by Baugh, built to the exact specifications of Baugh's ladder. Over the plaintiff's objection, the ladder was marked as an exhibit "for demonstrative purposes." Cuprum maintained that the ladder was "not substantive evidence," and Cuprum's expert used the ladder during his *516 testimony at trial.³

At first, the ladder was not sent back to the jury room. Soon, however, the jury asked to see the exemplar ladder. The plaintiff renewed his objection based upon the demonstrative character of the evidence, and that he had developed his trial strategy on the basis that the exemplar ladder was not substantive evidence. Tellingly, he noted that "the practice *in this courthouse, as far as [he had] known*" was that demonstrative exhibits did not go back to the deliberation room.⁴ The judge initially agreed with plaintiff's counsel, but, after a few days, permitted the ladder to go back to the jury room. A few hours after the ladder arrived in the jury room, the jury returned a verdict for the defendant.⁵ The Seventh Circuit reversed, noting that the ladder, as a demonstrative exhibit, should have never been permitted in the jury room.⁶ On retrial, the jury found for the plaintiff and awarded him over \$11 million in damages.⁷

The *Baugh* case is a cautionary tale, indeed. Despite Hinshaw's prescience on the need for discourse and agreement on the subject of demonstrative evidence, little progress has been made. Scholars either ignored the concept of demonstrative evidence or greatly limited its definition to some version of derivatively relevant, nonsubstantive evidence.⁸ Demonstrative exhibits were acknowledged as permissible "assists" to witnesses' oral testimonies, but scholars wrote little about the evidentiary status of such exhibits.

Notwithstanding scant academic discussion of the subject, trial lawyers began experimenting with the use of visual aids at trial, borrowing lessons learned from social science research used to good effect on Madison Avenue. Peer-to-peer teaching on the subject blossomed, with early pioneers of demonstrative aids sharing anecdotal data fresh from recent courtroom victories.⁹ In using this "new" tool, trial lawyers' imaginations were boundless -- both as to what could be used as a visual aid to maximize information transfer to jurors and to persuade them as to the significance of those facts. It was a grand experiment: the courtroom was the laboratory, the advocates were the scientists, the proposed use of the full spectrum of demonstrative evidence was the experiment, and the judges' rulings were the data.

The data demonstrated that without a uniform lexicon and agreed-upon rules, trial judges arrived at vastly different conclusions about the categorization, admissibility, and use of demonstrative evidence. A number of inconsistent *517 judge-made "practice rules" developed over time whereby judges, faced with a new form of proof not addressed in the Federal Rules of Evidence or most state analogues,¹⁰ navigated the waters of admissibility and use by way of trial and error. In essence, judges were left to figure out the proper evidentiary treatment of demonstrative exhibits and hammer out common sense conclusions. They used the discretion allotted to them under federal rules of evidence and their state counterparts to put that conclusion into effect.

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In articulating the rationale for these ad hoc “laws of trial advocacy,” judges employed language evocative of the various aspects of Federal Rules of Evidence 105, 403, and 611 that impart tremendous authority to trial judges over the presentation of evidence. Judges recognized that the probative value of demonstrative evidence validated its consideration by a jury, but they were concerned about delivering demonstrative exhibits to jurors during deliberations along with other admitted exhibits. These concerns centered on the risks that jurors would overvalue or misunderstand the demonstrative evidence.

Mounting inconsistencies in the definition and use of demonstrative evidence did not go unnoticed. Scholars and commentators wrote articles attempting to reconcile and explain these inconsistencies in an effort to decipher an orderly pattern that offered advocates some degree of predictability of judicial rulings.¹¹ Others called for modification of the evidence rules to create a uniform standard of admissibility.¹² The Advisory Committee on Rules of Evidence (Advisory Committee), however, has not considered any amendments to the Federal Rules of Evidence on this issue.¹³

Given this scholarly commentary, why this stagnation? Why do evidence and trial advocacy professors continue to teach the muddled status quo? Most evidence texts gloss over demonstrative evidence and its foundations, while trial advocacy texts perpetuate the existing confusion by teaching students that practice is inconsistent, varying from judge to judge, and jurisdiction to jurisdiction.¹⁴

***518** Law professors should confer and agree on Model Rules for Demonstrative Evidence (Model Rules). They should present proposed amendments both to the Advisory Committee and to their state counterparts for consideration, debate, and adoption. This is not to suggest, however, that once Model Rules have been agreed upon and presented legal teachers should rest on their laurels.¹⁵ Law professors should straightaway introduce to their students these Model Rules along with the conventional understanding of practice that is the “law of trial advocacy.” In doing so, professors have an opportunity to explain the analytic and practical superiority of the Model Rules and engage the next generation of trial lawyers in a discussion of the issues. Exposure in law school to a set of model rules and the analytic justification for them would, in turn, influence a future generation of lawyers and judges. The goal would be to have an immediate positive impact on the consistency of judicial rulings regarding the admissibility and use of demonstrative evidence, and eventual clarification of the standards for admissibility in the rules of evidence.

Section I of this Article documents the current practice across jurisdictions, noting that differences in nomenclature lead to confusion as to practice, which results in unpredictable results. Section II traces the roots of this doctrinal confusion, paying particular attention to the role of professors in perpetuating the confusion. Section III documents the magnitude of the problem and illustrates why the issue will likely worsen. Finally, Section IV highlights the privileged position of professors to identify a solution by examining the role of the academy in developing the Federal Rules of Evidence. Section IV also examines Maine Rule of Evidence 616, which addresses demonstrative evidence directly, and the lessons gleaned from Maine’s experiment.

I. TODAY’S JURISDICTIONS ARE INCONSISTENT IN THEIR IDENTIFICATION AND USE OF DEMONSTRATIVE EVIDENCE

Judges are the masters of their courtrooms. They have broad discretion as to the conduct of trials and control over how lawyers present their cases.¹⁶ They also generally have great latitude when evaluating the probative value of offered evidence and balancing that against the risks of admission.¹⁷ Underlying this discretion of the trial court is a codified standard -- be it a broad balancing test as in Federal Rule of Evidence 403 or a more strict restriction as in Federal Rule of Evidence 412. These standards, supplemented by case law, cabin a judge’s discretion and promote consistent evidentiary rulings.

***519** The admission and use of demonstrative evidence lacks these formal standards. The federal rules of evidence (and all state evidence rules except for Maine’s) offer no direction, as they are silent. Other guidance -- such as it is -- in case law, jury instructions, academic writings, and textbooks is limited, piecemeal, and inconsistent, leading to unpredictable judge-specific rules of admission.

A. Present-Day Judges Have Wide and Varied Definitions of Demonstrative Evidence

That judges struggle with the term demonstrative evidence¹⁸ is not surprising: the Federal Rules of Evidence and state analogues, with the exception of Maine's, have not given rule-based guidance to judges regarding the use of such visual aids. Nor do legal dictionaries or scholars offer useful guidance.¹⁹ Black's Law Dictionary defines demonstrative evidence as "[p]hysical evidence that one can see and inspect," while noting that the physical object "does not play a direct part in the incident in question."²⁰ In the very next sentence, Black's notes that "[t]his term sometimes overlaps with and is used as a synonym of real evidence," and that this evidentiary universe may also be referred to as "illustrative evidence; autoptic evidence; autoptic proference; real evidence; [and] tangible evidence."²¹

Scholars acknowledge the confusion. For example, Professors Christopher Mueller and Laird Kirkpatrick highlight existing definitional confusion in their treatise, stating:

There are at least three definitions of demonstrative evidence in current use. One describes demonstrative evidence as anything that "appeals to the senses," but this definition seems too broad because it reaches essentially everything (even testimony must be heard to be understood). An intermediate definition says that evidence is demonstrative if it conveys a "firsthand sense impression," thus excluding testimony because it is a secondhand recounting of the witness's perceptions. An even narrower definition equates demonstrative evidence with "illustrative evidence," thus limiting its scope to evidence used to explain or illustrate testimony (or other evidence) but lacking any substantive force of its own. Under such a definition, demonstrative evidence serves merely to add color, clarity, and interest to a party's proof.²²

***520** This terminology turmoil unsurprisingly appears in judicial decisions. Some judges use the term demonstrative evidence to refer to any physical evidence,²³ while others restrict the term's use to any nonadmissible exhibit to aid in understanding testimony or argument,²⁴ and still others use the words demonstrative evidence to describe substantive physical evidence (such as the weapon in a murder trial).²⁵ To add to the confusion, some judges use the term "illustrative" to refer to an entire subset of this evidentiary universe,²⁶ sometimes using the terms demonstrative and illustrative interchangeably,²⁷ yet at other times to describe discrete subparts of this evidentiary universe.²⁸ Still other jurisdictions talk of "admitting" demonstrative evidence as shorthand for permitting its use at trial without formally admitting it into evidence.²⁹

In addition to definitional problems, there is disagreement on theories of admissibility and use. Federal courts seem to address demonstrative evidence through the lens of Federal Rule of Evidence 611(a), which permits a trial court to "exercise reasonable control over . . . presenting evidence so as to . . . make those procedures effective for determining the truth."³⁰ Some federal courts speak of "authorizing" the use of "pedagogical aids," as opposed to admitting these items into evidence.³¹ Other jurisdictions address demonstrative evidence ***521** by focusing on its relevance.³² Other courts seem to conflate a showing of relevance with one of authenticity. In doing so, they address the authenticity of a demonstrative object, implicitly acknowledging its relevance, in that the evidence presented to establish authenticity would, in nearly every circumstance, serve to establish the object's relevance.³³

B. Contemporary Confusion About the Definition Results in Different Uses of Demonstrative Evidence

Confusion as to nomenclature, characterization, and admissibility adds to the uncertainty as to whether demonstrative evidence is formally admitted into evidence and whether jurors get to review the object in their deliberations.³⁴ If a demonstrative exhibit is admitted without limitation, then the advocate's use throughout the trial and the jury's use during deliberations presents no controversy. Confusion blossoms when the court permits some limited uses of the demonstrative exhibit short of admitting it in evidence for all purposes. This can happen, for example, when evidence is admitted for "illustrative purposes," or when evidence is *used* during the trial (presumably under the judge's authority to control presentation of evidence under rules such as Federal Rule of Evidence 611), and yet not formally admitted into evidence.³⁵ The approaches of jurisdictions vary widely, from barring such evidence from entering the jury room,³⁶ to permitting it if the evidence meets a certain evidentiary threshold of ***522** probity and fairness,³⁷ to permitting it wholesale with only a limiting instruction.³⁸ Yet others provide no guidance to

the trial court, leaving the matter completely within the trial court's discretion.³⁹

Differing standards for use of demonstrative evidence (in many cases without any criteria to guide a judge in her decision) are further complicated when trial and appellate courts conflate the concepts of admission and use. Admission of exhibits in evidence requires relevance,⁴⁰ authenticity,⁴¹ and reliability (through the hearsay⁴² and best evidence⁴³ rules). "Authorized for use" is theoretically a lower standard.⁴⁴ For example, a chart summarizing various criminal counts and the evidence therefore may not meet the voluminous requirement of Federal Rule of Evidence 1006 (and thus would be otherwise inadmissible as hearsay), but could still be "authorized for use" under Federal Rule of Evidence 611(a). Yet the reports are replete with appellate courts "admitting" demonstrative aids into evidence.⁴⁵ Moreover, many courts explicitly cite Federal Rule of Evidence Rule 611(a) (or a state equivalent) as the basis for "admitting" the evidence.⁴⁶ The inconsistency in lexicon and definition *523 leads to further confusion as to admissibility and use because appellate courts' discussions of acceptable discretionary practice rules for one type of evidence labeled demonstrative often conflict with other courts' practice rules.

C. The Inconsistent Practice Risks Inconsistent Case Results in Today's Courts

There are at least three ways that the doctrinal confusion surrounding demonstrative evidence risks inconsistency and inaccuracy. The uncertainty as to nomenclature casts the status of the proffered evidence into doubt. This uncertainty is magnified when courts fail to enforce the barrier between exhibits admitted into evidence and aids authorized for use in the courtroom. The unpredictability is amplified when a judge charges a jury and determines which exhibits will accompany the jury: confusion about the status of the evidence makes it difficult to predict whether an admitted demonstrative exhibit will be available to the jurors during deliberations along with other admitted exhibits. In addition, as noted by the Seventh Circuit, it could actually affect the outcome of the case as previously inadmissible exhibits are physically present in the jury deliberation room.⁴⁷

The lack of a cognizable standard across these decision points undermines accurate pretrial settlement valuation of a case and an advocate's trial preparation and presentation strategy. How does a trial lawyer know the value of her case if she is unsure of the strength of her evidence? Is the evidence coming in at trial or not? How will the advocate be permitted to use the evidence? What technical foundation is called for admission? What persuasive foundation will be needed to convey the information to the jurors? A lawyer planning to show the jury a diagram, for example, will need to know in advance whether a diagram is admissible under any (and what) conditions or whether a diagram properly authenticated is admissible for purposes of sufficiency of the evidence only as an illustrative exhibit. The advocate's examination of the foundational witness in the former circumstance will be vastly different than that of the latter. In essence, differing approaches to the admission and use of demonstrative evidence increase the risk of inconsistent verdicts.⁴⁸

However, unlike a situation where the appellate court may disagree with the application of a particular rule (even a rule which leaves the trial court with *524 considerable discretion such as Federal Rule of Evidence 403),⁴⁹ leaving the admission and use of demonstrative exhibits solely to a trial court's discretion (without accompanying criteria) creates a criterion-less standard which makes advocacy or oversight nearly impossible.

II. HOW THIS TANGLED WEB WAS WOVEN: THE EVOLUTION OF JUDGE-SPECIFIC, DISCRETION-BASED GUIDELINES

Several factors contributed to the evolution and persistence of inconsistent practices within and across jurisdictions governing the use of demonstrative evidence at trial. The entering argument, of course, is that there are not any rules or standards governing the admissibility and use of demonstrative evidence.⁵⁰ Against this backdrop, scholars have failed to agree on the nomenclature and on the use and admissibility of various visual aids, using terms such as "demonstrative aid," "demonstrative exhibit," "illustrative exhibit," and "exhibit admitted for illustrative purposes only" to describe similar evidentiary objects.⁵¹ Advocates capitalized on this uncertainty by pushing the envelope. In the absence of an evidence rule or united scholarly direction, trial judges developed a "common-sense common law of trial advocacy." Lacking focused guidance from evidentiary rules and

stymied by the contradictory direction from scholars of evidence and trial advocacy, judges created court-specific, discretion-based guidelines for the use of visual aids at trial that are inconsistent across jurisdictions and courtrooms. This confusion is perpetuated by evidence and trial advocacy teachers who teach that each jurisdiction (and each judge) is unique in its approach.

****525 A. Before “Demonstrative” There Was “Visual” Evidence -- and Scholars Never Agreed on Rules for Its Use or Admission***

Early evidence scholars gave little attention to the concept of demonstrative evidence.⁵² This is unsurprising given that the history of evidence dating back to the common law recognized testimonial evidence (oral testimony from a competent witness with personal knowledge about the facts at issue in a case) and certain types of tangible evidence, commonly referred to as “real” evidence.⁵³ The nature of tangible, extratestimonial evidence was originally limited to documents at issue in a case (the contract, the lease, the bank note, the publication in a defamation suit) and other items involved in the events of the case (the gun, the knife, the stolen property).⁵⁴

The idea of something beyond either the oral testimony of a witness with personal knowledge or the production of a tangible item that itself played a part in the underlying dispute seems to have been little contemplated. One notable outlier of academics’ bimodal thinking about evidence was John Wigmore, who referred to visual aids used during testimony as “non-verbal testimony.”⁵⁵ For Wigmore, the concept of nonverbal testimony recognized that a witness could communicate to a jury wordlessly by using physical demonstrations, diagrams, maps, photographs, and models.⁵⁶

Meanwhile, in the courtroom, the concept of “real” evidence was expanded to include not just items that played a role in the case themselves, but items with independent “real” probative value vis-à-vis the issues in the case. While not “the thing” at issue in the case, the evidence was admitted as providing direct, independent value supporting a fact useful to the determination of the issues in the case.⁵⁷ These items came to be viewed as an extension of those tangible items -- such as contracts, deeds, or guns -- that had an active “role” in the underlying controversy.⁵⁸ For example, a map documenting property parcels, created by city engineers and filed with the city, where the underlying controversy concerned the ownership or use of the property (such as a boundary dispute underlying a cause of adverse possession or trespass), was now treated as “real” evidence worthy of unqualified admission and consideration by a jury.⁵⁹

This development invited advocates to try to further broaden the universe of items admissible as substantive evidence. This newly-substantive evidence *526 could be used for all purposes, including establishing sufficiency of the evidence at all stages of the proceeding and on appeal. Over time, trial lawyers offered into evidence more varied tangible items that were not themselves involved in the controversy. Instead of city engineered maps in property disputes, advocates now offered hand-drawn diagrams of the layout of a living room in a domestic violence assault case.

Scholars were reluctant to draw a hard line or adopt a unified proposal for treatment of this expanding class of evidence. Instead, there was mostly silence or adherence to a general concept that only testimonial and “real” exhibit evidence -- that which provided direct evidence in a matter -- was admissible.

Later scholars faced with this explosion of nontestimonial evidence fell primarily into three categories: (1) those who ignored the topic; (2) those who used the term “demonstrative evidence” to describe any admissible, derivative evidence; and (3) those who used the term to refer to visual aids that assisted witness testimony but were not themselves evidence.⁶⁰ Scholars began to create various lexicons to describe similar items, inconsistently using the terms visual aids, demonstrative aids, illustrative aids, demonstrative evidence, illustrative evidence, and exhibits admitted for illustrative purposes. This variable labeling led, in part, to multiple, inconsistent formulae for evidentiary consideration and admission of such items at trial.⁶¹

B. Practitioners Creatively Expanded the Use of Demonstrative Evidence, Importing Lessons from Madison Avenue into the Courtroom

As trial lawyers began to experiment with the use of visual aids at trial, they lamented the lack of clarity surrounding the admissibility and use of demonstrative evidence.⁶² This call to the academy for help went largely unanswered.⁶³ Academics either ignored the concept of demonstrative evidence or greatly limited the definition to some version of “derivatively relevant evidence” that is admissible, but for the limited purpose of augmenting a witness’s oral testimony. The examination and analysis of the nature and use of such visual evidence by scholars in the area is quite cursory. A survey of *527 evidence textbooks reveals that none accord more than a few pages of text to the concept.⁶⁴

The transformation of trial practice in the 1960s, through the 1990s, and the 2010s was dramatic in terms of the type and quantity of visual material lawyers wanted to share with juries. Trial lawyers born after World War II grew with television as a source of both information and entertainment. They were also influenced by the advertising revolution spawned by postwar affluence that encouraged consumerism. Advocates were influenced by the social science data that followed the explosion of visual information delivery in mass media.⁶⁵ Early writing on the subject was generally found in professional journals, while later books like Robert Cialdini’s *Influence: The Psychology of Persuasion* were national best sellers aimed at the general public.

Innovative trial lawyers, seeking an advocative advantage, began experimenting with the use of visual aids at trial, leveraging the social science lessons to deliver information in the same manner contemporary jurors were accustomed to receiving entertainment. The practice quickly spread, with early adopters of demonstrative aids, such as personal injury attorney Melvin Belli, sharing lessons from the trenches of trial and encouraging fellow practitioners to push the envelope as far as trial judges would permit.⁶⁶

Evolution of visual aids at trial went from the early days of two-dimensional charts, graphs, and diagrams,⁶⁷ to the use of three-dimensional anatomical displays and to-scale dioramas of intersections replete with model cars, to the use of comprehensive computer animations visually conveying facts about everything from product manufacture methods to car, train, and aviation accidents. Trial lawyers’ imaginations as to what could be used as a visual aid both to maximize information transfer to jurors and to persuade them as to what those facts meant seemed without limit.

C. Judges Responded Using the Discretion Provided Under the Evidence Rules to Create a Judge-Specific “Law of Trial Advocacy”

Faced with this ever-expanding universe of evidentiary objects, judges were left to figure out the proper evidentiary treatment of such objects. Judges who ascended to the bench were poorly indoctrinated by their law school professors and early practice mentors on the expanding use of visual materials, if at all. Consequently, when faced with an onslaught of novel visual evidence, they used the discretion allotted them under the evidence rules to fashion court-specific *528 guidelines.

The existing rules of evidence provided little assistance in this endeavor. Rule 402 provides that relevant evidence is admissible unless barred by the Constitution, federal statutes, or the rules of the Supreme Court, including the evidence rules. So, unless some valid bar exists, the court must admit relevant evidence. Relevant evidence is defined in Rule 401 as evidence that “has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.”⁶⁸ This definition provides an extremely low threshold for admissibility: no category of evidence is excluded, no particular characteristics are required.⁶⁹

Given the relatively low bar of relevance, judges were faced with an expanding universe of evidence without training or experience to guide them. For example, exhibits such as diagrams drawn by a testifying witness and not to scale met the low threshold of relevance under Rule 401 and so were presumptively admissible under Rule 402. There was, however, a discomfort among judges who had not received training about the admissibility and use of such evidence, either in law school or in practice. This discomfort led to a wariness about the evidence itself: yes, it was relevant, but it did not seem to fit historic categories of testimonial or real evidence as defined and discussed in the scholarly literature. Judges recognized that the probative value of such evidence validated its consideration by a jury, but they were concerned about delivering demonstrative exhibits to jurors during deliberations along with other admitted exhibits. These concerns centered on the risks that jurors would overvalue or

misunderstand the demonstrative evidence.

Judges faced unattractive options under the rules. Judges could exclude a hand-drawn diagram under Rule 403 as cumulative, on the theory that a witness already testified to the scene; this rationale, however, would make a diagram of roadways in an automobile accident similarly inadmissible, even one produced by a city engineer. Judges could admit a diagram for a limited purpose and give a limiting instruction to a jury under Rule 105, but this would result in the diagram being delivered to the jury deliberation room with the other admitted exhibits. This also seemed like a wrong result: after all, a hand-drawn diagram was an *529 extension of a witness's oral testimony, which was itself unavailable to the jurors for review during deliberations. In some jurisdictions, then, a practice developed that such exhibits would be "admitted," but for "illustrative purposes" only: the exhibits were "admitted" into evidence, the jury would see the exhibits during the trial, the exhibits were part of the evidentiary record both on appeal and at trial for a challenge to the sufficiency of evidence, the exhibits could be used in summation, but the exhibits would not be delivered to the jury deliberation room as were the other admitted exhibits in the case.⁷⁰

A common judicial analysis for admitting demonstrative exhibits into evidence but excluding them from the jury deliberation room seemed to be a form of Rule 403, applied as a secondary afterthought to "admission" -- in essence, a "shadow Rule 403." The first round of Rule 403 balancing was applied to determine if the evidence should reach the jury at all. Having determined the answer to be "yes," judges admitted the evidence and then seemed to perform a second, "off-the-books" Rule 403 analysis to determine if the "admitted" evidence should be delivered to the jurors during deliberations.

In reaching this split-the-baby approach, some judges relied on the broad discretion afforded them to control courtroom proceedings, including discretionary regulation of the mode of presentation of evidence. The language underlying this reasoning reflected that of Federal Rule of Evidence 611.⁷¹ Additionally, some judges admitted the demonstrative evidence "for illustrative purposes only" and then instructed the jury as to the limited nature of the evidence. This language was similar to that of Federal Rule of Evidence 105.⁷² In essence, judges were left to figure out the proper evidentiary treatment of such visual aids and, having arrived at a commonsense conclusion, primarily used the *530 discretion allotted to them under Federal Rules of Evidence 403 and 611 and their state counterparts to put that conclusion into effect.⁷³

D. The Snake Comes Full Circle: Law Professors Now Teach that Admissibility and Use of Demonstrative Evidence Is Judge-Dependent, Not Standard-Dependent

The persistent, uncertain state of demonstrative evidence, which the Seventh Circuit stated "may have contributed to the error in the district court,"⁷⁴ is unsurprising, considering the array of scholarship on this topic. Evidence treatises are replete with resigned statements. Professors Mueller and Kirkpatrick note that "[t]here is no consensus on the proper definition or scope of demonstrative evidence,"⁷⁵ while Professor Kenneth McCormick cautions that "the use of any single term to denominate all such evidence can be at best confusing and at worst harmful to a clear analysis of what should be required to achieve its admission into evidence."⁷⁶ Professor Wigmore refused to even use the term "demonstrative."⁷⁷ As recently as 2012, one commentator lamented that "[a]s demonstrative exhibits have become increasingly more powerful, one might expect courts to have responded by becoming more vigilant about what the exhibits depict. This has not been the case."⁷⁸

Most treatise and textbook authors do not address the landscape with a normative analysis, but rather identify the accepted trial procedure in their respective jurisdiction. They do not advocate for a particular approach, but rather acknowledge the lack of consensus across jurisdictions.⁷⁹ Some academics teach that demonstrative exhibits can constitute substantive evidence under certain circumstances,⁸⁰ some consider visual aids to be admissible as exhibits *531 with a limited use, for "illustrative purposes only," while others argue that any visual evidence is derivative, and thus inadmissible, even where testimonial foundation has been laid establishing both its authenticity and relevance to the issues in the case. Some evidence textbooks do not list demonstrative evidence in either the table of contents or the index, and others reference it only in brief passing.⁸¹ Stanford Professor George Fisher and University of Washington Professor Peter Nicolas, for example, do not discuss demonstrative evidence in their texts, although each author includes a case that illustrates specific evidentiary issues that intersect with the concept of demonstrative evidence.⁸²

By 2010, authoritative academic works catalogued multiple evidentiary statuses of various tangible items, such as photographs or diagrams produced to scale.⁸³ A survey of evidence and trial advocacy texts and treatises reveals at least five differing characterizations of a photograph offered into evidence: “real *532 evidence,”⁸⁴ “tantamount to real evidence,”⁸⁵ “substantive evidence,”⁸⁶ “representative evidence,”⁸⁷ and “demonstrative evidence.”⁸⁸ The different characterizations, in turn, produce different instruction as to the nature and use of a photograph at trial. This is particularly notable, given that “[s]ome students of photographic evidence estimate that photographs are used in roughly half the cases in the United States.”⁸⁹ One text highlights an Indiana case in which the court considered competing definitions and evidentiary uses of photographs.⁹⁰ The Indiana court noted that photographs fall within the “‘pictorial testimony theory’ of photographic evidence,” and, as such, are not evidence in themselves, as contrasted with the “silent witness theory” for the admission of photographs that qualifies the photo as substantive evidence.⁹¹ The text’s authors posit: “Given the impressive scientific evidence of the reliability of the photographic process, doesn’t it seem logical that a photograph should qualify as substantive evidence?”⁹²

Similarly, a survey of texts and treatises reveals conflicting characterizations of a hand-drawn diagram or map: it is described as a “visual aid” used for explanatory or illustrative purposes only;⁹³ “representative evidence” that represents another thing;⁹⁴ an “illustrative exhibit” that is “relevant so long as it fairly and accurately depicts the portrayed scene”;⁹⁵ “demonstrative evidence” that can be taken to the jury deliberation room if the judge finds “it is particularly helpful . . . and is not too argumentative.”⁹⁶ These conflicting characterizations have led to inconsistent conclusions with respect to relevance and admissibility: “the use of such evidence is usually left to the discretion of the trial court”;⁹⁷ a diagram is no different than a photograph, and like a photograph, should be admitted into evidence;⁹⁸ and a diagram need not be to *533 scale and “the mere fact that the drawing is hand-drawn during the course of trial and fails to get the size and distance exactly right is ordinarily a matter that goes to the weight of the evidence and not its admissibility.”⁹⁹

Not only do definitions and uses of demonstrative evidence differ between texts, there exist inconsistencies within single sources. For example, one text categorizes photographs as demonstrative evidence, which the authors define as generally “ha[ving] no probative value,” but nonetheless states that such nonprobative evidence can be admitted into evidence.¹⁰⁰ This conflicts with the prohibition of Rule 402, which dictates that nonprobative evidence is irrelevant and inadmissible.¹⁰¹

Not only do scholars document the state of confusion, they also perpetuate it. Having left judges to their own devices to create court-specific discretionary guidelines for demonstrative evidence, professors have solidified the resulting confusion by teaching the next generation that demonstrative evidence lives outside the rules of evidence. In the classroom, in textbooks, and at continuing legal education seminars, those reared to accept the standardless status quo pass that acceptance to the next generation. The lack of uniform standards on admissibility and use of demonstrative evidence is particularly apparent when evidence professors, trial advocacy teachers, lawyers, and judges come together to teach trial skills in such programs as those sponsored by the National Institute of Trial Advocacy.¹⁰² When the question of how to use demonstrative evidence in the courtroom comes up, as it inevitably does at such training seminars, confusion reigns. Conflicting statements of “the law of trial advocacy” erupt, with the experts either disavowing any reliable practice or espousing contradictory views of “the way it’s done.” A sampling of current authoritative works and law school texts illustrate this:

While all jurisdictions allow the use of demonstrative aids throughout the trial, there is some diversity of judicial opinion concerning their precise evidentiary status. Some jurisdictions treat such items as admissible exhibits which may be reviewed on appeal and sometimes viewed by the jury during deliberations. Other courts treat them differently, either admitting them for “demonstrative purposes” only or refusing to admit them at all as exhibits. These courts then differ on *534 whether to allow them into the jury room during deliberations.¹⁰³

Judges exercise discretion over what evidence, if any, the jurors may take to the jury room. Judges often allow the jury to take into the jury room real and documentary evidence that has been admitted into evidence. Sometimes they permit the jury to take demonstrative evidence, if it is particularly helpful in organizing the facts of a complex case and is not too argumentative.¹⁰⁴

The only limits on the use of demonstrative evidence are the trial judge’s discretion and the trial attorney’s imagination.¹⁰⁵

Despite the solid case support for visual evidence, lawyers often feel anxious about foundational and ethical questions. The concerns and questions feeding this discomfort include the following: . . . What category does this evidence fall in -- real or demonstrative? . . . What is the potential for impeachment over foundation details?¹⁰⁶

Most judges in exercising judicial discretion will permit the use of visual aids if it can be demonstrated in advance that these aids can properly be used.¹⁰⁷

Conflicting practices exist on whether jurors may take exhibits into deliberations. Explicit rules on the subject do not exist in many jurisdictions . . .¹⁰⁸

The introduction and use of demonstrative evidence is subject to a variety of approaches depending upon the practice in a jurisdiction and the preferences of the judge . . .¹⁰⁹

The status of diagrams . . . is somewhat uncertain in many jurisdictions. . . . [T]here are wide variations In some states, illustrations of a witness's testimony such as diagrams, models, and computer simulations are treated as visual testimony. . . . In other states, this kind of media is considered as "demonstrative evidence" and is admitted as a special category of evidence, sometimes with a limiting instruction to the effect that the diagram should be given no greater weight than the *535 supporting witness's testimony. In some states, diagrams seem to be treated as ordinary tangible evidence.¹¹⁰

The admissibility status of demonstrative exhibits varies. What does it mean when a judge "admits" the exhibit in evidence? . . . This difference in judicial views means that when a demonstrative exhibit is offered and "admitted" in evidence, a lawyer must determine if the judge will allow the exhibit to be used only with the witness, allow it to be used during closing arguments, and allow it to go to the jury during deliberations.¹¹¹

Even though scholars have ably identified the problem, they have not yet unified in an effort towards resolution. Some scholars have attempted to articulate the foundation required for demonstrative evidence,¹¹² although by doing so they serve to perpetuate the confusion as to the "admissibility" of demonstrative evidence.¹¹³ Other scholars attempted to define the universe of demonstrative evidence,¹¹⁴ yet their proposals have not gained universal or even grudging acceptance.

The result of such discord is that each generation of law students is indoctrinated into the "evidentiary rules of trial advocacy" through the prism of law school textbooks and by professors who impart their localized, anecdotal opinions on the "rules" regarding the use and admissibility of demonstrative evidence at trial. Students schooled on these principles, in turn, continue those definitions and terms of use when they enter practice and when they become judges.

III. THE DOCTRINAL CONFUSION, THOUGH SEEMINGLY MINOR, HAS REAL-WORLD NEGATIVE CONSEQUENCES

Although those who have been advocating within, administering, or teaching the status quo may downplay the impact of this confusion, it is already *536 having a negative effect on trial practice. Additionally, as the judge-made "law of trial advocacy" is solidified into pattern jury instructions, the potentially inconsistent practice is reinforced. Finally, multiple innovations in trial practice can combine with unintended and undesirable results.

A. *The Relative Silence on the Issue Belies the Seriousness of the Situation*

To some extent, the seeming acceptance of scholars, judges, lawyers, and rules drafters regarding the murky and inconsistent "rules" of demonstrative evidence might be chalked up to a collective ennui, expressed through inaction, amounting to "what's the big deal?" It may be that this type of proof -- whether referred to as a visual aid, demonstrative aid, illustrative aid,

demonstrative exhibit, illustrative exhibit, or exhibit admitted for illustrative purposes only -- is reflexively categorized and marginalized as a mere persuasive device in the tool box of the trial advocate. This classification as a trial technique may explain why demonstrative proof is often sidelined from rigorous evidentiary analysis. The oversimplification in definition produces an oversimplified and inconsistent approach to evaluating the relevance and admissibility of the proof.

This ennui appears to be borne out by the relative absence of this issue from appellate reports. But that absence is unsurprising, because there is a long error chain that must remain unbroken to have the issue reviewed and documented. First, the confusion about the admission or use of demonstrative evidence must result in some type of error.¹¹⁵ Second, this error must be of such a magnitude as to potentially affect the outcome of a trial, and a losing party must expend the resources to pursue an appeal. Additionally, there must be sufficient evidence in the record to demonstrate an abuse of discretion to make an appeal worthwhile. Third, the issue must be sufficiently identified (and not lost among other assignments of error) to merit an appellate court's attention. If any of the links in this chain are broken, the demonstrative evidence issue will not see the light of day. While this may seem to diminish this problem, this long error chain in fact magnifies the importance of this predicament. And even with the relative difficulty of these issues coming to light, trial courts are still incorrectly admitting or using demonstrative exhibits, requiring appellate review, and, in some cases, reversal.¹¹⁶ Whatever the source of the hands-off approach, the potential for real-world, negative consequences exists, and the problem further develops with the calcification (if not codification) of this judge-made "law of trial advocacy" into pattern jury instructions.

***537 B. Pattern Jury Instructions Perpetuate the Problem by Implying a Standard**

Over the years, oral jury instructions were developed to notify jurors during trial that an "illustrative exhibit" being used with a witness would not be available to them during deliberations.¹¹⁷ This was to distinguish these visual aids from other exhibits admitted in the case, because in some jurisdictions judges instruct juries at the beginning of a trial that exhibits admitted into evidence will go back to the jury deliberation room at the conclusion of the trial for the jurors' consideration. In Washington State, for example, one jury instruction reads:

I am allowing [this exhibit] [exhibit number] to be used for illustrative purposes only. This means that its status is different from that of other exhibits in the case. This exhibit is not itself evidence. Rather, it is one [[[party's] [witness's] [summary] [explanation] [illustration] [interpretation]], offered to assist you in understanding and evaluating the evidence in the case. Keep in mind that actual evidence is the testimony of witnesses and the exhibits that are admitted into evidence.

Because it is not itself evidence, this exhibit will not go with you to the jury room when you deliberate. The lawyers and witnesses may use the exhibit now and later on during this trial. You may take notes from this exhibit if you wish, but you should remember that your decisions in the case must be based upon the evidence.¹¹⁸

The title of this instruction is "Exhibit Admitted for Illustrative Purposes," even though the text of the instruction states that the exhibit "is not itself evidence."¹¹⁹ The language of the instruction thus suggests contradictorily that the exhibit both is and is not admitted into evidence.¹²⁰ Not only does this codify the confusion, but also communicates to judges and practitioners alike the state of uncertainty in this area. This should, standing alone, provide sufficient impetus to address this issue; when combined with other developments in trial practice, this state of affairs can produce unintended and undesirable results.

***538 C. The Combination of Innovations in Both Jury Instructions and Trial Practice Produces Anomalous Results**

While jurisdictions developed approaches to demonstrative evidence (either judge by judge or through pattern jury instructions), there were other independent developments that few foresaw would produce anomalous, unknowable "shadow evidence" to be relied on by juries beyond the eyes of judges and lawyers. One such development was the advent of note taking

by jurors.

All jurisdictions have addressed note taking by jurors during trial. There are thirteen states where note taking must be allowed during trial.¹²¹ There are twenty-six states where juror note taking lies in a judge's discretion.¹²² There are six states where the language is ambiguous, but clearly note taking is allowed and preferred.¹²³ Finally, there are seven where the rule is currently unclear.¹²⁴

***539** The rationale for these rules is well-founded: jurors have limited capacity to remember and a strong desire to render a just verdict based on the evidence. Note taking reduces anxiety in some jurors, knowing that they can record facts they find important without fear of forgetting them. Note taking also allows jurors to engage in a robust discussion in the jury deliberation room about the evidence presented to them. The soundness of juror note taking is widely accepted.

The combination of the common jury instruction regarding exhibits admitted for illustrative purposes only, discussed above, with the newly devised rules allowing jurors to take notes during trial produced several unforeseen and undesirable results. One example is when a witness -- let's say a domestic violence victim -- is testifying to the events that occurred in her apartment. The prosecutor asks her to describe the apartment: the size, the furniture, and the distances. In the process of doing so, she indicates she could better explain the layout of her apartment to the jury if she could draw the apartment. With the court's permission, the witness sketches a diagram -- clearly not to scale -- of her apartment. It is marked as an exhibit and offered into evidence. It is objected to by the defense counsel on the basis of foundation. It is, after all, not to scale. The prosecutor, having learned well at school, revises her offer and states: "We offer it for illustrative purposes only your honor." The court accepts the offer and "admits" the exhibit.

It is at this point that a judge-made "law of trial advocacy" allowing use but not full admission of such a hand-drawn diagram, a pattern jury instruction regarding "exhibits admitted for illustrative purposes only," and a court rule on juror note taking come together to risk an extremely odd and most unintended and undesirable evidentiary result. The prosecutor is allowed to share the witness's diagram with the jury during her testimony; at that time the judge reads the jury instruction alerting the jury that this "exhibit," unlike the other exhibits introduced at trial, will not be going back to the jury deliberation room; the jurors -- recognizing the importance of the diagram and now knowing it will not later be available to them -- pull out their note pads and start sketching the diagram. The jurors are incited to try to reproduce on the fly, with divided attention and no direct knowledge of the scene they reproduce, the floorplan drawn by the witness on the stand. So instead of receiving a single hand-drawn diagram in the jury deliberation room, one to which the witness has attested under oath to be accurate, the jurors now have up to twelve secondary iterations of a diagram to which they had limited temporal exposure and no knowledge of the underlying facts portrayed therein. This is exactly the type of anomalous result, contrary to the goals of the rules of evidence, that Seventh Circuit noted in its decision in *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*¹²⁵

***540** There are scores of other anecdotal examples of chaotic and presumably unintended consequences of the lack of agreement on the nature and use of demonstrative evidence. There are, also, the documented facts of the *Baugh* case. In any event, the lack of data on the frequency of disparate rulings on admissibility and use of demonstrative evidence, or data quantifying harm resulting to parties or the system, is not reason for inaction.¹²⁶ Many of the federal rules of evidence were drafted not to solve in-court problems of admissibility left to judicial discretion under Rule 403, but to proactively ensure consistent, fair rulings. For example, Federal Rule 406's addressing of habit evidence was not necessitated by the mischaracterization or misuse of habit evidence by judges: on the contrary, the Advisory Committee's note to Rule 406 states that the rule "is consistent with prevailing views" and that there was general agreement "that habit evidence [was] highly persuasive as proof of conduct on a particular occasion."¹²⁷ There was no pressing corrective need for Rule 406, as habit by its terms is distinguishable from character evidence and is thus not subject to Rule 404. The drafters' decision to expressly include constitutional rights in the text of some evidence rules¹²⁸ is further confirmation that rules may be crafted as a prophylactic measure without documenting chaos in the courts. There is no evidence that there was empirical data that judges were depriving litigants of their constitutional rights in applying the rules of evidence; rather, the inclusion has been characterized as a congressional reminder that due process considerations may extend beyond those enumerated in the text of the rules.¹²⁹

IV. LEADING THE WAY: EVIDENCE AND TRIAL ADVOCACY TEACHERS SHOULD DEBATE THE ISSUES AND ENDORSE A SET OF MODEL RULES

Confusion as to the evidentiary status of demonstrative evidence has been long acknowledged by law professors. They have identified this confusion as a problem that needs to be addressed, although usually from their own discipline's point of view.¹³⁰ Trial advocacy professors and practitioners advance the Melvin Belli omnibus theory of demonstrative evidence: do what is necessary to employ this powerful communication tool.¹³¹ On the other hand, scholars, if they address *541 demonstrative evidence at all, are more likely to focus on the distinction between real and substantive evidence, often addressed through the lens of relevance.¹³² Some professors have even proposed solutions, including modification of the definition of relevance set forth in the evidence rules.¹³³ Scholarly calls for action in law journals, however, have not been answered with reform, at least not by the Advisory Committee, or by the drafters of state evidence rules, with the notable exception of the state of Maine.¹³⁴

However, evidence and trial advocacy teachers are exceptionally well situated to pool their expertise and work together, taking an active role in shaping the future of demonstrative trial evidence. Their respective areas of scholarship and teaching intersect pointedly on the subject of demonstrative evidence. As scholars and teachers, they presumptively have the time, the motivation, and the resources to study this complex issue: they can survey and evaluate practices across jurisdictions and wrestle with the analytical and practical implication of various suggestions for reform. Academic institutions encourage and support such discussion and debate of issues relevant to law professors' areas of teaching and scholarship.

The relevant issues are also ripe for reform. The unrelenting interest of trial lawyers in using demonstrative exhibits,¹³⁵ the reasonable expectation of jurors to receive information via easily understood modalities,¹³⁶ as well as the rapidly expanding universe of digital and computer-assisted evidence,¹³⁷ all signal a need for clarifying the rules of evidence. A preliminary set of Model Rules could provide the needed impetus and basis for a wider, robust dialogue with lawyers and judges who would, in turn, bring their experiences and expertise to bear.

**542 A. Law Professors Were Contributing Architects of the Original Federal Rules of Evidence*

Law professors are particularly well equipped to wrestle with the issues presented by demonstrative evidence and help craft proposed rules for consideration by the Advisory Committee. They were integrally involved in the formation of the original Federal Rules of Evidence, enacted in 1975.¹³⁸ The creation of agreed-upon rules did not happen overnight: it took over thirty-five years. The history of the federal rules not only testifies to how long the road to a uniform set of evidence rules can be, but also highlights the critical importance of law professors in providing a foundational analysis and guidance on that journey.

In 1938, a year after the enactment of the Federal Rules of Civil Procedure, former Attorney General William D. Mitchell proposed that an advisory committee draft a set of uniform evidence rules.¹³⁹ Over the next twenty years, journals such as the *Vanderbilt* and *Harvard Law Reviews* published articles discussing the creation of uniform evidence rules.¹⁴⁰ Dean Ladd of the University of Iowa said that “[a]ll of the law of evidence needs clarification and simplification. . . . A review of the history of evidence, with its spotted and often accidental growth, is persuasive proof of the need of introspective study of the law of evidence with a view to far-reaching improvement.”¹⁴¹ Judges, too, advocated for uniform evidence rules.¹⁴² Several sets of rules were proposed over the years, but agreement took decades.

In 1961, the Judicial Conference created an advisory committee, which *543 formed a special committee to study the advisability and feasibility of uniform evidence rules.¹⁴³ Chief Justice Earl Warren included law professors on the committee.¹⁴⁴ The committee endorsed uniform rules as “both advisable and feasible.”¹⁴⁵ Lawyers, judges, and scholars then provided feedback on the committee's report.¹⁴⁶ The feedback confirmed the special committee's conclusions, and an advisory committee drafted the first uniform federal rules of evidence. The advisory committee consisted of trial lawyers, federal judges, and law professors, and met for the first time in June 1965.¹⁴⁷ It took almost four years to finish the first preliminary draft of the rules.¹⁴⁸ On completion, the committee acknowledged the valuable contributions of the American Law Institute Model Code of Evidence, the Uniform Rules of Evidence, and the state evidence rules of California and New Jersey.¹⁴⁹ Those model codes and rules provided a working template for the advisory committee as it began its work.¹⁵⁰

This history of the Federal Rules of Evidence underscores the importance of community discussion and debate on proposed evidence rules, and the value of legal scholars being actively engaged in that process. Moreover, the contributions of other entities and jurisdictions (such as the American Law Institute, California, and New Jersey) highlight the benefits of an iterative, deliberative process that builds upon previous attempts at solving this problem. And yet, on the topic of demonstrative evidence the state of Maine stands alone as having enacted a rule-based solution.

B. A Case Study: Maine Rule of Evidence 616

Maine is the first and only jurisdiction to have grappled with the murky status of demonstrative evidence and fashioned an evidence rule to provide guidance.¹⁵¹ While the rule is crisp in clarifying administrative aspects of use,¹⁵² it is less successful clarifying when and how these demonstrative exhibits may be *544 used at trial. In the same way that analysis of the New Jersey and California rules of evidence aided the development of the Federal Rules of Evidence, analysis of Maine Rule 616 is helpful in constructing an agenda for scholars tackling the Model Rules of Demonstrative Evidence. Specifically, the Maine rule provides information as to the rule's placement in the evidence rules, the definition of demonstrative or illustrative evidence, and a judge's discretion in the use of illustrative evidence in a trial. The Maine rule provides:

RULE 616.

ILLUSTRATIVE AIDS

- (a) Otherwise inadmissible objects or depictions may be used to illustrate witness testimony or counsel's arguments.

- (b) The court may limit or prohibit the use of illustrative aids as necessary to avoid unfair prejudice, surprise, confusion, or waste of time.¹⁵³

Maine's demonstrative evidence rule is sited in close proximity to its Rule 611,¹⁵⁴ the rule that outlines a trial court's broad discretion to control courtroom proceedings in controlling the mode and order of presenting evidence.¹⁵⁵ Rule 611 requires that the control be "reasonable" and that it serve the general objectives of ascertaining the truth, avoiding needless consumption of time, and protecting witnesses from harassment and embarrassment.¹⁵⁶ Of course, any discretion exercised by a judge pursuant to Rule 611 cannot circumvent other rules of evidence.¹⁵⁷

The text of Maine Rule 616 does not provide affirmative definitions of "illustrative aids" or demonstrative exhibits.¹⁵⁸ Rather, the rule states what they are *not*: they are depictions and objects *not* admissible as evidence.¹⁵⁹ This definition appears unintentionally overbroad in that it facially includes *all* inadmissible objects, even when the bar to admissibility is relevance, authentication, best evidence, or unfair prejudice (or other bars under Rule 403). The advisory committee note (ACN) to the rule offers additional guidance on the definition, explaining that illustrative aids, or demonstrative exhibits, are those objects which do not carry probative force in themselves, but are used to assist in the communication of facts by a lay or expert witness testifying or by counsel arguing. . . . They are not admissible in *545 evidence because they themselves have no relevance to the issues in the case.¹⁶⁰

Rule 616 states that this inadmissible, irrelevant nonevidence may be shared with a jury to illustrate the testimony of witnesses or the arguments of counsel unless a court, in its discretion, rules otherwise.¹⁶¹

Rule 616 addresses three areas of potential use by advocates of demonstrative exhibits at trial: (1) before the presentation of evidence (opening statements), (2) after the presentation of evidence (closing arguments), and (3) during the presentation of evidence (witness examinations). Rule 616's expansion of Rule 611-like discretion to expressly address the administrative aspects and use of demonstrative exhibits in opening statements and closing arguments is both helpful and consistent with the other rules of evidence. To the extent evidence is previewed in an opening statement, subject to constraints that there is a good faith basis for the admissibility of the facts previewed, or admitted evidence is reviewed and explained in a closing argument, the use of demonstrative exhibits under a court's supervision with the guidelines set forth in Rule 616 is analytically sound.

The rule is analytically infirm, however, when applied to the use of demonstrative exhibits during the presentation of evidence. Neither Rule 616 nor the ACN attempts to reconcile the requirements of Maine Rule 402¹⁶² with the discretionary authority granted a trial judge under Rule 616 when it comes to the presentation of exhibits to a jury during witness examination. Rule 402 prohibits the admission of irrelevant evidence, presumably for consideration by jurors, while Rule 616 permits the presentation of irrelevant, inadmissible evidence to jurors. For jurors to view demonstrative exhibits during the presentation of evidence with the approval of the court, the absolute prohibition of Rule 402 of admission (and juror consideration) of irrelevant evidence is presumptively overcome. However, that premise contradicts the core definition of "illustrative evidence" under Rule 616-- that it is irrelevant.

The language of the rule, and the ACN confirming the rule's intention to give trial judges a form of Rule 403-like discretion in allowing jurors to view irrelevant and inadmissible evidence, seems to be an alternative version of the judge-made "shadow Rule 403" analysis adopted in other jurisdictions. As discussed above, some judges perform a first round of Rule 403 balancing to *546 determine if the evidence should reach the jury at all.¹⁶³ Having determined the answer to be "yes," judges admit the evidence and then seem to perform a second, "off-the-books" Rule 403 analysis to determine if the "admitted" evidence should be delivered to jurors during deliberations. Under Maine Rule 616, the reverse seems to be the case: a judge first determines if the evidence is *inadmissible* because it is irrelevant and then proceeds to determine if this irrelevant, inadmissible evidence should be shared with the jury during the presentation of evidence.

Nonetheless, the state of Maine broke ground in drafting a rule of demonstrative evidence in 1993 and deserves credit for doing so. Peter L. Murray, an accomplished trial lawyer, visiting evidence professor at Harvard Law School, and coauthor of a treatise on Maine evidence,¹⁶⁴ was an architect of the rule.¹⁶⁵ Professor Murray was a visionary and an activist: he saw in his own trial practice the state of confusion when it came to the use of demonstrative exhibits and he set out to correct it.¹⁶⁶ He lent his considerable knowledge and experience, both in the courtroom and the classroom, to the work of the Maine advisory committee. Without this experience-based, scholarly input, the rule on demonstrative evidence might never have been proposed.

C. Law Schools Market Leadership, Law Professors Should Deliver on This Promise

A core value of most law schools, often prominently figured in their mission statements, is a commitment to cultivating public leadership.¹⁶⁷ Law schools tout that they educate leaders, creating "a bridge from scholarship and service to leadership and practice."¹⁶⁸ Law professors have an opportunity to lead by example and build a set of Model Rules for Demonstrative Evidence to be submitted for consideration and debate by the Advisory Committee on the Federal Rules of Evidence. Progress may not be swift, but it can be steady, and without effort, the problem is likely to worsen as legal practice becomes increasingly digital and reliant on technology.

Evidence and trial advocacy teachers should exchange drafts and comments on proposed demonstrative evidence rules. Professors can post proposed rules on Social Science Research Network (SSRN) for comment, or they can circulate them by email, either directly or through the American Association of Law Schools, the Society of American Law Teachers, the American Bar Association, *547 or other professional organizations. Professors can circulate draft rules to pattern jury instruction committees nationally, which commonly include judges and lawyers. Professors could come together for an academic conference to discuss model evidence rules for demonstrative evidence.¹⁶⁹ It may be that widespread discussion of a set of model rules ultimately produces only a modest proposed amendment to the Federal Rules of Evidence. On the other

hand, a robust debate among judges, lawyers, and scholars on the many issues triggered by this subject could effectuate significant change.

When outlining this Article, the authors drafted a working proposal for Model Rules for Demonstrative Evidence. Our intention was to conclude the Article with our concise, analytically sound Model Rules and advocate for their adoption. Initially, we championed no change at all to the existing Federal Rules of Evidence. Rather, we proposed a new Advisory Committee note clarifying that the rules do not recognize or differentiate between various categories of evidence (e.g., real and demonstrative); all evidence is either admissible under the rules or it is not. This “light touch” is consistent with the overarching approach of the Federal Rules of Evidence:

The Federal Rules of Evidence do not form a *code* in the usual sense of that term. . . . [T]hey are neither lengthy nor comprehensive in coverage. The entire set of rules can be fit into a short pamphlet. A number of areas of evidence law are left to judicial development. Even where rules govern particular areas, they are often written in general, rather than specific, language.¹⁷⁰

However, after months of work on this Article, and deep discussion with lawyers, judges, and scholars who read drafts of our work and provided insightful feedback, our proposal has morphed and continues to evolve as this Article goes to press.

A continuing point of debate is whether the Federal Rules of Evidence should endeavor to define the term “evidence.” The California Evidence Code sets forth the following definition: “‘Evidence’ means testimony, writings, material objects, of other things presented to the senses that are offered to prove the existence or nonexistence of a fact.”¹⁷¹ A definition could clarify what fell within the reach of the rules, particularly Rules 401 to 403, in that there would be a single category of “evidence,” all of which would be subject to the same rules of use and admission. This should eliminate the artificial distinction that has developed in practice between real and demonstrative evidence based on a theory of “direct” versus “derivative” probative value. Evidence defined under the rules to include both real and demonstrative exhibits would then be subject to the same analysis under Rules 401, 402, and 403. There would not be differing *548 standards or an “off the books” shadow 403 determination by a court after admission but prior to submission to a jury.

While we do not have a set of Model Rules to propose at this time, the discussion going forward should include, at a minimum, the topics of terminology and juror use during deliberations. More specifically, the following items should be addressed in any model rule:

Clarifying terminology. Should visual aids bear different labels depending on whether they are employed during opening statement, during the presentation of evidence, or during closing argument? Perhaps jettisoning the terms “illustrative evidence” and “demonstrative evidence” entirely in favor of a new lexicon would be valuable, especially when used in reported appellate decisions. Perhaps items used during opening statements could be labeled “preview aids.” Items used during witness examinations could be called “nonverbal testimony” (if they are adopted by the witness as his testimony and merely communicate the content of that testimony to the jurors nonverbally) or “testimonial aids” otherwise. Items used during closing arguments might be called “argument aids.” **Clarifying what goes to the jury deliberation room.** Current practice is built largely on the general premise that admitted exhibits are delivered to jurors for review during deliberations. Should this continue to be the rule? It made immense sense that early practice was to deliver admitted exhibits to the jurors and not testimony. After all, two hundred years ago, there were far fewer exhibits admitted than is the case today in a large commercial lawsuit. As such, those exhibits would have been quite easy to deliver to the jurors, and easy for the jurors to review. Conversely, recollection and retrieval of oral testimony was much more involved and cumbersome. Considering there is no more value in a written letter admitted into evidence than the testimony of its author as to the underlying facts contained therein, the mere logistical difficulty in delivering these separate pieces of evidence seems to have been the driver for differentiating between exhibits and testimony.¹⁷² Now that many courts have the capability of recording testimony and producing an easy-to-access DVD (replete with an index), the logistical challenges are all but obviated. This is particularly true in cases with hundreds or thousands of admitted exhibits.

Perhaps the ever-increasing volume of exhibits in modern litigation supports a wholesale change in the basic presumption that

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all admitted exhibits are delivered to a jury during deliberations.¹⁷³ It may better further the goals of *549 the evidence rules¹⁷⁴ to require parties to identify which exhibits (and perhaps testimony) they propose be delivered to jurors for consideration during deliberations. Opposing counsel could then object to the request, and a judge could perform a 403-like balancing test, weighing the value to jurors' deliberations against the risks of juror confusion, misuse, or overreliance. This would be similar to the "shadow 403" analysis currently conducted by many judges who allow demonstrative evidence to be shared with a jury during trial but prohibit its delivery to the deliberation room. Rule 403 could be divided into two parts: 403(a) would be the rule as currently drafted, allowing the exclusion of evidence otherwise admissible where the probative value is substantially outweighed by risks of harm. Rule 403(b) would provide a court a "second look" at evidence to determine, after performing a similar balancing test, if it should be submitted to the jury deliberation room.

CONCLUSION

The unsettled state of demonstrative evidence has caused problems for trial courts, practitioners, and academics alike. The confusion surrounding the characterization and use of demonstrative exhibits produces results that can undermine the aspiration underlying the Federal Rules of Evidence: 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."¹⁷⁵ While jurors have changed how they accept and process information, the formal rules of evidence have not kept pace. This state of affairs promises to worsen as technology improves. A unified approach is needed: evidence rules should be amended to address demonstrative evidence, and trial advocacy and evidence teachers can lay the groundwork for reform. Law professors are in a unique and privileged position to be able to articulate and advocate for a unified solution because they can both understand the scope of the problem and have access to the next generation of lawyers, judges, and academics.

Footnotes

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¹ Joseph H. Hinshaw, *Use and Abuse of Demonstrative Evidence: The Art of Jury Persuasion*, 40 A.B.A. J. 479, 479 (1954).

² *Baugh v. Cuprum S.A. De C.V.*, No. 08 C 4204, 2015 WL 9304338, at *1 (N.D. Ill. Dec. 22, 2015).

³ *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 703 (7th Cir. 2013).

⁴ *Id.* at 704 (emphasis added).

5 *Id.*

6 *Id.* at 711.

7 *Baugh*, 2015 WL 9304338, at *1.

8 *See, e.g.*, ME. R. EVID. 616 advisers' note to 1976 amendment (“[Demonstrative exhibits] are not admissible in evidence because they themselves have no relevance to the issues in the case. Their utility lies in their ability to convey relevant information which must be provided directly from some actual evidentiary source....”).

9 A representative list of such articles may be found in Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957 nn.145-46 (1992).

10 *Id.* at 962 n.13. Many states have rules based on the Federal Rules of Evidence. Unless otherwise noted, references to the Federal Rules of Evidence encompass references to those state analogues.

11 *See, e.g.*, Michael Sudman, Comment, *The Jury Trial: History, Jury Selection, and the Use of Demonstrative Evidence*, 1 J. LEGAL ADVOC. & PRAC. 172, 183-84 (1999) (discussing trends in judicial treatment of demonstrative evidence in trial courts).

12 *See, e.g.*, Brain & Broderick, *supra* note 9, at 1018-19 (proposing that Rule 401 be revised to recognize different admissibility standards for what the authors term “primarily relevant evidence” and “derivatively relevant proof”).

13 A search of the archives of the Advisory Committee on the Federal Rules of Evidence reveals that not only has no one suggested revising the Federal Rules of Evidence to address demonstrative evidence, but also the issue has never been addressed in any comments. *See Archived Rules Comments*, U.S. COURTS, [http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-comments?committee=44&year\[value\]\[year\]=&page=3](http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-comments?committee=44&year[value][year]=&page=3) (last visited Apr. 1, 2016); *Archived Rules Suggestions*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-suggestions?committee=44&year%5Bvalue%CC5D%CC5Byear%5D=> (last visited Apr. 1, 2016).

14 *See infra* Part II.D for an analysis of the academic confusion surrounding demonstrative evidence and law schools' contributions to the lack of standards in this area.

15 The Advisory Committee has been criticized as taking an historically “hands off” approach to its oversight responsibilities such that “only the most egregious issues are addressed, leaving many other short-comings in the Rules intact.” *See* Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 682-83 (2000).

16 *See* FED. R. EVID. 611. The trial court's broad discretion remains subject to due process and other constitutional principles, of course.

17 *See, e.g., id.* 403.

18 *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 706 (7th Cir. 2013) (“The term ‘demonstrative’ has been used in different ways that can be confusing....”).

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- ¹⁹ See, e.g., Brain & Broderick, *supra* note 9, at 960, n.7 (“[A]lmost all the academic commentary that has focused on demonstrative evidence has mischaracterized it.”); *id.* at 1002-10 (discussing confusion over both the definition and use of demonstrative evidence); see also RICHARD D. FRIEDMAN, *THE ELEMENTS OF EVIDENCE* 153 (3d ed. 2004) (“The term *demonstrative* evidence is sometimes used to include pretty much all non-testimonial evidence. But the term is often used in a narrower sense, to distinguish it from *real* evidence.”).
- ²⁰ *Demonstrative Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014).
- ²¹ *Id.*
- ²² CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 9.32, at 1142 (5th ed. 2012) (footnotes omitted) (first citing Melvin Belli, *Demonstrative Evidence: Seeing Is Believing*, 16 TRIAL 70 (1980); then citing *Demonstrative Evidence*, BLACK’S LAW DICTIONARY (6th ed. 1990); then citing Brain & Broderick, *supra* note 9, at 968-69; then citing Thomas R. Mulroy, Jr. & Ronald J. Rychlak, *Use of Real and Demonstrative Evidence at Trial*, 33 TRIAL LAW.’S GUIDE 550, 555 (1989); and then citing 2 KENNETH S. BROWN, *MCCORMICK ON EVIDENCE* § 214 (6th ed. 2006)).
- ²³ *E.g.*, *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1231 (7th Cir. 1996) (“Physical exhibits (*‘demonstrative evidence’*) are a very powerful form of evidence....” (emphasis added)).
- ²⁴ See, e.g., *Gomez v. Great Lakes Steel Div. Nat’l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986).
- ²⁵ See, e.g., *State v. Parks*, 977 So. 2d 1015, 1027-28 (La. Ct. App. 2008) (“Before it can be admitted at trial, demonstrative evidence must be properly identified. A sufficient foundation for the admission of evidence is established when the evidence as a whole shows it is more probable than not that the object is one connected with the crime charged.” (citation omitted)); see also *State v. Mosner*, 969 A.2d 487, 500 (N.J. Super. Ct. App. Div. 2009).
- ²⁶ See, e.g., *Hinton v. Outboard Marine Corp.*, No. 1:09-cv-00554-JAW, 2012 WL 243210, at *2 (D. Me. Jan. 25, 2012) (referring to ME. R. EVID. 616, which regulates the use of illustrative aids).
- ²⁷ *E.g.*, *Pierce v. State*, 718 So. 2d 806, 809 (Fla. Dist. Ct. App. 1997) (“Under Florida law, in order to admit a demonstrative exhibit, illustrating an expert’s opinion, such as a computer animation, the proponent must establish the foundation requirements necessary to introduce the expert opinion.”); *State v. Foster*, 967 P.2d 852, 859 (N.M. 1998) (“Demonstrative exhibits are likely to be merely illustrative of other evidence.”); *State v. Lord*, 822 P.2d 177, 193 (Wash. 1991) (“The use of demonstrative or illustrative evidence is to be favored and the trial court is given wide latitude in determining whether or not to admit demonstrative evidence.”).
- ²⁸ *E.g.*, *State v. Swinton*, 847 A.2d 921, 936 n.20 (Conn. 2004) (differentiating between demonstrative and illustrative evidence).
- ²⁹ See, e.g., *State v. Pangborn*, 836 N.W.2d 790, 797 (Neb. 2013) (“We historically have discussed the use of demonstrative exhibits in terms of admissibility.... But the use of such terminology can be misleading.”).
- ³⁰ FED. R. EVID. 611.
- ³¹ See, e.g., *United States v. Irvin*, 682 F.3d 1254, 1262-63 (10th Cir. 2012) (explaining that some circuits have construed Rule 611 to

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authorize summary exhibits for pedagogical purposes); *United States v. Milkiewicz*, 470 F.3d 390, 398 (1st Cir. 2006) (discussing permissible pedagogical aids under Rule 611); *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000) (same); *United States v. Salerno*, 108 F.3d 730, 744 (7th Cir. 1997) (stating demonstrative aids are regularly permitted under Rule 611 “to clarify or illustrate testimony”); *United States v. Johnson*, 54 F.3d 1150, 1159-60 (4th Cir. 1995) (concluding that the trial court’s admission of summary charts pursuant to Rule 611 did not constitute error); *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988) (same); *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988) (same); *United States v. Gardner*, 611 F.2d 770, 776 (9th Cir. 1980) (same); *see also Gomez v. Great Lakes Steel Div. Nat’l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986) (distinguishing summaries and charts admitted under Rule 1006 from those “used as pedagogical devices which organize or aid the jury’s examination of testimony or documents which are themselves admitted into evidence”).

³² *See, e.g.*, N.C. GEN. STAT. ANN. § 8-97 (West 2016) (permitting photographic representations after proper foundation); *Duncan v. State*, 827 So. 2d 838, 850-51 (Ala. Crim. App. 1999) (declaring the “reasonable tendency to prove or disprove some material fact in issue” as the ultimate consideration in admitting demonstrative evidence); *Mayes v. State*, 887 P.2d 1288, 1313 (Okla. Crim. App. 1994) (finding no error when relevant photographs were admitted); *Commonwealth v. Reid*, 811 A.2d 530, 552 (Pa. 2002) (permitting the admission of demonstrative evidence if its relevance outweighed its prejudicial effect).

³³ *See, e.g.*, *State v. Parks*, 977 So. 2d 1015, 1027-28 (La. Ct. App. 2008).

³⁴ Two Washington State Superior Court judges (one, a career public defender, and the other, a career prosecutor before ascending to the bench), team teaching a trial advocacy class this academic year, were surprised to discover that they disagreed on the definition and use of demonstrative evidence.

³⁵ *E.g.*, *United States v. Bray*, 139 F.3d 1104, 1111-12 (6th Cir. 1998) (“We note in passing that in appropriate circumstances not only may such pedagogical-device summaries be used as illustrative aids in the presentation of the evidence, but they may also be admitted into evidence even though not within the specific scope of Rule 1006.”).

³⁶ *E.g.*, *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 708 (7th Cir. 2013) (“Demonstrative exhibits that are not admitted into evidence should not go to the jury during deliberation, at least not without consent of all parties.”); *cf. Johnson*, 54 F.3d at 1161 n.11 (concluding that properly admitted evidence may be used by the jury during deliberations); *Scales*, 594 F.2d at 564 n.3 (noting that when demonstrative evidence is not admitted to the jury it is usually because such evidence was not properly admitted).

³⁷ *See, e.g.*, *United States v. Parker*, 491 F.2d 517, 522-23 (8th Cir. 1973) (permitting the jury to use a document written by a narcotics agent during deliberations because the defense vigorously cross-examined the agent on its contents); *People v. Manley*, 272 N.E.2d 411, 412 (Ill. App. Ct. 1971) (concluding that “[t]he taking of physical evidence into the jury room by the jury is within the sound discretion of the trial judge,” but requiring close scrutiny because such a “procedure may be prejudicial to the defendant”).

³⁸ *E.g.*, *United States v. Downen*, 496 F.2d 314, 321 (10th Cir. 1974); *Shane v. Warner Mfg. Corp.*, 229 F.2d 207, 209-10 (3d Cir. 1956); *In re Lucitte*, No. L-10-1136, 2012 WL 362002, at *17 (Ohio Ct. App. 2012).

³⁹ *E.g.*, *Commonwealth v. Walter*, 406 N.E.2d 1304, 1309 (Mass. App. Ct. 1980); *State v. Pangborn*, 836 N.W.2d 790, 801 (Neb. 2013); *Commonwealth v. Moore*, 279 A.2d 179, 184-85 (Pa. 1971).

⁴⁰ *See* FED. R. EVID. 401-402.

⁴¹ *See id.* 901-903.

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42 *Id.* 801-807.

43 *Id.* 1001-1008.

44 *See* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 9:22 (4th ed. 2012) (database updated June 2015) (“For illustrative evidence, the foundation may be easier to lay than for substantive evidence, because the proponent need only show that the item is a ‘fair depiction’ or ‘reasonable facsimile.’”).

45 *See, e.g.*, *United States v. Salerno*, 108 F.3d 730, 744 (7th Cir. 1997) (“*Demonstrative aids* are regularly used to clarify or illustrate testimony.” (emphasis added)). The *Salerno* court cited *Roland v. Langlois*, 945 F.2d 956, 963 (7th Cir. 1991), in which the Seventh Circuit confirmed the trial court’s admission of a life-size model of an amusement park ride into evidence, and *United States v. Towns*, 913 F.2d 434, 445-46 (7th Cir. 1990), where the court confirmed the admission of a ski mask and gun for the demonstrative purpose of providing examples of the mask and gun used during a bank robbery, to support its conclusion.

46 *See, e.g.*, *United States v. Scales*, 594 F.2d 558, 563-64 (6th Cir. 1979) (“Authority for [admitting] such summaries is not usually cited, but would certainly exist under Fed. R. Evid. 611(a).”); *United States v. Blackwell*, 954 F. Supp. 944, 971 (D.N.J. 1997) (“Charts that summarize documents or testimony, already admitted into evidence, *may be admissible under Rule 611(a)*... as *demonstrative evidence*, as opposed to Rule 1006, as substantive evidence.” (emphasis added)). The issue, of course, is that Rule 611(a) is primarily a rule of procedure, in that it provides the judge control over the evidence presented in his courtroom. It is not a rule of admission. *See United States v. Irvin*, 682 F.3d 1254, 1263 (10th Cir. 2012) (“In short, resort to Rule 611(a) in no way resolves the hearsay problem that renders Exhibit 1-2 inadmissible.”).

47 *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 711 (7th Cir. 2013). The prejudicial effect of a nonadmitted exhibit in the jury deliberation room was repeatedly raised (and rejected) by opposing counsel. *Id.* at 704-05.

48 Although, it is inevitable that different judges and different juries will produce individualized, and thus perhaps inconsistent, verdicts.

49 *See, e.g.*, *United States v. McDermott*, 245 F.3d 133, 141 (2d Cir. 2001) (“While we may disagree with a district court’s evidentiary ruling, our disagreement is not alone sufficient to reverse an otherwise rational, carefully considered and non-arbitrary decision.”). Codified standards lead to a body of case law, which in turn guides advocates and trial courts. Federal Rule of Evidence 403 (or its state analogue) has broad language merely requiring the trial court to ensure the probative value is not substantially outweighed by other concerns, including unfair prejudice. This amorphous language requires trial courts to examine the entirety of the evidence before ruling on admission or to articulate their balancing on the record. *E.g.*, *United States v. Loughry*, 660 F.3d 965, 971 (7th Cir. 2011) (requiring examination of the entirety of the evidence); *United States v. Moran*, 493 F.3d 1002, 1012 (9th Cir. 2007) (encouraging the trial court to state how it balanced the evidence). Case law also provides greater definition for vague terms such as “substantially outweighed” and “unfair prejudice.” *See, e.g.*, *People v. Quang Minh Tran*, 253 P.3d 239, 244 (Cal. 2011) (elaborating on the term “substantially outweighed”); *Swajian v. Gen. Motors Corp.*, 916 F.2d 31, 34-35 (1st Cir. 1990) (elaborating on the term “unfair prejudice”).

50 The Federal Rules of Evidence and state analogues (with the exception of the state of Maine’s) have not given rule-based guidance to judges regarding the use of such visual aids. The term “demonstrative evidence” is not found in the Federal Rules of Evidence, and it is mentioned only once in the Advisory Committee notes. *See infra* Part IV.B for a discussion of Maine’s approach to the use of demonstrative evidence.

51 While some scholars use the terms “demonstrative evidence” and “illustrative evidence” interchangeably, others draw a distinction. *See e.g.*, RONALD JAY ALLEN, RICHARD B. KUHNS, ELEANOR SWIFT, DAVID S. SCHWARTZ & MICHAEL S. PARDO, EVIDENCE: TEXT, PROBLEMS, AND CASES 192 (5th ed. 2011) (demonstrative evidence is admitted and illustrative evidence is not admitted into evidence).

52 See Brain & Broderick, *supra* note 9, at 986-1018 (discussing the history of academic treatment of demonstrative evidence).

53 *Id.* at 960 n.7.

54 *Id.* at 988-89.

55 See 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 932 (1904) (indexing certain evidence as “non-verbal testimony”).

56 *Id.* §§ 789, 791, 792, 794, 795, 797; see also Brain & Broderick, *supra* note 9, at 997.

57 1 WIGMORE, *supra* note 55, §§ 789, 791, 792, 794, 795, 797.

58 *Id.*; see also Brain & Broderick, *supra* note 9, at 996.

59 1 WIGMORE, *supra* note 55, § 791; see also Brain & Broderick, *supra* note 9, at 996 n.117; cf. GRAHAM C. LILLY, DANIEL J. CAPRA & STEPHEN A. SALTZBURG, PRINCIPLES OF EVIDENCE 57 (6th ed. 2012) (suggesting that such a map in a boundary dispute is demonstrative evidence).

60 See Brain & Broderick, *supra* note 9, at 960-62.

61 See *infra* Part II.D for an analysis of the academic confusion about demonstrative evidence and law professors’ contributions to the lack of standards in this area.

62 See, e.g., Hinshaw, *supra* note 1, at 479-82, 539-43.

63 Conflicting definitions and sanctioned use of demonstrative evidence within and between academic circles and the practicing bar are a byproduct of the fact that the concept was developed as a utilitarian tool in courtrooms, with scholarly commentators reluctantly playing catch up.

[P]ractioners’ contribution to the study of the subject has largely been their consistent use of such proof at trial and their unflinching use of the term “demonstrative” to describe it. As a result, the idea of a separate branch of evidence known as “demonstrative evidence” eventually became so ingrained in our legal system that the academic writers could not ignore it. For the most part, however, practitioner-authored writings on the subject are devoid of detailed analysis of the attributes and proper role of demonstrative proof....

Brain & Broderick, *supra* note 9, at 960 n.7.

64 See *infra* note 81 .

65 As early as the 1920s, psychologists such as Walter D. Scott applied psychological theory to the field of advertising. LUDY T. BENJAMIN, JR. & DAVID B. BAKER, FROM SÉANCE TO SCIENCE: A HISTORY OF THE PROFESSION OF PSYCHOLOGY IN AMERICA 118-21 (2004).

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- ⁶⁶ See, e.g., MELVIN M. BELLI, READY FOR THE PLAINTIFF (1956); Melvin M. Belli, *Demonstrative Evidence and the Adequate Award*, 22 MISS. L.J. 284 (1951); Melvin Belli, *Demonstrative Evidence: Seeing Is Believing*, TRIAL, July 1980, at 70.
- ⁶⁷ A simple, but extremely impactful chart was used by John Gotti's defense attorney Bruce Cutler in 1987, whereby the defense illustrated the multiple convictions of the prosecution's witnesses.
- ⁶⁸ FED. R. EVID. 401. Facts "of consequence" are those that are material to the issues in the case and are determined by looking at the claims and defenses set forth in the pleadings, and the underlying law provides the rule of decision in the case. See *Rankin v. State*, 974 S.W.2d 707, 710 (Tex. Crim. App. 1996), *opinion withdrawn in part on reconsideration* (July 8, 1998) ("[I]t appears that 'fact of consequence' includes either an elemental fact or an evidentiary fact from which an elemental fact can be inferred. An evidentiary fact that stands wholly unconnected to an elemental fact, however, is not a 'fact of consequence.' A court that articulates the relevancy of evidence to an evidentiary fact but does not, in any way, draw the inference to an elemental fact has not completed the necessary relevancy inquiry because it has not shown how the evidence makes a 'fact of consequence' in the case more or less likely.").
- ⁶⁹ See FED. R. EVID. 402. While unsupported by the language of Rule 402 itself, some scholars, in analyzing the differential treatment of demonstrative evidence, have fashioned a concept of "derivative relevance." See, e.g., Brain & Broderick, *supra* note 9, at 967. They concluded that only evidence that is "primarily relevant" is admissible under Federal Rule 402, and that demonstrative evidence is not admissible for all purposes because its relevance is "derivative." *Id.*
- ⁷⁰ In allowing jurors to view and consider demonstrative evidence, judges implicitly seemed to have found that the evidence was (1) relevant, thus (2) presumptively admissible, and (3) not barred by any other rule of evidence or the Constitution. See FED. R. EVID. 402. For jurors to view demonstrative exhibits during the presentation of evidence with the approval of the court, the Federal Rules' (and state analogues') absolute prohibition of admitting (and thus juror consideration of) irrelevant evidence was presumptively overcome. Further, the balancing mandated by Federal Rule of Evidence 403 (requiring that the probative value of evidence outweigh the potential risks of misuse by jurors or other costs) must also implicitly have been conducted and found to weigh in favor of admissibility.
- ⁷¹ FED. R. EVID. 611(a)(1)-(3) ("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.").
- ⁷² Federal Rule of Evidence 105 provides that "[i]f the court admits evidence that is admissible against a party or for a purpose -- but not against another party or for another purpose -- the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly." *Id.* 105. Some judges also misguidedly rely on this rule to craft a "limited use" doctrine with respect to demonstrative evidence, allowing it to be admitted into evidence for a limited "illustrative purpose" that restricts the advocate's use of the exhibit to the direct examination of the foundational witness and prohibits the exhibit to go to the jury during deliberations with other admitted evidence. This misuse of Rule 105 misunderstands the rule's concept of admission for a "limited purpose." Such a limit is on the points of proof the jurors may apply the exhibit to, not a limit on the use of the evidence for the point of proof for which it was offered and admitted.
- ⁷³ See ALLEN ET AL., *supra* note 51, at 701 ("Although FRE 901 does not fully apply because these devices are not exhibits a foundation for the accuracy of illustrative evidence must be laid, and the use of illustrative aids at trial is regulated by FRE 611(a) and FRE 403. Many courts endorse the use of illustrative evidence as a trial management technique so long as an appropriate limiting instruction informs the jury that the chart itself is not evidence but is only an aid in evaluating the evidence.").
- ⁷⁴ *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 706 (7th Cir. 2013).
- ⁷⁵ 5 MUELLER & KIRKPATRICK, *supra* note 44, § 9:22. Mueller and Kirkpatrick note that the term has referred to one of three

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possibilities: (1) evidence that “appeals to the senses,” (2) evidence that conveys a “firsthand sense impression,” or (3) evidence used to illustrate other evidence, but lacking any independent substantive force. *Id.* (first quoting Melvin Belli, *Demonstrative Evidence: Seeing is Believing*, 16 Trial 70 (1980); then quoting 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 212 (4th ed. 1991)).

76 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 212 (7th ed. 2013).

77 Brain & Broderick, *supra* note 9, at 997.

78 David S. Santee, *More than Words: Rethinking the Role of Modern Demonstrative Evidence*, 52 SANTA CLARA L. REV. 105, 112 (2012).

79 *See, e.g.*, ROGER PARK, DAVID LEONARD, AVIVA ORENSTEIN & STEVEN GOLDBERG, A STUDENT’S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 583-84 (3d ed. 2011) (“Demonstrative evidence used for illustrative purposes is handled differently from jurisdiction to jurisdiction and sometimes from courtroom to courtroom.”).

80 *See, e.g.*, LILLY ET AL., *supra* note 59, at 57-58 (“[T]here is an area of overlap between ‘original’ real evidence and demonstrative evidence.”).

81 *See, e.g.*, ALLEN ET AL., *supra* note 51, at 151-52, 192-95, 219 (“demonstrative evidence” mentioned in seven of 917 pages); CHRISTOPHER W. BEHAN, EVIDENCE AND THE ADVOCATE: A CONTEXTUAL APPROACH TO LEARNING EVIDENCE 49-50 (2012) (one paragraph of 695 pages); GEORGE FISHER, EVIDENCE 50-54 (3d ed. 2013) (four pages of 1085 pages); STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE: LAW AND PRACTICE 743 (6th ed. 2014) [hereinafter FRIEDLAND ET AL., EVIDENCE: LAW AND PRACTICE] (one page of 823 pages); STEVEN I. FRIEDLAND & JACK P. SAHL, EVIDENCE PROBLEMS AND MATERIALS 14 (4th ed. 2012) [[[hereinafter FRIEDLAND & SAHL, EVIDENCE PROBLEMS AND MATERIALS] (one page of 570); ERIC D. GREEN, CHARLES R. NESSON & PETER L. MURRAY, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 1017-1018 (3d ed. 2000) (two pages of 1122); DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 10-13, 38 (2d ed. 2012) (five of 983 pages); DAVID P. LEONARD, VICTOR J. GOLD & GARY C. WILLIAMS, EVIDENCE: A STRUCTURED APPROACH 47, 51-52 (3d ed. 2012) (three of 647 pages); LILLY ET AL., *supra* note 59 (two of 456 pages); MUELLER & KIRKPATRICK, *supra* note 22, § 4.2 (sixteen of 1206 pages); PETER NICOLAS, EVIDENCE: A PROBLEM-BASED AND COMPARATIVE APPROACH 411-15 (3d ed. 2014) (four of 846 pages); ROGER C. PARK & RICHARD D. FRIEDMAN, EVIDENCE: CASES AND MATERIALS 36, 964-70 (12th ed. 2013) (seven of 1508 pages); PAUL R. RICE & ROY A. KATRIEL, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 14-15, 200-08 (6th ed. 2009) (ten of 1259 pages); OLIN GUY WELLBORN III, CASES AND MATERIALS ON THE RULES OF EVIDENCE 9, 477-79 (3d ed. 2005) (three of 606 pages); PAVEL WONSOWICZ, EVIDENCE: A CONTEXT AND PRACTICE CASEBOOK, 8, 10, 24 (2012) (three of 518 pages); IRVING YOUNGER, MICHAEL GOLDSMITH & DAVID A. SONENSHEIN, PRINCIPLES OF EVIDENCE 29-31 (3d ed. 1997) (three of 922 pages).

82 *See* FISHER, *supra* note 81, at 50-54 (noting that demonstrative evidence is discussed in the case of *Commonwealth v. Serge*, 896 A.2d 1170 (Pa. 2006), *cert. denied*, 549 U.S. 920 (2006), concerning expert opinion and computer-generated animation); NICOLAS, *supra* note 81, at 411-15 (noting that demonstrative evidence is mentioned in the case of *United States v. Bray*, 139 F.3d 1104 (6th Cir. 1998), concerning summaries authorized under FRE 1006). As discussed in Nicolas’s text, the *Bray* court distinguished 1006 summaries from both “illustrative aids,” which are *not* admitted and are *not* evidence, and “secondary evidence summaries,” which are a “combination” of 1006 summaries and illustrative aids that *are* admitted into evidence -- despite failing to comply with the requirements of FRE 1006. *Id.* at 415. In its analysis, the *Bray* court notes that a jury should be told that the admitted evidence is *not* independent evidence of the underlying evidence summarized. *Id.*

83 *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS (8th ed. 2014); *see also* JACK B. WEINSTEIN, JOHN H. MANSFIELD, NORMAN ABRAMS & MARGARET A.

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BERGER, EVIDENCE: CASES AND MATERIALS 157-60 (9th ed. 1997) (surveying various scholarly and judicial approaches to the evidentiary status and admissibility of photographs).

84 *See, e.g.*, LEONARD ET AL., *supra* note 81, at 52.

85 *E.g.*, STEVEN LUBET, MODERN TRIAL ADVOCACY 351 (4th ed. 2009).

86 *See, e.g.*, ROBERT J. GOODWIN & JIMMY GURULE, CRIMINAL AND FORENSIC EVIDENCE: CASES, MATERIALS, PROBLEMS 991 (4th ed. 2014).

87 *E.g.*, FRIEDLAND ET AL., EVIDENCE: LAW AND PRACTICE, *supra* note 81, at 743.

88 *See, e.g.*, YOUNGER ET AL., *supra* note 81, at 30; *see also* ALLEN ET AL., *supra* note 51, at 191-92; KENNETH S. BROUN & WALTER J. BLAKELY, EVIDENCE 95 (2d ed. 1994); ANDRE A. MOENSSENS, BETTY LAYNE DESPORTES & CARL N. EDWARDS, SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 67 (6th ed. 2013).

89 RONALD CARLSON, EDWARD IMWINKELRIED, JULIE SEAMAN & ERICA BEECHER-MONAS, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 218 (7th ed. 2012).

90 *Id.* at 219-20 (reprinting *Bergner v. State*, 397 N.E.2d 1012 (Ind. Ct. App. 1979)).

91 *Id.* (reprinting *Bergner*, 397 N.E.2d at 1016).

92 *Id.* at 220.

93 *See, e.g.*, PARK & FRIEDMAN, *supra* note 81, at 36.

94 *See, e.g.*, FRIEDLAND & SAHL, EVIDENCE PROBLEMS AND MATERIALS, *supra* note 81, at 15.

95 *See, e.g.*, BEHAN, *supra* note 81, at 294.

96 *See, e.g.*, MERRITT & SIMMONS, *supra* note 81, at 38.

97 *See, e.g.*, WELLBORN, *supra* note 81, at 485 (citing *Smith v. Ohio Oil Co.*, 134 N.E.2d 526 (Ill. App. Ct. 1956)).

98 *See, e.g.*, L. TIMOTHY PERRIN, H. MITCHELL CALDWELL & CAROL A. CHASE, THE ART & SCIENCE OF TRIAL ADVOCACY 273 (2003).

99 *Id.* at 272.

100 MOENSSENS ET AL., *supra* note 88, at 67.

- ¹⁰¹ F ED. R. E VID. 402; *see id.* 401; *see also* STEVEN GOODE & OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK 2014-2015, at 51, 54 (2014) (stating that “demonstrative or illustrative evidence.... [is] subject to the general relevancy requirements of Rules 401, 402, and 403,” and underscoring that Rule 401 requires probative value of admitted evidence); WONSOWICZ, *supra* note 81, at 10 (stating that demonstrative evidence may be used “as long as [it is] admissible pursuant to the rules of evidence”).
- ¹⁰² Professor Howard has taught trial advocacy programs coast-to-coast for over fifteen years with law professors, federal judges, state judges, federal and state prosecutors, defense lawyers, and “BigLaw” litigation partners.
- ¹⁰³ KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, D. H. KAYE, ROBERT P. MOSTELLER, E. F. ROBERTS & ELEANOR SWIFT, MCCORMICK ON EVIDENCE 485 (7th ed. 2014).
- ¹⁰⁴ MERRITT & SIMMONS, *supra* note 81, at 38.
- ¹⁰⁵ EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 133 (8th ed. 2012).
- ¹⁰⁶ WILLIAM S. BAILEY & ROBERT W. BAILEY, SHOW THE STORY: THE POWER OF VISUAL ADVOCACY 284 (2011).
- ¹⁰⁷ *Id.* at 284 (citing ALAN E. MORRILL, TRIAL DIPLOMACY 26 (2d ed. 1973)). The authors do not identify, however, the standard for admission or the nature of a judge’s discretion with respect to the use of such aids.
- ¹⁰⁸ MICHAEL R. FONTHAM, TRIAL TECHNIQUE & EVIDENCE 403 (4th ed. 2013).
- ¹⁰⁹ ROGER HAYDOCK & JOHN SONSTENG, TRIAL: ADVOCACY BEFORE JUDGES, JURORS AND ARBITRATORS 453 (4th ed. 2011).
- ¹¹⁰ GREEN ET AL., *supra* note 81, at 1017-18.
- ¹¹¹ THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 317-18 (6th ed. 2016).
- ¹¹² *See, e.g., id.* at 317 (“[T]he proponent must call a competent witness, one having firsthand knowledge of the actual thing at the relevant dates to testify that the exhibit fairly represents or shows the actual thing. To be relevant, the exhibit must help the jury understand some fact of consequence to the case.”).
- ¹¹³ *Id.* (describing the foundation of diagrams and models and concluding that the exhibits are “admissible”). In fairness, Mauet and Wolfson examine the question: “What does it mean when a judge ‘admits’ the exhibit in evidence?” *Id.* Nonetheless, by misstating that demonstrative evidence is “admissible” the seeds of confusion have already been sown.
- ¹¹⁴ *See, e.g.,* 2 MCCORMICK ON EVIDENCE, *supra* note 76, § 212 (“The term ‘demonstrative aid’ will be employed here to identify these and other types of evidence whose relevance is illustrative, rather than substantive. Some courts refer to these aids as ‘pedagogic aids’ or ‘devices.’”); 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 401:2 (7th ed. 2015) (“Demonstrative evidence... is distinguished from real evidence in that it has no probative value itself, but serves merely as a visual aid to the jury in

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comprehending the verbal testimony of a witness or other evidence.”).

¹¹⁵ See, e.g., *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 710 (7th Cir. 2013); *State v. Perea*, 322 P.3d 624, 637 (Utah 2013); *State v. Lord*, 822 P.2d 177, 194 (Wash. 1991).

¹¹⁶ See, e.g., *United States v. Hawkins*, 796 F.3d 843, 866 (8th Cir. 2015) (characterizing the district court’s erroneous admission of a demonstrative timeline as harmless error); *Baugh*, 730 F.3d at 711 (concluding that the district court had abused its discretion by overruling objections to the use of an exhibit, on the ground that its use would be limited to demonstrative purposes only, but then allowing the exhibit’s admission into evidence during jury deliberations).

¹¹⁷ See, e.g., COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS’N, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 1.43 (2015); FLA. BAR, FLORIDA STANDARD JURY INSTRUCTIONS 301.4 (2015); MINN. DIST. JUDGES ASS’N, COMM. ON CRIMINAL JURY INSTRUCTION GUIDES, JURY INSTRUCTION GUIDES -- CRIMINAL 3.26 (6th ed. 2014); COMM. ON FED. CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CRIMINAL JURY INSTRUCTIONS 3.17 (2012); JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, CIVIL JURY INSTRUCTIONS 5020 (2012)...

¹¹⁸ WASH. STATE SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PATTERN JURY INSTRUCTIONS -- CIVIL 6.06 (2013).

¹¹⁹ *Id.*

¹²⁰ At the Washington Pattern Instruction Committee meeting on November 7, 2015, Professor Howard proposed to modify the instruction title from “Exhibit *Admitted* for Illustrative Purposes” to “Exhibit *Used* for Illustrative Purposes” (emphasis added), in an effort to eliminate the internal linguistic inconsistency of the exhibit being referred to as both “admitted [into evidence]” and “not evidence,” and thereby reconcile the title with the substance of the instruction. The proposal was rejected. The committee members noted that the phrasing had long been the lexicon of trial practice and that judges and lawyers understood its meaning. The Seventh Circuit appears to disagree, noting that confusion in trial courts over such demonstrative evidence has resulted in the frustration of several of the goals of the evidence rules. See *Baugh*, 730 F.3d at 708-10.

¹²¹ 725 ILL. COMP. STAT. 5/115-4 (West 2016); LA. CODE CIV. PROC. ANN. art 1794 (2015); NEB. REV. STAT. ANN. § 25-1107.01 (West 2016); NEV. REV. STAT. ANN. § 175.131 (West 2015); ARIZ. R. CIV. P. 39(p); ARIZ. R. CRIM. P. 18.6; CAL. R. CT. 2.1031 (“Jurors must be permitted to take written notes in all civil and criminal trials.”); HAW. R. CIV. P. 47(d) (“Except upon good cause articulated by the court, jurors shall be allowed to take notes during trial.”); HAW. R. CRIM. P. 24(e) (“Except upon good cause articulated by the court, jurors shall be allowed to take notes during trial.”); IOWA R. CIV. P. 1.926; IOWA R. CRIM. P. 2.19; MO. SUP. CT. R. 69.03 (“Upon the court’s own motion or upon the request of any party, the court shall permit jurors to take notes.”); PA. R. CIV. P. 223.2(a)(1) (permitting jurors to take notes “whenever a jury trial is expected to last more than two days”); PA. R. CRIM. P. 644(A) (permitting jurors to take notes “when a jury trial is expected to last more than two days”); TENN. R. CIV. P. 43A.01; TENN. R. CRIM. P. 24.1(a)(1); WASH. SUPER. CT. CRIM. R. 6.8; WASH. SUPER. CT. CIV. R. 47(j); WYO. R. CRIM. P. 24.1; WYO. R. CIV. P. 39.1(a); *Reece v. Simpson*, 437 So. 2d 68, 68 (Ala. 1983).

¹²² LA. CODE CRIM. PROC. ANN. art. 793 (2015); N.C. GEN. STAT. ANN. § 15A-1228 (West 2015); WIS. STAT. ANN. §§ 805.13, 972.10 (West 2015); CONN. SUPER. CT. CIV. R. § 16-7; ME. R. CIV. P. 47; ME. R. CRIM. P. 24; MASS. SUPER. CT. R. 8A; MICH. R. CIV. P. 2.513(H); MISS. CIR. & CTY. CT. R. 3.14; N.H. SUPER. CT. CRIM. R. 64-A; N.H. SUPER. CT. CIV. R. 38(3)(c); N.J. CT. R. 1:8-8(c); N.Y. CT. R. § 220.10; N.D. R. CT. 6.7; OHIO R. CIV. P. 47(E); OHIO R. CRIM. P. 24(I); VT. R. CIV. P. 39(e); VA. SUP. CT. R. 123.A; *Alaska State Hous. Auth. v. Contento*, 432 P.2d 117, 122 (Alaska 1967); *People v. Martinez*, 652 P.2d 174, 177 (Colo. App. 1981); *Williamson v. State*, 235 S.E.2d 643, 645 (Ga. 1977); *Johnson v. State Highway Comm’n*, 366 P.2d 282, 285 (Kan. 1961) (“It would seem to be true that there is authority that a trial judge in his discretion may allow the jury to take notes.”); *Travis v. Commonwealth*, 457 S.W.2d 481, 481 (Ky. 1970); *Wharton v. State*, 734 So. 2d 985 (Miss. 1998)

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(permitting juror note taking, but not allowing jurors to take notes into deliberations); *State v. Hage*, 853 P.2d 1251, 1254 (Mont. 1993); *Sligar v. Bartlett*, 916 P.2d 1383, 1387 (Okla. 1996); *Cohee v. State*, 942 P.2d 211, 214 (Okla. Crim. App. 1997); *State v. Rose*, 748 A.2d 1283, 1286-87 (R.I. 2000); *State v. Trent*, 106 S.E.2d 527, 530-31 (S.C. 1959); *Price v. State*, 887 S.W.2d 949, 954 (Tex. Crim. App. 1994); *State v. Triplett*, 421 S.E.2d 511, 520 (W. Va. 1992).

¹²³ S.D. CODIFIED LAWS § 15-14-20 (2016) (allowing jurors in civil trials to take their notes into deliberations); ARK. R. CRIM. P. 33.5; IDAHO CRIM. R. 24.1; IND. JURY R. 20; MD. R. CIV. P. CIR. CT. 2-521(a) (“The court may, and on request of any party shall, provide paper notepads for use by sworn jurors, including any alternates, during trial and deliberations.”); MD. R. CRIM. P. 4-326 (same); OR. R. CIV. P. 59.C(4) (“Jurors may take notes of the testimony or other proceeding on the trial and may take such notes into the jury room.”).

¹²⁴ S.D. CODIFIED LAWS § 23A-25-7 (remaining silent on juror note taking in criminal trials); *see* DEL. SUPER. CT. JUROR USE STANDARD 16; FLA. STANDARD CRIM. JURY INSTRUCTION 2.1(a); MINN. R. CRIM. P. 26.03 subdiv. 13; N.M. R. CRIM. UNIFORM JURY INSTRUCTION 14-9002, 14-7011, 14-7010; *Cooney-Koss v. McCracken*, No. 10C-10-230 WCC, 2012 WL 8962833 (Del. Super. Ct. 2012) (allowing jurors to take notes); *State v. Jeffs*, No. 061500526, 2007 WL 3033648 (Utah Dist. Ct. 2007) (“During this trial I will permit you to take notes. Many [c]ourts do not permit note-taking by jurors, and a word of caution is in order.”).

¹²⁵ 730 F.3d 701, 708 (7th Cir. 2013).

¹²⁶ As a colleague in the University of Washington Computer Science Department, Dr. David Callahan, likes to say, “Multiple anecdotes are not data.”

¹²⁷ FED. R. EVID. 406 advisory committee’s notes to 1972 proposed rules.

¹²⁸ *See, e.g.*, FED. R. EVID. 402, 412, 501.

¹²⁹ *See, e.g., id.* 412(b)(1)(C) (carving out a constitutional exception within the rape shield law for “evidence whose exclusion would violate the defendant’s constitutional rights”).

¹³⁰ *See supra* Part II.A for a discussion regarding how law professors have attempted to define demonstrative evidence. *See supra* Part II.D for a discussion of how law professors now teach the permissibility of demonstrative evidence usage as within the discretion of the trial court.

¹³¹ *See, e.g.*, Karen D. Butera, *Seeing Is Believing: A Practitioner’s Guide to the Admissibility of Demonstrative Computer Evidence*, 46 CLEV. ST. L. REV. 511 (1998); Mary Quinn Cooper, *The Use of Demonstrative Exhibits at Trial*, 34 TULSA L.J. 567 (1999); Don Howarth, Suzelle M. Smith & Mary La Cesa, *Rules Governing Demonstrative Evidence at Trial: A Practitioner’s Guide*, 20 W. ST. U. L. REV. 157 (1992); Richard J. Leighton, *The Use and Effectiveness of Demonstrative Evidence and Other Illustrative Materials in Federal Agency Proceedings*, 42 ADMIN. L. REV. 35 (1990).

¹³² *See, e.g.*, 2 MCCORMICK ON EVIDENCE, *supra* note 76 § 214; LUBET, *supra* note 85, at 335; MERRITT & SIMMONS, *supra* note 81, at 12-13; Brain & Broderick, *supra* note 9; Michael H. Graham, *Real and Demonstrative Evidence, Experiments and Views*, 46 CRIM L. BULL. 792 (2010); Santee, *supra* note 78.

¹³³ *See, e.g.*, Brain & Broderick, *supra* note 9, at 997-98.

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¹³⁴ See *infra* Part IV.B for a discussion of Maine Rule of Evidence 616.

¹³⁵ See, e.g., Carrie Leonetti & Jeremy Bailenson, *High-Tech View: The Use of Immersive Virtual Environments in Jury Trials*, 93 MARQ. L. REV. 1073 (2010); Jennifer L. Mnookin, *Repeat Play Evidence: Jack Weinstein, "Pedagogical Devices," Technology, and Evidence*, 64 DEPAUL L. REV. 571, 578 (2015).

¹³⁶ See John J. Delany III, David M. Governo & Mary Noffsinger, *The Generation X and Y Factors*, D.R.I. FOR DEF., Jan. 2013, at 74, 74 ("The same techniques Madison Avenue utilizes to sell products can be adopted by trial attorneys to convey effective trial themes. A trial theme should be a multi-sensual message....").

¹³⁷ Fredric I. Lederer, *Courtroom Technology: For Trial Lawyers, the Future Is Now*, CRIM. JUST., Spring 2004, at 14, 15 (2004) (noting the availability of technology in federal courts and its use in a variety of cases, ultimately concluding that "[s]ooner than may seem possible, technology use at trial will be commonplace").

¹³⁸ "The Federal Rules of Evidence are little changed from the first proposed draft in 1969." Josh Camson, *History of the Federal Rules of Evidence*, A.B.A. LITIG. NEWS (2010), https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html.

Absent from the proposed draft are Rules 412, 413, 414, and 415. These rules dealing with sex offense cases, sex assault cases, and child molestation cases weren't enacted until after the initial adoption of the Federal Rules of Evidence. Rule 412 was added in 1978, and the others were added in 1994. Also missing from the proposed draft is Rule 807, the residual exception to the hearsay rule. This is because in the proposed draft, Rule 807 was the default rule. Amendments in the form of new rules, and changes in wording and meaning have all taken place over the last 35 years.

Id. In 2010, the Judicial Conference of the United States' Committee on Rules of Practice and Procedure restyled the language of the rules to simplify and clarify their meaning. *Federal Rules of Evidence -- 2011 Amendment to Restyle the Federal Rules of Evidence*, FED. EVIDENCE REV., <http://federalevidence.com/Restyling> (last visited Apr. 1, 2016).

¹³⁹ Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the U.S. District Courts*, 30 F.R.D. 73, 81 (1962) [hereinafter *Preliminary Report*].

¹⁴⁰ 1 RICHARD FRIEDMAN & JOSHUA DEAHL, *FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY* ix (2015); STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* 1 (9th ed. 2006); Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 214, 218 (1942); Camson, *supra* note 138 (citing Edmund M. Morgan, *Practical Difficulties Impeding Reforms in the Law of Evidence*, 14 VAND. L. REV. 725 (1961)).

¹⁴¹ Camson, *supra* note 138.

¹⁴² 1 FRIEDMAN & DEAHL, *supra* note 140, at ix.

¹⁴³ *Id.*

¹⁴⁴ *Preliminary Report*, *supra* note 139, at 75; 1 FRIEDMAN & DEAHL, *supra* note 140, at x.

¹⁴⁵ Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 177 (1969) [hereinafter *Proposed Rules for District Courts and Magistrates*].

146 Camson, *supra* note 138.

147 *See* 1 FRIEDMAN & DEAHL, *supra* note 140, at x.

148 There had been several prior reporter's drafts, beginning in 1965, and several revised drafts afterward, preceding the enactment of the rules on January 2, 1975 and the discharge of the Advisory Committee. *See id.* at ix; *see also FRE Legislative History Overview Resource Page*, FED. EVIDENCE REV., <http://federalevidence.com/legislative-history-overview> (last visited Apr. 1, 2016).

149 *Proposed Rules for District Courts and Magistrates*, *supra* note 145, at 180.

150 Camson, *supra* note 138; *see also* 1 FRIEDMAN & DEAHL, *supra* note 140, at xi.

151 Maine Rule 616 nominally addresses the use of "illustrative aids," although the advisers' note to the rule acknowledges that these are also referred to as "demonstrative exhibits." ME. R. EVID. 616 advisers' note to 1976 amendment.

152 Rule 616 states that illustrative aids (1) shall be disclosed to opposing counsel in advance; (2) may be used by any party during trial; (3) shall remain the property of the proponent; (4) shall not go back to the jury during deliberations, absent consent of all parties and good cause; and (5) shall be preserved for appeal upon request. *Id.* 616(c)-(d).

153 *Id.* The remainder of the rule addresses the administrative aspects of the rule, as discussed in *supra* note 152.

154 Maine's evidence rules are modeled on the Federal Rules of Evidence, sharing similar (if not identical) major subject headings. *State v. Williams*, 388 A.2d 500, 506 (Me. 1978) (observing that the Maine Rules of Evidence were modeled on the Federal Rules).

155 This discretion is, of course, subject to the requirements of due process and other constitutional considerations.

156 ME. R. EVID 611(a).

157 *See, e.g., United States v. Irvin*, 682 F.3d 1254, 1263 (10th Cir. 2012) ("In short, resort to Rule 611(a) in no way resolves the hearsay problem that renders Exhibit 1-2 inadmissible.").

158 The advisers' note to the rule acknowledges that "illustrative aids" are also referred to as "demonstrative exhibits." ME. R. EVID. 616 advisers' note to 1976 amendment.

159 *Id.* 616(a) (emphasis added).

160 *Id.* 616 advisers' note to 1976 amendment (emphases added).

161 *See id.* 616(a)-(b). The advisers' note to Rule 616 states:
Paragraph (b) of the proposed rule makes clear, however, that the court retains the discretion to condition, restrict or exclude the use of any illustrative aid in order to avoid the risk of unfair prejudice, surprise, confusion or waste of time. This is similar to the discretion

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exercised by the court under Rule 403 in dealing with objects which are admissible in evidence. Because of the multiplicity of potential problems which may be encountered, it is deemed wiser to allow the court a measure of discretion in applying general standards rather than to establish a legal test for utilization of these media.

Id. 616 advisers' note to 1976 amendment.

¹⁶² *Id.* 402 ("Irrelevant evidence is not admissible.").

¹⁶³ See *supra* Part II.C for an in-depth discussion of the admissibility balancing test.

¹⁶⁴ RICHARD H. FIELD & PETER L. MURRAY, MAINE EVIDENCE (6th ed. 2007).

¹⁶⁵ Professor Murray and Professor Richard H. Field were co-consultants to the Maine Advisory Committee from its inception in 1973. See *Peter Murray*, MURRAY PLUMB & MURRAY, <http://www.mpmlaw.com/lawyer/peter-murray/> (last visited Apr. 1, 2016).

¹⁶⁶ E-mail from Peter L. Murray, Visiting Professor of Law, Harvard Law Sch., to Maureen A. Howard, Assoc. Professor of Law, Univ. of Wash. Sch. of Law (Dec. 29, 2015) (on file with authors).

¹⁶⁷ Susan Sturm, *Law Schools, Leadership, and Change*, 127 HARV. L. REV. F. 49, 49 (2013) ("Law schools' rhetoric celebrates lawyers' leadership role.").

¹⁶⁸ *E.g.*, *Mission and History*, N.Y. L. SCH., http://www.nyls.edu/about_the_school/mission_and_history/ (last visited Apr. 1, 2016).

¹⁶⁹ Professor Howard has proposed demonstrative evidence as a topic for an AALS Discussion Group at the January, 2017 annual meeting, and she is organizing a workshop at the University of Washington School of Law in autumn 2016.

¹⁷⁰ LEONARD ET AL., *supra* note 81, at 5-6.

¹⁷¹ CAL. EVID. CODE § 140.

¹⁷² The BBC television series *Garrow's Law* illustrates this point in its portrayal of trials at the Old Bailey in Georgian London. In addition to being educational (it is based on real legal cases from the late eighteenth century), the drama is well scripted and boasts exceptional talent, including Rupert Graves. See Press Release, BBC, Award-Winning Drama *Garrow's Law* Starts Shooting Second Series in Scotland (Oct. 29, 2014), http://www.bbc.co.uk/pressoffice/pressreleases/stories/2010/07_july/07/garrow.shtml; see also *The Proceedings of the Old Bailey, 1674-1913*, OLD BAILEY PROCEEDINGS ONLINE, <http://www.oldbaileyonline.org/> (last visited Apr. 1, 2016).

¹⁷³ Similarly, the burgeoning number of exhibits at trial provided the impetus for Rule 1006, which allows, under certain circumstances, the admission of summaries to prove content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. FED. R. EVID. 1006.

¹⁷⁴ *Id.* 102.

¹⁷⁵ *Id.*

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TAB 10

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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: April 1, 2018

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The outline begins with a short discussion of the Court's two latest cases on confrontation, *Ohio v. Clark* and *Williams v. Illinois*, and then summarizes all the post-*Crawford* cases by subject matter heading.

I. Recent Supreme Court Confrontation Cases

A. *Ohio v. Clark*

The Court's most recent opinion on the Confrontation Clause and hearsay, *Ohio v. Clark*, 135 S.Ct. 2173 (2015), sheds some more light on how to determine whether hearsay is or is not "testimonial." As shown in the outline below, the Court has found a statement to be testimonial when the "primary motivation" behind the statement is that it be used in a criminal prosecution. *Clark* raised three questions about the application of the primary motivation test:

1. Can a statement be primarily motivated for use in a prosecution when it is not made with the involvement of law enforcement? (Or put the other way, is law enforcement involvement a prerequisite for a finding of testimoniality?).

2. If a person is required to report information to law enforcement, does that requirement render them law enforcement personnel for the purpose of the primary motivation test?

3. How does the primary motivation test apply to statements made by children, who are too young to know about use of statements for law enforcement purposes?

In *Clark*, teachers at a preschool saw indications that a 3 year-old boy had been abused, and asked the boy about it. The boy implicated the defendant. The boy's statement was admitted at trial under the Ohio version of the residual exception. The boy was not called to testify --- nor could he have been, because under Ohio law, a child of his age is incompetent to testify at trial. The defendant argued that the boy's statement was testimonial, relying in part on the fact that under Ohio law, teachers are required to report evidence of child abuse to law enforcement. The defendant argued that the reporting requirement rendered the teachers' agents of law enforcement.

The Supreme Court in *Clark*, in an opinion by Justice Alito for six members of the Court, found that the boy's hearsay statement was not testimonial.¹ It made no categorical rulings as to the issues presented, but did make the following points about the primary motive test of testimoniality:

1. Statements of young children are *extremely unlikely* to be testimonial because a young child is not cognizant of the criminal justice system, and so will not be making a statement with the primary motive that it be used in a criminal prosecution.

2. A statement made without law enforcement involvement is *extremely unlikely* to be found testimonial because if law enforcement is not involved, there is probably some other motive for making the statement other than use in a criminal prosecution. Moreover, the formality of a statement is a critical component in determining primary motive, and if the statement is not made with law enforcement involved, it is much less likely to be formal in nature.

3. The fact that the teachers were subject to a reporting requirement was essentially irrelevant, because the teachers would have sought information from the child whether or not there was a reporting requirement --- their primary motivation was to protect the child, and the reporting requirement did nothing to change that motivation. (So there may be room left for a finding of testimoniality if the government sets up mandatory reporting in a situation in which the individual would not otherwise think of, or be interested in, obtaining information).

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

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.

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

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

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 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.

concluded in the judgment nonetheless, because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently “formalized.” He declared that the Cellmark report:

lacks the solemnity of an affidavit of deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . And, although the report was introduced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

Fallout from Williams:

The irony of *Williams* is that *eight* members of the Court rejected Justice Thomas’s view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. Yet if a court is counting Justices, it appears that it might be necessary for the government to comply with the rather amorphous standards for “informality” established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of “primary motive” but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then it can be argued that the government must establish that the hearsay is not tantamount to a formal affidavit --- because five members of the Court rejected the argument that the Confrontation Clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert’s opinion.

There is a strong argument, though, that counting Justices after *Williams* is a fool’s errand for now --- because of the death of Justice Scalia and the uncertainty over Justice Gorsuch’s view of the Confrontation Clause.

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor “I’ve just been shot by Bill. Call an ambulance.” Surely that statement --- admissible against the accused as an excited utterance --- satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfies the less restrictive Alito view. Thus, Justice Thomas’s “formality” test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would find no constitutional problem with its admission. See *Michigan v. Bryant*, 562 U.S. 344 (2011) (Thomas, J., concurring) (excited utterance of shooting victim “bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.”).

Similarly, there is extensive case law both before and after *Williams* allowing admission of testimonial statements on the ground that they are not offered for their truth. For example, if a statement is legitimately offered to show the background of a police investigation, or offered to show that the statement is in fact false, then it is not hearsay and it also does not violate the right to confrontation. This is because if the statement is not offered for its truth, there is no reason to cross-examine the declarant, and cross-examination is the procedure right that the Confrontation Clause guarantees. As will be discussed further below, while both Justice Thomas and Justice Kagan in *Williams* reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause “does not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted.” And they both approve of the result in *Tennessee v. Street*, 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant’s own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true --- and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

II. Post-*Crawford* Cases Discussing the Relationship Between the Confrontation Clause and the Hearsay Rule and its Exceptions, Arranged By Subject Matter

“Admissions” --- Hearsay Statements by the Defendant

Defendant’s own hearsay statement was not testimonial: *United States v. Lopez*, 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford*. The court declared that “for reasons similar to our conclusion that appellant’s statements were not the product of custodial interrogation, the statements were also not testimonial.” That is, the statement was spontaneous and not in response to police interrogation.

Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. See *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006) (admission of defendant’s own statements does not violate *Crawford*); *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012): “The Sixth Amendment simply has no application [to the defendant’s own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself.”

Defendant’s own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson*, 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted

testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford*. But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Text messages were properly admitted as coming from the defendant: *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014). In a prosecution for sex trafficking, text messages sent to a prostitute were admitted against the defendant. The defendant argued that admitting the texts violated his right to confrontation, but the court disagreed. The court stated that the texts were properly admitted as statements of a party-opponent, because the government had established by a preponderance of the evidence that the texts were sent by the defendant. They were therefore "not hearsay" under Rule 801(d)(2)(A), and "[b]ecause the messages did not constitute hearsay their introduction did not violate the Confrontation Clause."

Note: The court in *Brinson* was right but for the wrong reasons. It is true that if a statement is "not hearsay" its admission does not violate the Confrontation Clause. (See the many cases collected under the "not hearsay" headnote, *infra*). But party-opponent statements are only technically "not hearsay." They are in fact hearsay because they are offered for their truth --- they are hearsay subject to an exemption. The Evidence Rules' technical categorization in Rule 801(d)(2) cannot determine the scope of the Confrontation Clause. If that were so, then coconspirator statements would automatically satisfy the Confrontation Clause because they, too, are classified as "not hearsay" under the Federal Rules. That would have made the Supreme Court's decision in *Bourjaily v. United States* unnecessary; and the Court in *Crawford* would not have had to discuss the fact that coconspirator statements are ordinarily not testimonial. The real reason that party-opponent statements are not hearsay is that when the defendant makes a hearsay statement, he has no right to confront himself.

***Bruton* --- Testimonial Statements of Co-Defendants**

***Bruton* line of cases not applicable unless accomplice's hearsay statement is testimonial: *United States v. Figueroa-Cartagena*, 612 F.3d 69 (1st Cir. 2010):** The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

***Bruton* does not apply unless the testimonial hearsay directly implicates the nonconfessing codefendant:** *United States v. Lung Fong Chen*, 393 F.3d 139, 150 (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* remains in place to protect against admission of testimonial hearsay against a non-confessing co-defendant:** *United States v. Ramos-Cardenas*, 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford*. But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant (because he has no right to confront himself); nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court found that the reference to the other defendants in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Codefendant’s testimonial statements were not admitted “against” the defendant in light of limiting instruction: *United States v. Harper*, 527 F.3d 396 (5th Cir. 2008): Harper’s co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper’s right to confrontation because the co-defendant was not a witness “against” him. The court relied on the post-*Bruton* case of *Richardson v. Marsh*, and held that the limiting instruction was sufficient to protect Harper’s right to confrontation because the co-defendant’s confession did not directly implicate Harper and so was not as “powerfully incriminating” as the confession in *Bruton*. The court concluded that because “the Supreme Court has so far taken a pragmatic approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton*.”

***Bruton* inapplicable to statement made by co-defendant to another prisoner, because that statement was not testimonial: *United States v. Vasquez*, 766 F.3d 373 (5th Cir. 2014):** The defendant’s co-defendant made a statement to a jailhouse snitch that implicated the defendant in the crime. The defendant argued that admitting the codefendant’s statement at his trial violated *Bruton*, but the court disagreed. It stated that *Bruton* “is no longer applicable to a non-testimonial prison yard conversation because *Bruton* is no more than a by-product of the Confrontation Clause.” The court further stated that “statements from one prisoner to another are clearly non-testimonial.”

***Bruton* protection does not apply unless codefendant’s statements are testimonial: *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009):** The court held that after *Crawford*, *Bruton* is applicable only when the codefendant’s statement is testimonial.

***Bruton* protection does not apply unless codefendant’s statements are testimonial: *United States v. Dale*, 614 F.3d 942 (8th Cir. 2010):** The court held that after *Crawford*, *Bruton* is applicable only when the codefendant’s statement is testimonial.

Statement admitted against co-defendant only does not implicate *Crawford*: *Mason v. Yarborough*, 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant’s name was never mentioned --- *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a “witness against” the defendant. “Because Fenton’s words were never admitted into evidence, he could not ‘bear testimony’ against Mason.”

Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson*, 713 F.3d 1237 (10th Cir. 2013): The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. *See also United States v. Clark*, 717 F.3d 790 (10th Cir. 2013) (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was not testimonial); *United States v. Morgan*, 748 F.3d 1024 (10th Cir. 2014) (statement admissible as a coconspirator statement cannot violate *Bruton* because “*Bruton* applies only to testimonial statements” and the statements were made between coconspirators dividing up the proceeds of the crime and so “were not made to be used for investigation or prosecution of crime.”).

Child-Declarants

Statements of young children are extremely unlikely to be testimonial: *Ohio v. Clark*, 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement from a young child is extremely unlikely to be testimonial because the child is not aware of the possibility of use of statements in criminal prosecutions, and so cannot be speaking with the primary motive that the statement will be so used. The Court refused to adopt a bright-line rule, but it is hard to think of a case in which the statement of a young child will be found testimonial under the primary motivation test.

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse’s primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Co-Conspirator Statements

Co-conspirator statement not testimonial: *United States v. Felton*, 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant’s coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford*. **Accord *United States v. Sanchez-Berrios***, 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* “explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial.”). *See also United States v. Turner*, 501 F.3d 59 (1st Cir. 2007) (conspirator’s statement made during a private conversation were not testimonial); *United States v. Ciresi*, 697 F.3d 19 (1st Cir. 2012) (statements

admissible as coconspirator hearsay under Rule 801(d)(2)(E) are “by their nature” not testimonial because they are “made for a purpose other than use in a prosecution.”).

Statements made pursuant to a conspiracy to commit kidnapping are not testimonial: *United States v. Stimler*, 864 F.3d 253 (3rd Cir. 2017): The defendants were prosecuted for conspiracy to kidnap and related crimes arising out of Orthodox Jewish divorce proceedings. Statements were made at a *beth din* which was convened when the alleged victim of one of the kidnappings had challenged the validity of the *get* he signed. The court found that those statements were made pursuant to the kidnapping conspiracy, and reasoned that “none of the individuals at the *beth din* --- all of whom were charged in the conspiracy --- would have reasonably believed that they were making statements for the purpose of assisting a criminal prosecution.”

Surreptitiously recorded statements of coconspirators are not testimonial: *United States v. Hendricks*, 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. **Accord** *United States v. Bobb*, 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker’s murder convictions and death sentence. It held that coconspirator statements are not testimonial under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. **Accord** *United States v. Delgado*, 401 F.3d 290 (5th Cir. 2005); *United States v. Olguin*, 643 F.3d 384 (5th Cir. 2011); *United States v. Alaniz*, 726 F.3d 586 (5th Cir. 2013). **See also** *United States v. King*, 541 F.3d 1143 (5th Cir. 2008) (“Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford’s* protection”). Note that the court in *King* rejected the defendant’s argument that the co-conspirator statements were testimonial because they were “presented by the government for their testimonial value.” Accepting that definition would mean that all hearsay is testimonial simply by being offered at trial. The court observed that “*Crawford’s* emphasis clearly is on whether the statement was testimonial at the time it was made.”

Statement by an anonymous coconspirator is not testimonial: *United States v. Martinez*, 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford* because it was not written with the intent that it would be used in a criminal investigation or prosecution. **See also** *United States v. Mooneyham*, 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them “has no awareness or expectation that his or her statements may later be used at a trial”; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); *United States v. Stover*, 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis*, “co-conspirators’ statements made in pendency and furtherance of a conspiracy are not testimonial” and therefore

that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); *United States v. Damra*, 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator "by their nature are not testimonial") *United States v. Tragas*, 727 F.3d 610 (6th Cir. 2013) ("As coconspirator statements were made in furtherance of the conspiracy, they were categorically non-testimonial.").

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove*, 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that "*Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, "the Supreme Court specifically cited *Bourjaily* --- which as here involved a coconspirator's statement made to a government informant --- to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements to be admissible must be made during the course and in furtherance of the conspiracy, they cannot be the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford*. The court reached the same result on co-conspirator hearsay in *United States v. Reyes*, 362 F.3d 536 (8th Cir. 2004); *United States v. Singh*, 494 F.3d 653 (8th Cir. 2007); and *United States v. Hyles*, 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators); *United States v. Furman*, 867 F.3d 981 (8th Cir. 2017) (statements by a coconspirator over a prison telephone were not testimonial even though the declarant knew the statements were recorded by law enforcement: "[A]lthough Gerald was aware that law enforcement might listen to his telephone conversations and use them as evidence, the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution.").

Statements in furtherance of a conspiracy are not testimonial: *United States v. Allen*, 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." *See also United States v. Larson*, 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial); *United States v. Grasso*, 724 F.3d 1077 (9th Cir. 2013) ("co-conspirator statements in furtherance of a conspiracy are not testimonial"); *United States v. Cazares*, 788 F.3d 956 (9th Cir. 2015) ("a conversation between two gang members about the journey of their burned gun is not testimonial").

Statements admissible under the co-conspirator exemption are not testimonial: *United States v. Townley*, 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant’s argument that hearsay is testimonial under *Crawford* whenever “confrontation would have been required at common law as it existed in 1791.” It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. *Accord United States v. Ramirez*, 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); *United States v. Patterson*, 713 F.3d 1237 (10th Cir. 2013) (same); *United States v. Morgan*, 748 F.3d 1024 (10th Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they “were not made to be used for investigation or prosecution of crime.”).

Statements made during the course and in furtherance of the conspiracy are not testimonial: *United States v. Underwood*, 446 F.3d 1340 (11th Cir. 2006): In a narcotics prosecution, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements “clearly were not made under circumstances which would have led [Darryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.” The court concluded as follows:

Although the foregoing discussion would probably support a holding that the evidence challenged here is not “testimonial,” two additional aspects of the *Crawford* opinion seal our conclusion that Darryl’s statements to the government informant were not “testimonial” evidence. First, the Court stated: “most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy.” Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it “hew[ed] closely to the traditional line” of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

See also United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011): co-conspirator’s statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely “bragging to a friend” and not a formal statement intended for trial.

Cross-Examination

Cross-examination of a witness during prior testimony was adequate even though defense counsel was found ineffective on other grounds: *Rolan v. Coleman*, 680 F.3d 311 (3rd Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford*. The question was whether the witness --- who was unavailable for the second trial --- was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be constitutionally ineffective at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate --- that court found “baseless” the defendant’s argument that counsel had failed to explore the witness’s immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that “[t]here is no Supreme Court precedent to suggest that Goldstein’s cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court’s finding was not contrary to, or an unreasonable application of, *Crawford*.”

Attorney’s cross-examination at a prior trial was adequate and therefore admitting the testimony at a later trial did not violate the right to confrontation: *United States v. Richardson*, 781 F. 3d 287 (5th Cir. 2015): The defendant was convicted on drug and gun charges, but the conviction was reversed on appeal. By the time of retrial on mostly the same charges, a prosecution witness had become unavailable, and the trial court admitted the transcript of the witness’s testimony from the prior trial. The court found no violation of the right to confrontation. The court found that *Crawford* did not change the long-standing rule as to the opportunity that must be afforded for cross-examination to satisfy the Confrontation Clause. What is required is an “adequate opportunity to cross-examine” the witness: enough to provide the jury with “sufficient information to appraise the bias and the motives of the witness.” The court noted that while the lawyer’s cross-examination of the witness at the first trial could have been better, it was adequate, as the lawyer explored the witness’s motive to cooperate, his arrests and convictions, his relationship with the defendant, and “the contours of his trial testimony.”

State court was not unreasonable in finding that cross-examination by defense counsel at the preliminary hearing was sufficient to satisfy the defendant’s right to confrontation: *Williams v. Bauman*, 759 F.3d 630 (9th Cir. 2014): The defendant argued that his right to confrontation was violated when the transcript of the preliminary hearing testimony of an eyewitness was admitted against him at his state trial. The witness was unavailable for trial and the defense counsel cross-examined him at the preliminary hearing. The court found that the state court was not unreasonable in concluding that the cross-examination was adequate, thus satisfying the right to confrontation. The court noted that “there is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause purposes” but concluded that there was “reasonable room for debate” on the question, and

therefore the state court's decision to align itself on one side of the argument was beyond the federal court's power to remedy on habeas review.

**Declarations Against Penal Interest
(Including Accomplice Statements to Law Enforcement)**

Accomplice's jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial: *United States v. Pelletier*, 666 F.3d 1 (1st Cir. 2011): The defendant's accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements "to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility." For similar reasons, the hearsay was not testimonial under *Crawford*. The court stated that the statements were made "not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier."

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget*, 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States*, hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson*, because it was made to an undercover officer---the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford* --- it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. *See also United States v. Williams*, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. *Accord United States v. Wexler*, 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends found admissible under Rule 804(b)(3) and not testimonial).

Intercepted conversations were admissible as declarations against penal interest and were not testimonial: *United States v. Berrios*, 676 F.3d 118 (3rd Cir. 2012): Authorities intercepted a conversation between two criminal associates in a prison yard. The court held that the statements were non-testimonial, because neither of the declarants "held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance." A defendant also

lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant “only to complain that he crashed the getaway car.”

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan*, 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice’s statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: “To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates.” The court also found the accomplice’s statement properly admitted as a declaration against interest. The court elaborated as follows:

Here, although Brown’s statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, by extension, for Tabon’s murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice’s statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor*, 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant’s husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband’s statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued that a statement is testimonial if the *government’s* primary motivation is to prepare the statement for use in a criminal prosecution --- and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the *husband’s* primary motivation was not to prepare a statement for any criminal trial. The court observed that the “intent of the police officers or investigators is relevant to the determination of whether a statement is testimonial only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially.”

Note: This case was decided before *Michigan v. Bryant, infra*, but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication --- and that all of them must be primarily motivated to have the statement used in a criminal prosecution for the statement to be testimonial.

Accomplice’s confessions to law enforcement agents were testimonial: *United States v. Harper*, 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception --- but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

Accomplice’s statements to a friend, implicating both the accomplice and the defendant in the crime, were not testimonial: *Ramirez v. Dretke*, 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice’s roommate. The court found that these statements were not testimonial under *Crawford*: “There is nothing in *Crawford* to suggest that testimonial evidence includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context.”

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin*, 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant’s accomplices (Clarke), was speaking to a friend (Wright) sometime after the robbery. Wright told Clarke that he looked “stressed out.” Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke’s hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark’s interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke’s statement was not testimonial under *Crawford*:

Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke’s statements only as his friend and confidant.

The court distinguished other cases in which an informant’s statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that “the informant’s statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant.”

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where “the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame”); *United States v. Johnson*, 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn’t know he was speaking to law enforcement, and so a person in his position “would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.”).

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant’s roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant’s interest because “they admitted his participation in an unsolved murder and bank robbery.” And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded “and therefore could not have made his statement in order to obtain a benefit from law enforcement.” Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones*, 371 F.3d 363 (7th Cir. 2004): An accomplice’s statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, “under *Crawford*, no part of Rock’s confession should have been allowed into evidence.”

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson*, 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony’s statement was against his own interest, and rejected Watson’s contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: “A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes.” **Accord** *United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014): Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v.*

Bryant, had in the interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry “is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had.” Applying this objective approach, the court concluded that the conversation “looks like a casual, confidential discussion between co-conspirators.”

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre*, 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancée that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was “not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.”

Accomplice statements to cellmate were not testimonial: *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007): The defendant’s accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Accomplice’s confession to law enforcement was testimonial, even if redacted: *United States v. Shaw*, 758 F.3d 1187 (10th Cir. 2014): At the defendant’s trial, the court permitted a police officer to testify about a confession made by the defendant’s alleged accomplice. The accomplice was not a co-defendant, but the court, relying on the *Bruton* line of cases, ruled that the confession could be admitted so long as all references to the defendant were replaced with a neutral pronoun. The court of appeals found that this was error, because the confession to law enforcement was, under *Crawford*, clearly testimonial. It stated that “[r]edaction does not override the Confrontation Clause. It is just a tool to remove, in appropriate cases, the prejudice to the defendant from allowing the jury to hear evidence admissible against the codefendant but not admissible against the defendant.” The trial court’s reliance on the *Bruton* cases was flawed because in those cases the accomplice is joined as a codefendant and the confession is admissible against the accomplice. In this case, where the defendant was tried alone and the confession was offered against him only, it was inadmissible for any purpose, whether or not redacted.

Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: *United States v. Smalls*, 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement

to be testimonial. And the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.*, 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington and Hammon v. Indiana*, 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis*, the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon*, the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to one of the statements in *Hammon*. The Court set the dividing line for such statements as follows:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant*, 562 U.S. 344 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter --- and admitted as an excited utterance under a state rule of evidence --- was not testimonial under *Davis* and *Crawford*. The Court applied the test for testimoniality established by *Davis* --- whether the primary motive for making the statement was to have it used in a criminal prosecution --- and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an

emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.

2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's primary purpose. An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency --- unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose

motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a primary purpose “to establish or prove past events potentially relevant to later criminal prosecution.” For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter’s location; or anything else about the crime. They asked exactly the type of questions necessary to enable them “to meet an ongoing emergency” --- essentially, who shot the victim and where did the act occur. Nothing in the victim’s responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency --- apprehending a suspect with a gun --- and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law --- he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux*, 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant’s girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events “in real time, as she witnessed them transpire”; 2) she specifically requested police assistance; 3) the dispatcher’s questions were tailored to identify “the location of the emergency, its nature, and the perpetrator”; and 4) the daughter was “hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe.” The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the “primary motivation” for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus, the declarant was in "imminent personal peril" when the call was made and therefore her report was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher --- a question that only momentarily interrupted an otherwise continuous stream of consciousness."

911 call --- including statements about the defendant's felony status --- was not testimonial: *United States v. Proctor*, 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the "primary purpose" test and evaluated the call in the following passage:

Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency --- not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not

momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

See also United States v. Mouzone, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as “each caller simply reported his observation of events as they unfolded”; the 911 operators were not attempting to “establish or prove past events”; and “the transcripts simply reflect an effort to meet the needs of the ongoing emergency”).

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: *United States v. Arnold*, 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is “fixing to shoot me.” The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said “a black handgun.” At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated: “that's the guy that pulled the gun on me.” A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of “testimonial” as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances --- Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is not testimonial: *United States v. Thomas*, 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements as follows:

[T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

Statement made by a child immediately after an assault on his mother was admissible as excited utterance and was not testimonial: *United States v. Clifford*, 791 F.3d 884 (8th Cir. 2015): In an assault trial, the court admitted a hearsay statement from the victim's three-year-old son, made to a trusted adult, that the defendant "hurt mama." The statement was made immediately after the event and the child was shaking and crying; the statement was in response to the adult asking, "what happened?" The court of appeals held that the statement was admissible as an excited utterance and was not testimonial. There was no law enforcement involvement and the court noted that the defendant "identifies no case in which questions from a private individual acting without any direction from state officials were determined to be equivalent to police interrogation." The court also noted that the interchange between the child and the adult was informal, and was in response to an emergency. Finally, the court relied on the Supreme Court's most recent decision in *Ohio v. Clark*:

As in *Clark*, the record here shows an informal, spontaneous conversation between a very young child and a private individual to determine how the victim had just been injured. [The child's] age is significant since "statements by very young children will rarely, if ever, implicate the Confrontation Clause."

911 calls and statements made to officers responding to the calls were not testimonial: *United States v. Brun*, 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford*. The court first found that the nephew's 911 call was not testimonial because it was not the kind of statement that was equivalent to courtroom testimony. The court had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon* and then *Bryant*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime. The *Brun* decision is especially consistent with the pragmatic approach to finding an emergency (and to the observation that emergency is only one factor in the primary motive test) that the Court found in *Michigan v. Bryant*.

Statements made by mother to police, after her son was taken hostage, were not testimonial: *United States v. Lira-Morales*, 759 F.3d 1105 (9th Cir. 2014): The defendant was charged with hostage-taking and related crimes. At trial, the court admitted statements from the hostage's mother, describing a telephone call with her son's captors. The call was arranged as part of a sting operation to rescue the son. The court found that the mother's statements to the officers about what the captors had said were not testimonial, because the primary motive for making the call --- and thus the report about it to the police officers --- was to rescue the son. The court noted that throughout the event the mother was "very nervous, shaking, and crying in response to continuous ransom demands and threats to her son's life." Thus, the agents faced an "emergency situation" and "the primary purpose of the telephone call was to respond to these threats and to ensure [the son's] safety." The defendant argued that the statements were testimonial because an agent attempted, unsuccessfully, to record the call that they had set up. But the court rejected this argument, noting that the agent "primarily sought to record the call to obtain information about

Aguilar's location and to facilitate the plan to rescue Aguilar. Far from an attempt to build a case for prosecution, Agent Goyco's actions were good police work directed at resolving a life-threatening hostage situation. * * * That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation."

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant*.

911 call that a man had put a gun to another person's head was not testimonial: *United States v. Hughes*, 840 F.3d 1368 (11th Cir. 2016): In a felon-firearm prosecution, the trial court admitted a 911 call in which a bystander reported that the defendant had cocked a gun and put it to the head of a couple of people. The defendant argued that the 911 call was testimonial, but the court of appeals found no error. It concluded that "Hughes fails to distinguish the 911 caller's statements from those in *Davis* in any way whatsoever."

Expert Witnesses

Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois*, 567 U.S. 50 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on

testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. At this stage, the answer appears to be that an expert can rely on testimonial hearsay so long as it is not in the form of an affidavit or certificate --- that proviso would then get Justice Thomas's approval. As seen elsewhere in this outline, some courts have found *Williams* to have no precedential effect other than over cases that present the same facts as *Williams*. And many courts have held that the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008): The court found that an expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

Note: This opinion precedes *Williams* and is questionable if you count the votes in *Williams*. But the case is quite consistent with the Alito opinion in *Williams* and many --- allowing the expert to use testimonial hearsay as long as the hearsay is not introduced at trial and the expert is not simply parroting the hearsay. And lower courts are treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.

Confrontation Clause violated where expert does no more than restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez*, 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant's vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz*, and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant's right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) ("[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay," there is likely a *Crawford* violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozi*, 491 F.3d 61, 72 (2d Cir.2007) (" [T]he

admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion.”). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales’s testimony as anything other than a recitation of Borrero’s report. On direct examination, the prosecutor asked Morales to “say what are the results of the test,” and he did exactly that, responding “[b]oth bricks were positive for cocaine.” This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero’s report. Morales’s testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

Note: Whatever *Williams* may mean, the court’s analysis in *Ramos-Gonzalez* surely remains valid. Five members of the *Williams* Court rejected the proposition that an expert can rely *at all* on testimonial hearsay even if the expert testifies to his own opinion. And even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Confrontation Clause not violated where testifying expert conducts his own testing that confirms the results of a testimonial report: *United States v. Soto*, 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant’s laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico*, in which the Court held that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy’s forensic report was not introduced into evidence through Agent Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent Murphy’s report into evidence through Agent Pickett. We do not interpret *Bullcoming* to mean that the agent who testifies against the defendant cannot know about another agent’s

prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The court reviewed the votes in *Bullcoming* and found that "it appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination." This count resulted from the fact that Justice Ginsburg, joined by Justice Scalia, stated that the Confrontation problem in *Bullcoming* could have been avoided if the testifying expert had simply retested the substance and testified on the basis of the retest.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

See also Barbosa v. Mitchell, 812 F.3d 62 (1st Cir. 2016): On habeas review, the court found it not clearly established that expert reliance on a testimonial lab report violates the Confrontation Clause. The defendant was convicted in the time between *Melendez-Diaz* and *Williams*. The Court held that, "[t]o the contrary, four Justices [in *Williams*] later read *Melendez-Diaz* as not establishing at all, much less beyond doubt" the principle that such testimony violates the Confrontation Clause.

Expert reliance on a manufacturing label to conclude on point of origin did not violate the Confrontation Clause, because the label was not testimonial: *United States v. Torres-Colon*, 790 F.3d 26 (1st Cir. 2015): In a trial on a charge of unlawful possession of a firearm, the

government's expert testified that the firearm was made in Austria. He relied on a manufacturing inscription on the firearm that stated: "made in Austria." The court found no confrontation violation in the expert's testimony. The statement on the firearm was clearly not made by the manufacturer with the primary purpose of use in a criminal prosecution.

No relief under AEDPA where expert relied on informal notations regarding testing of buccal swab: *Washington v. Griffin*, 876 F.3d 395 (2nd Cir. 2017) (Livingston, J.): In this habeas petition, the constitutional challenge in state court presented facts close to those of *Williams*: a buccal swab of the defendant was subjected to DNA testing, and an expert relied on notations by lab personnel indicating the process of extraction, amplification, and chain of custody. The expert who testified was not involved in conducting or supervising that process, but the expert did conduct her own review and made an independent conclusion that the DNA from the buccal swab matched the DNA from the crime scene. The court held that the petitioner had not established a clear violation of the Confrontation Clause --- as required under AEDPA --- when the state court allowed the expert to testify and did not require production of the lab analysts. The court found that *Melendez-Diaz* and *Bullcoming* were distinguishable because "Washington does not rely on a lab analyst's affidavit, as in *Melendez-Diaz*, or on the formal certificate of an analyst attesting to his results, as in *Bullcoming*, to make out his constitutional claim. He instead points to a medley of unsworn, uncertified notations by often unspecified lab personnel. * * * Such notations, standing alone, are potentially as suggestive of a purpose to record tasks, in order to accomplish the lab's work, as of any purpose to make an out-of-court statement for admission at trial." The court also noted that the lab reports on the buccal swab were never entered into evidence. The court found that the disarray in *Williams* only highlighted the fact that the state court had not violated clearly established law in allowing the expert to testify and not requiring the lab analysts to do so.

Judge Katzmann, concurring, suggested that the prosecution could avoid any litigation risk by simply having the expert supervise a new test when the case is going to trial. He noted, and the court agreed, that the supervising analyst "need not conduct every step of the process herself. Instead, by supervising the process, she could personally attest to the extraction and correct labeling of the sample, that a proper chain of custody was maintained, and that the DNA profile match was in fact a comparison of the defendant's DNA to that of the DNA found on the crime scene evidence.

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury: *United States v. Lombardozi*, 491 F.3d 61 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that "it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." *See also United States v. Mejia*, 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Statements made to psychiatric expert were testimonial and were used by the jury for their truth at trial: *Lambert v. Warden*, 861 F.3d 459 (3rd Cir. 2017): Tillman shot two people and Lambert drove him to and from the crime. Tillman challenged his mental capacity and called a psychiatric expert to whom he made statements. Tillman did not testify at trial. The court found that the jury may have used these statements, related inferentially in the expert’s testimony, against Lambert for their truth --- in which case there would have been a confrontation violation. The government argued that the statements were not offered to prove anything, only for judging the expert’s opinion, but the court found that in the context of the case this was not a “legitimate” not for truth purpose --- the prosecutor raised the statements as inferential proof of Lambert’s involvement and the trial court gave no limiting instruction. The court remanded for an assessment of whether the defense counsel’s failure to object constituted ineffective assistance of counsel.

Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers*, 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government’s failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a “pure instrument read-out.” The court stated that “[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine” should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial.

See also United States v. Shanton, 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*: “[W]e believe five justices would affirm: Justice Thomas on the ground that the statements at issue were not testimonial and Justice Alito, along with the three justices who joined his plurality opinion, on the ground that the statements were not admitted for the truth of the matter asserted.”).

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford*: *United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court recognized that it is “appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay.” But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. “Instead, each expert presented his independent judgment and specialized understanding to the jury.” Because the experts “did not become mere conduits” for the testimonial hearsay, their

consideration of that hearsay “poses no *Crawford* problem.” *Accord United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts “did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury.”). *Accord United States v Palacios*, 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert “did not specifically reference” any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

Note: These cases are in doubt if you count the votes in *Williams*, but most courts have come to the same result after *Williams*: Finding no confrontation problem where an expert relies on testimonial hearsay, so long as the hearsay is not admitted into evidence and the expert draws his own conclusion from the data (rather than just parroting it).

Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants: *United States v. Garcia*, 752 F.3d 382 (4th Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied, in coming to her conclusion, on input from coconspirators whom she had debriefed. The court distinguished *Johnson, supra*, on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that “the question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.” In this case, “we cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just as well have been the result of the Government’s failure to elicit a proper foundation for Agent Dayton’s interpretations.” The government argued that the information from the coconspirators only served to confirm the Agent’s interpretations after the fact, but the court concluded that “[t]he record is devoid of evidence that this was, in fact, the sequence of Dayton’s analysis, to Garcia’s prejudice.”

Expert testimony on gangs, based in part on testimonial hearsay, did not violate the Confrontation Clause when the hearsay was not transmitted to the jury: *United States v. Rios*, 830 F.3d 403 (6th Cir. 2016): In a prosecution of Latin Kings gang members for racketeering and drug offenses, the court found it was not error to allow a law enforcement officer to testify as an expert about the organization of the gang. The testimony was based in large part on listening to jail conversations and interviewing former members. The court found no violation of the Confrontation Clause to the extent the underlying statements were not transmitted to the jury. The one instance in which a statement was related to the jury was found to be harmless error.

Expert opinion based in part on information learned during custodial interrogation did not violate *Crawford* where expert was more than a conduit: *United States v. Lockhart*, 844 F.3d 501 (5th Cir. 2016): In a sex trafficking prosecution, an officer testified as an expert that the defendants were gang members. The defendant argued that the testimony violated his right to confrontation because the officer, in reaching his conclusion, relied on statements made during

custodial interrogations, as well as statements of other officers describing their experiences during interrogations. But the court found no error. The court explained that *Crawford* “in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence.” It further stated that “when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.” The court concluded that in this case the expert “did not serve as a conduit for inadmissible testimonial hearsay.”

Police officer’s reliance on statements from people he had arrested for drug crimes did not violate *Crawford*: *United States v. Collins*, 799 F.3d 554 (6th Cir. 2015): In a trial involving manufacture of methamphetamine, a law enforcement officer testified as an expert on the conversion ratio between pseudoephedrine and methamphetamine. He relied in part on statements from people he had interviewed after he had arrested them for manufacturing methamphetamine. The court found no plain error because there was “no evidence that the suspected methamphetamine manufacturers Agent O’Neil questioned throughout his career ‘intended to bear testimony’ against Collins or his co-defendants.” Thus, the expert was not relying on testimonial hearsay.

Note: The court appears to be applying --- maybe without realizing it --- Justice Alito’s definition of testimoniality in *Williams*. The court is saying that the arrestees did not target their testimony toward the defendant. But under the view of five Justices in *Williams*, the statements of the arrestees would probably be testimonial, as they were under arrest --- just like Mrs. Crawford --- and the statements could be thought to be motivated toward some criminal prosecution.

Expert reliance on printout from machine and another expert’s lab notes does not violate *Crawford*: *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008): The court held that an expert’s testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because “data is not ‘statements’ in any useful sense. Nor is a machine a ‘witness against’ anyone.” Moreover, the expert’s reliance on another expert’s lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could “insist that the data underlying an expert’s testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause.” The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Note: The court makes two holdings in *Moon*. The first is that expert reliance on a machine output does not violate *Crawford* because the machine is not a witness. That holding appears unaffected by *Williams* --- at least it can be said that *Williams* says nothing about

whether machine output is testimony. The second holding, that an expert's reliance on lab notes he did not prepare, is at the heart of *Williams*. It would appear that such a practice would be permissible even after *Williams* because 1) *post-Williams* courts have found that an expert may rely on testimonial hearsay so long as the expert does his own analysis and the hearsay is not introduced at trial; and 2) in any case, lab "notes" are not certificates or affidavits so they do not appear to be the kind of formalized statement that Justice Thomas finds to be testimonial.

Expert reliance on drug test conducted by another does not violate the Confrontation Clause --- though on remand from *Williams* the court states that part of the expert's testimony might have violated the Confrontation Clause, but finds harmless error: *United States v. Turner*, 591 F.3d 928 (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 implicate the Confrontation Clause" as it is "not a testimonial statement offered to prove the truth of the matter asserted."

No Confrontation Clause violation where expert's opinion was based on his own assessment and not on the testimonial hearsay: *United States v. Vera*, 770 F.3d 1232 (9th Cir. 2014): Appealing from convictions for drug offenses, the defendants argued that the testimony of a prosecution expert on gangs violated the Confrontation Clause because it was nothing but a conduit for testimonial hearsay from former gang members. The court agreed with the premise that expert testimony violates the Confrontation Clause when the expert "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." But the court disagreed that the expert operated as a conduit in this case. The court found that the witness relied on his extensive experience with gangs and that his opinion "was not merely repackaged testimonial hearsay but was an original product that could have been tested through cross-examination."

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo*, 625 F.3d 1285 (10th Cir. 2010), *on remand for reconsideration under Williams*, 696 F.3d 1280 (10th Cir. 2012): The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert's opinion

--- which the court found to be permissible under Rule 703. The court observed that “[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant’s confrontation rights * * * is a matter of degree.” According to the court, if an expert “simply parrots another individual’s testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay.” In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that “we need not decide the precise mandates and limits of *Williams*, to the extent they exist.” The court noted that five members of the *Williams* Court “might find” that the expert’s reliance on the lab test in this case was for its truth. But “we cannot say the district court plainly erred in admitting Ms. Snider’s testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission.” The court explained as follows in a parsing of *Williams*:

On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in *Williams*. The four-Justice plurality in *Williams* likely would determine that Ms. Snider’s testimony was not offered for the truth of the matter asserted in Ms. Dick’s report, but rather was offered for the separate purpose of evaluating Ms. Snider’s credibility as an expert witness per Fed.R.Evid. 703; and therefore, that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite “solemnity” required for the statements therein to be considered testimonial for purposes of the Confrontation Clause. Since Ms. Dick’s report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas’s solemnity test. In sum, it is not clear or obvious under current law that the district court erred in admitting Ms. Snider’s testimony, so reversal is unwarranted on this basis.

The *Pablo* court on remand concluded that “the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4-1-4 divide of opinions in *Williams*.”

Expert’s testimony on gang structure and practice did not violate the Confrontation Clause even though it was based in part on testimonial hearsay, where expert applied his own expertise. *United States v. Kamahale*, 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."

Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture: *United States v. Jackson*, 706 F.3d 262 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant's drug operation and as retaliation for robbing one of the defendant's friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

Forfeiture can be found on the basis of Pinkerton liability: *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, "the Constitution

does not guarantee an accused person against the legitimate consequence of his own wrongful acts.”

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson*, 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because “Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981.” Thus, there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Forfeiture of confrontation rights, like forfeiture under Federal Rule 804(b)(6), is found upon a showing by a preponderance of the evidence: *United States v. Johnson*, 767 F.3d 815 (9th Cir. 2014): The court affirmed convictions for murder and armed robbery. At trial hearsay testimony of an unavailable witness was admitted against the defendant, after the government made a showing that the defendant had threatened the witness; the trial court found that the defendant had forfeited his right under both the hearsay rule and the Confrontation Clause to object to the hearsay. The court found no error. It held that a forfeiture of the right to object under the hearsay rule and under the Confrontation Clause is governed by the same standard: the government must establish by a preponderance of the evidence that the defendant acted wrongfully to cause the unavailability of a government witness, with the intent that the witness would not testify at trial. The defendant argued that the Constitution requires a showing of clear and convincing evidence before forfeiture of a right to confrontation can be found. But the court disagreed. It noted that a clear and convincing evidence standard had been applied by some lower courts when the Confrontation Clause regulated the admission of unreliable hearsay. But now, after *Crawford v. Washington*, the Confrontation Clause does not bar unreliable hearsay from being admitted; rather it regulates testimonial hearsay. The court stated that after *Crawford*, “the forfeiture exception is consistent with the Confrontation Clause, not because it is a means for determining whether hearsay is reliable, but because it is an equitable doctrine designed to prevent defendants from profiting from their own wrongdoing.” The court also noted that the Supreme Court’s post-*Crawford* decisions of *Davis v. Washington* and *Giles v. California* “strongly suggest, if not squarely hold, that the preponderance standard applies.” On the facts, the court concluded that “the evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did. This was sufficient to satisfy the preponderance standard.”

Evaluating the kind of action the defendant must take to justify a finding of forfeiture: *Carlson v. Attorney General of California*, 791 F.3d 1003 (9th Cir. 2015): Reviewing the denial of a habeas petition, the court found that statements of victims to police were testimonial, but that the state trial court was not unreasonable in finding that the petitioner had forfeited his right to confront the declarants. In a careful analysis of Supreme Court cases, the court provided “a standard for the kind of action a defendant must take” to be found to have forfeited the right to confrontation. The court concluded that

[T]he forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case. Simple tolerance of, or failure to foil, a third party’s previously unexpressed decision either to skip town himself rather than testifying or to prevent another witness from appearing [is] not a sufficient reason to foreclose a defendant’s Sixth Amendment confrontation rights at trial.

On the merits --- and applying the standard of deference required by AEDPA, the court concluded that the trial court could reasonably have found, on the basis of circumstantial evidence, that the petitioner more likely than not was actively involved in procuring unavailability, with the intent to keep the witness from testifying.

Note: The court says that a defendant’s mere “acquiescence” is not enough to justify forfeiture. That language might raise a doubt as to whether a forfeiture may be found by the defendant’s mere membership in a conspiracy; many courts have found such membership to be sufficient where disposing of a witness is within the course and furtherance of the underlying conspiracy. See, e.g., *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012). The *Carlson* court, however, cited the conspiracy cases favorably, and noted that in such cases, the defendant *has* acted affirmatively and committed wrongdoing by joining a conspiracy in which a foreseeable result is killing witnesses.

A different panel of the Ninth Circuit, in a case decided around the same time as *Carlson*, upheld a finding of forfeiture based on conspiratorial liability. See *United States v. Cazares*, 788 F.3d 956 (9th Cir. 2015).

The *Carlson* court noted that the restyled Rule 804(b)(6) provides that mere passive agreement with the wrongful act of another is not enough to find forfeiture, but that that forfeiture can be found if a defendant “acquiesced in wrongfully causing” the absence of the witness --- and that would include joining a conspiracy where one of the foreseeable consequences is to kill witnesses. The court found the restyling to be a helpful clarification of what the original rule meant by “acquiescence.”

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocation statement are both testimonial: *United States v. Bruno*, 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocation statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford*. The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See also *United States v. Becker***, 502 F.3d 122 (2nd Cir. 2007) (plea allocation is testimonial even though redacted to take out direct reference to the defendant: “any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all”); *United States v. Snype*, 441 F.3d 119 (2nd Cir. 2006) (plea allocation of the defendant’s accomplice was testimonial even though all direct references to the defendant were redacted); *United States v. Gotti*, 459 F.3d 296 (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 allocation against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer’s guilty plea: *United States v. Head*, 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend’s guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford*’s statement that “prior testimony that the defendant was unable to cross-examine” is one of the “core class of ‘testimonial’ statements.”

Grand jury testimony is testimonial: *United States v. Wilmore*, 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of “testimonial” (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Implied Testimonial Statements

Testimony that a police officer’s focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant’s right to confrontation: *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating

witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." ***Compare United States v. Occhiuto***, 784 F.3d 862 (1st Cir. 2015): In a narcotics prosecution, an officer testified that he arranged for a cooperating informant to buy drugs from the defendant; that he monitored the transactions; and that the drugs that were in evidence were the same ones that the defendant had sold to the informant. The defendant argued that the officer's conclusion about the drugs must have rested on assertions from the informant, and therefore his right to confrontation was violated. The defendant relied upon *Meises*, but the court distinguished that case, because here the officer's testimony was based on his own personal observations and did not necessarily rely on anything said by the informant. The fact that the officer's surveillance was not airtight did not raise a confrontation issue, rather it raised a question of weight as to the officer's conclusion.

Testimonial statements to law enforcement were admitted by implication, in violation of the Confrontation Clause: ***United States v. Kizzee***, 877 F.3d 650 (5th Cir. 2017): The defendant was suspected of drug-dealing; an officer arrested Brown after leaving the defendant's house and Brown implicated the defendant. At trial, the officer was asked only whether he asked Brown about the defendant's drug activity. The officer responded that he asked but did not state Brown's answers. The officer was asked what he did after receiving Brown's answers and he responded that he got a warrant to search the defendant's house. The court found that the officer's testimony "introduced Brown's out-of-court testimonial statements by implication" and that an officer's testimony "that allows a fact-finder to infer the statements made to him --- even without revealing the content of those statements --- is hearsay."

Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: ***Ocampo v. Vail***, 649 F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court's denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant's testimonial hearsay statement. It reasoned as follows:

Where the government officers have not only “produced” the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language --- contradictions, hesitations, and other clues often used to test credibility --- are lost, and instead a veneer of objectivity conveyed.

* * *

Whatever locution is used, out-of-court statements admitted at trial are “statements” for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

See also United States v. Brooks, 772 F.3d 1161 (9th Cir. 2014): An agent testified that he telephoned a postal supervisor and provided him a description of the suspect, and then later searched a particular parcel with a tracking number and mailing information he had been provided over the phone as identifying the package mailed by the suspect. The postal supervisor was not produced for trial. The government argued that the agent’s testimony did not violate the Confrontation Clause because the postal supervisor’s actual statements were never offered at trial. But the court declared that “out-of-court statements need not be repeated verbatim to trigger the protections of the Confrontation Clause.” Fairly read, the agent’s testimony revealed the substance of the postal supervisor’s statements. And those statements were made with the motivation that they be used in a criminal prosecution. Therefore, the agent’s testimony violated the Confrontation Clause.

Informal Circumstances, Private Statements, No Law Enforcement Involvement, etc.

Statement of young child to his teacher is not sufficiently formal to be testimonial: *Ohio v. Clark*, 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement is extremely unlikely to be found testimonial in the absence of some participation by or with law enforcement. The presence of law enforcement is what signifies that a statement is made formally with the motivation that it will be used in a criminal prosecution. The Court did not establish a bright-line rule, however, leaving at least the remote possibility that an accusation might be testimonial even if law enforcement had no role in the making of the statement.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia*, 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were

not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people “in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial.” There was no indication that the statements were made “to police, in an investigative context, or in a courtroom setting.”

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan*, 385 F.3d 196 (2nd Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford*. The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant’s hotel room; 5) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 6) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between defendant and undercover informant was not testimonial under *Davis*: *United States v. Burden*, 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The defendant’s part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, “anything he said was meant not as an accusation in its own right but as bait.”

Note: Other courts, as seen in the “Not Hearsay” section below, have come to the same result as the Second Circuit in *Burden*, but using a different analysis: 1) admitting the defendant’s statement does not violate the Confrontation Clause because it is his own statement and he doesn’t have a right to confront himself; 2) the informant’s statement, while testimonial, is not offered for its truth but only to put the defendant’s statements in context --- therefore it does not violate the right to confrontation because it is not offered as an accusation.

Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones*, 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily

motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that “a declarant’s understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent” and that “just because recorded statements are used at trial does not mean they were created for trial.” The court also noted that a prison “has significant institutional reasons for recording phone calls outside or procuring forensic evidence --- i.e., policing its own facility by monitoring prisoners’ contact with individuals outside the prison.”

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse’s primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps*, 686 F.3d 281 (5th Cir. 2012): The court found no error in the state court’s admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements “unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial.” The court elaborated further:

The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals’ statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become available at trial. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal-Mart parking lot. An objective analysis would conclude that the primary purpose of the unidentified individuals’ statements was to arrange the drug deal. Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause.

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter*, 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." *See also United States v. Boyd*, 640 F.3d 657 (6th Cir. 2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not to go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement --- especially because the declarant was a former police officer.

Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant*. The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.

Informal statements made about planned criminal activity are not testimonial: *United States v. Klemis*, 899 F.3d 436 (7th Cir. 2017): In a narcotics prosecution in which a user died, the court held that statements by the victim to a friend, that he had stolen from her in order to pay a drug debt to the defendant, were not testimonial. The court reasoned that the Supreme Court in *Ohio v. Clark* declared that a statement was very unlikely to be testimonial if it was made outside the law enforcement context. Here, spontaneous statements to a friend about attempts to borrow or steal from her to pay a drug debt, were not "efforts to create an out-of-court substitute for trial testimony."

Statements made by an accomplice to a jailhouse informant are not testimonial: *United States v. Honken*, 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime --- but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate

who would falsely confess. In fact, this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that he was speaking to a government agent. It explained as follows:

Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Incrimatory statements made by an accomplice from a telephone in jail are not testimonial: *United States v. LeBeau*, 867 F.3d 960 (8th Cir. 2017): The defendant's codefendant made coded calls while in jail to further drug activity. The defendant argued that these statements were testimonial because the codefendant was aware --- based on a message played at the beginning of the call --- that his call was being monitored by law enforcement. But the court rejected this argument, stating that even though the codefendant might have anticipated that his statements were used in a criminal prosecution, his primary motivation was not related to law enforcement: "the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution." The fact that the codefendant spoke in code was strong evidence that his primary motivation was *not* to have his statement used in a criminal prosecution.

Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright*, 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

Accusatory statements in a victim's diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Jailhouse conversations among coconspirators were not testimonial: *United States v. Alcorta*, 853 F.3d 1123 (10th Cir. 2017): Affirming drug convictions, the court rejected the defendant’s argument that admitting jailhouse conversations of his coconspirators violated his right to confrontation. The court stated that to be testimonial, the statements must be made “with the primary purpose of creating evidence for the prosecution.” The court concluded that “[t]he statements here --- jailhouse conversations between criminal codefendants (none of whom were cooperating with the government) --- do not satisfy that definition because that was not their purpose; quite the opposite.”

Private conversation between mother and son is not testimonial: *United States v. Brown*, 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant’s mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother’s reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford*. The court reasoned as follows:

We need not divine any additional definition of “testimonial” evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Defendant’s lawyer’s informal texts with I.R.S. agent found not testimonial: *United States v. Wilson*, 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting checks that he knew to be issued as a result of fraudulently filed income tax returns. He claimed that he was a legitimate cashier and did not know that the checks were obtained by fraud. The trial court admitted texts sent by the defendant’s lawyer to the I.R.S. The texts involved the return of certain records that the I.R.S. agent had allowed the defendant to take to copy; the texts contradicted the defendant’s account at trial that he didn’t know he had to return the boxes (in essence a showing of consciousness of guilt). The defendant argued that the lawyer’s texts to the I.R.S. agent were testimonial, but the court disagreed: “Here, the attorney communicated through informal text messages to coordinate the delivery of the boxes. The cooperative and informal nature of those text messages was such that an objective witness would not reasonably expect the texts to be used prosecutorially.” *See also United States v. Mathis*, 767 F.3d 1264 (11th Cir. 2014) (text messages between defendant and a minor concerning sex were informal, haphazard communications and therefore not made with the primary motive to be used in a criminal prosecution).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony recounting the interpreter’s translation does not violate *Crawford*: *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012): At the defendant’s drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter’s statements about what the defendant said violated his right to confrontation. The court found that the interpreter had acted as a “mere language conduit” and so he was not a witness against the defendant within the meaning of the Confrontation Clause. The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as “which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter’s qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.” The court found that these factors cut in favor of the lower court’s finding that the interpreter in this case had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, “the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself.” *See also United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012)(where an interpreter served only as a language conduit, the defendant’s own statements were properly admitted under Rule 801(d)(2)(A), and the Confrontation Clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself); *United States v. Aifang Ye*, 808 F.3d 395 (9th Cir. 2015) (adhering to pre-*Crawford* case law that a translator acting as a language conduit does not implicate the Confrontation Clause, because that case law “is not clearly irreconcilable with *Crawford*”; finding on the facts that the translator was a language conduit, by applying the four-factor test from *Orm Hieng*).

Interpreter’s statements were testimonial: *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant’s statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter’s translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, *supra*. *See also United States v. Curbelo*, 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator’s implicit out-of-court representation that the translation was correct, and the translator’s implicit assertions were testimonial; but there was no violation of the Confrontation Clause because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

Interrogations, Tips to Law Enforcement, Etc.

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford*. Whatever the limits of the term "testimonial," it clearly covers sworn statements by accomplices to police officers.

Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez*, 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth --- to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh*, 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes a formal statement to government officers bears testimony." *See also United States v. McGee*, 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Circuit Court's opinion that an anonymous tip to law enforcement is testimonial was reversed by the Supreme Court on AEPDA grounds: *Etherton v. Rivard*, 800 F.3d 737 (6th Cir. 2015), *rev'd sub nom.*, *Woods v. Etherton*, 136 S.Ct. 1149 (2016): On habeas review, the court held that an anonymous tip to law enforcement, accusing the defendant of criminal misconduct, was testimonial. It further held that the defendant's right to confrontation was violated at his trial where the tip was admitted into evidence for its truth. It noted that "[t]he prosecutor's repeated references both to the existence and the details of the tip went far beyond what was necessary for background --- thereby indicating the content of the tip was admitted for its truth." **But the Supreme Court, in a per curiam opinion, reversed the Sixth Circuit**, holding that it gave insufficient deference to the state court's determination that the anonymous tips were properly admitted for the non-hearsay purpose of explaining the context of the police investigation. The Court stated that a "fairminded jurist" could conclude "that repetition of the tip did not establish that the uncontested facts it conveyed were submitted for their truth. Such a jurist might reach that conclusion by placing weight on the fact that the truth of the facts was not disputed. No precedent of this Court clearly forecloses that view."

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen*, 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during an interrogation. The court noted that even the first part of Volz’s statement --- that she did not have access to the floor safe --- violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers*, 414 F.3d 1287 (10th Cir. 2005): The defendant’s accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, “How did you guys find us?” The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford*. The court explained as follows:

Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed’s statement *
* * implicated himself and thus was loosely akin to a confession.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez*, 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant’s accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers’ reactions to the statements. But the court found that “testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay.” The court also found that the accomplice’s statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Investigative Reports

Reports by a law enforcement officer on prior statements made by a cooperating witness were testimonial: *United States v. Moreno*, 809 F.3d 766 (3rd Cir. 2016): After a cooperating witness testified on direct, defense counsel attacked his credibility on the ground that he had made a deal. On redirect, the trial court allowed the witness to read into evidence the reports of a law enforcement officer who had interviewed the witness. The reports indicated that the witness had made statements consistent with his in-court testimony. The court of appeals found a violation of the Confrontation Clause, because the officer’s hearsay statements (about what the witness had told him) were testimonial and the officer was not produced for cross-examination.

The court found that the reports were “investigative reports prepared by a government agent in actual anticipation of trial.”

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen*, 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant’s statements violated the defendant’s right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis “does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen’s co-counsel elicited the hearsay has no bearing on her right to confront her accusers.”

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine*, 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge’s findings and order of criminal contempt, offered to prove the defendant’s lack of good faith in a tangentially related fraud case, did not violate the defendant’s right to confrontation. The court found “no reason to believe that Judge Carr wrote the order in anticipation of Sine’s prosecution for fraud, so his order was not testimonial.”

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge’s deportation order was nontestimonial because it “was not made in anticipation of future litigation”).

Law Enforcement Involvement

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse’s primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Accusations made to child psychologist appointed by law enforcement were testimonial: *McCarley v. Kelly*, 759 F.3d 535 (6th Cir. 2014): A three-year old boy witnessed a murder but would not talk to the police about it. The police sought out a child psychologist, who

interviewed the boy with the understanding that she would try to “extract information” from him about the crime and refer that information to the police. Helping the child was, at best, a secondary motive. Under these circumstances, the court found that the child’s statements to the psychologist were testimonial and erroneously admitted in the defendant’s state trial. The court noted that the sessions “were more akin to police interrogations than private counseling sessions.”

Note: *McCarley* was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *McCarley* differs in one respect from *Clark*, though. In *McCarley*, the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result in *McCarley* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of both the speaker and the interviewer.

Police officer’s count of marijuana plants found in a search is testimonial: *United States v. Taylor*, 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant’s premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer’s hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker’s interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant’s state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that “this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation.” The court found it important that the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker “was simply acting as a surrogate interviewer for the police.”

Note: *Bobadilla* was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *Bobadilla* differs in one respect from *Clark*, though. In *Bobadilla*, the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result in

***Bobadilla* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford*. The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a “forensic” interview . . . That [the victim’s] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

Note: This case was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. This case differs in one respect from *Clark*, though --- the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result here is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.

Moreover, the court concedes that there may have been a dual motive here --- treatment being the other motive. At a minimum, a court would have to make the finding that the prosecutorial motive was primary, and the court did not do this.

***See also United States v. Eagle*, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). *Compare United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child’s statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: “Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively**

nontestimonial.”); *United States v. DeLeon*, 678 F.3d 317 (4th Cir. 2012) (discussed below under “medical statements” and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machine-Generated Information

Printout from machine is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant’s blood sample. The expert testified to his interpretation of the data issued by the machine --- that the defendant’s blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant’s blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

The technicians could neither have affirmed or denied independently that the blood contained PCP and alcohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . The raw data generated by the diagnostic machines are the “statements” of the machines themselves, not their operators. But “statements” made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine’s report.

Note: The result in *Washington* appears unaffected by *Williams*, as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert’s reliance on a “pure instrument read-out” did not violate the Confrontation Clause because such a read-out is not “testimony”).

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008): The court held that an expert’s testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the

substance taken from the defendant was narcotics) did not violate *Crawford* because “data is not ‘statements’ in any useful sense. Nor is a machine a ‘witness against’ anyone.”

Google satellite images, and machine-generated location markers, are not hearsay and therefore, even if prepared for trial, their admission does not violate the Confrontation Clause: *United States v. Lizarraga-Tirado*, 789 F.3d 1107 (4th Cir. 2015): The defendant was convicted of illegal entry as a previously removed alien. The defendant contended that when he was arrested, he was still on the Mexican side of the border. At trial the arresting officer testified that she contemporaneously recorded the coordinates of the defendant’s arrest using a handheld GPS device. To illustrate the location of these coordinates, the government introduced a Google Earth satellite image. The image contained a “tack” showing the location of the coordinates to be on the United States side of the border. There was no testimony on whether the tack was automatically generated or manually placed and labeled. The defendant argued that both the satellite image and the tack were inadmissible hearsay and that their admission violated his right to confrontation. As to the satellite image itself, the court found that “[b]ecause a satellite image, like a photograph, makes no assertion, it isn’t hearsay.” The court found the tack to be a more difficult question. It noted that “[u]nlike a satellite image itself, labeled markers added to a satellite image do make clear assertions. Indeed, that is what makes them useful.” The court concluded that if a tack is placed manually and then labeled, “it’s classic hearsay” --- for example, a dot manually labeled with the name of a town “asserts that there’s a town where you see the dot.” On the other hand, “[a] tack placed by the Google Earth program and automatically labeled with GPS coordinates isn’t hearsay” because it is completely machine-generated and so no assertion is being made.

In this case, the court took judicial notice that the tack was automatically generated because the court itself accessed Google Earth and typed in the same coordinates to which the arresting officer testified --- which resulted in a tack identical to the one shown on the satellite image admitted at trial. Thus, the program “analyze[d] the GPS coordinates and, without any human intervention, place[d] a labeled tack on the satellite image.” The court concluded that “[b]ecause the program makes the relevant assertion --- that the tack is accurately placed at the labeled GPS coordinates --- there’s no statement as defined by the hearsay rule.” The court noted that any issues of malfunction or tampering present questions of authenticity, not hearsay, and the defendant made no authenticity objection. Finally, “[b]ecause the satellite images and tack-coordinates pair weren’t hearsay, their admission also didn’t violate the Confrontation Clause.”

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons*, 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a CD of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant’s cell phone at the time the threats were made. The defendant argued that the information on the CD was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that “the witnesses with whom the Confrontation Clause is concerned are *human* witnesses” and that the purposes of the Confrontation Clause “are ill-served through confrontation

of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9).” The court concluded that there was no hearsay statement at issue, and therefore the Confrontation Clause was inapplicable.

Medical/Therapeutic Statements

Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon*, 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant*. The court also recognized that the Air Force program “incorporates reporting requirements and a security component” but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the “primary motive” test was not met in the following passage:

We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan's answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.

Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties' actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan --- not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements

were nontestimonial and that their admission did not violate DeLeon's Sixth Amendment rights.

Note: The court's analysis is strongly supported by the subsequent Supreme Court decision in *Ohio v. Clark*. The *Clark* Court held that: 1) Statements by children are extremely unlikely to be primarily motivated for use in a criminal prosecution; and 2) public officials do not become an agent of law enforcement by asking about suspected child abuse.

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Labels on electronic devices, indicating that they were made in Taiwan, are not testimonial: *United States v. Napier*, 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government proved the interstate commerce element by offering two cellphones used to commit the crimes. The cellphones were each labeled "Made in Taiwan." The defendant argued that the statements on the labels were hearsay and testimonial. But the court found that the labels clearly were not made with the primary motive of use in a criminal prosecution.

Note: The court in *Napier* reviewed the confrontation argument for plain error, because the defendant objected at trial only on hearsay grounds; a hearsay objection does not preserve a claim of error on confrontation grounds.

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pfler*, 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

Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation: *United States v. Wallace*, 753 F.3d 671 (7th Cir. 2014): In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was:

a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was “confronted.” [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define “statement” to include “nonverbal conduct,” but only if the person whose conduct it was “intended it as an assertion.” We can’t fit the videotape in this definition.

Photographs of seized evidence was not testimony so its admission did not violate the Confrontation Clause: *United States v. Brooks*, 772 F.3d 1161 (9th Cir. 2014): In a narcotics trial, the defendant objected to the admission of photographs of a seized package on the ground it would violate his right to confrontation. But the court disagreed. It noted that the *Crawford* Court defined “testimony” as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” The photographs did not meet that definition because they “were not ‘witnesses’ against Brooks. They did not ‘bear testimony’ by declaring or affirming anything with a ‘purpose.’”

See also the cases under the heading “Machine-Generated Evidence” supra.

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant's own statements: *United States v. Bostick*, 791 F.3d 127 (D.C.Cir. 2015): In a surreptitiously taped conversation, the defendant made incriminating statements to a confidential informant in the course of a drug transaction. The defendant argued that admitting the informant's part of the conversation violated his right to confrontation because the informant was motivated to develop the conversation for purposes of prosecution. But the court found that the Confrontation Clause was inapplicable because the informant's statements were not offered for their truth, but rather to provide "context" for the defendant's own statements regarding the drug transaction. (And the defendant had no right to confront his own statements). Statements that are not hearsay cannot violate the Confrontation Clause even if they fit the definition of testimoniality.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant's own statements: *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* --- as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements not offered for their truth. *Accord United States v. Walter*, 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."); *United States v. Santiago*, 566 F.3d 65 (1st Cir. 2009) (statements were not offered for their truth "but as exchanges with Santiago essential to understand the context of Santiago's own recorded statements arranging to 'cook' and supply the crack"); *United States v. Liriano*, 761 F.3d 131 (1st Cir. 2014) (even though statements were testimonial, admission did not violate the Confrontation Clause where they were properly offered to place the defendant's responses in context). *See also Furr v. Brady*, 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito's analysis that the Confrontation Clause was not violated because the testimonial lab report was not admitted for its truth. The question from *Williams* is whether those five Justices (now four, actually) are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which (in their personal view) the statement has

a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert's use of the lab report from the prosecution's admission of an accomplice's confession in *Tennessee v. Street*, where the confession "was not introduced for its truth, but only to impeach the defendant's version of events." In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele's confession. Peele's confession was introduced not for its truth but only to show that it differed from Street's. For that purpose, it didn't matter whether it was true. Justice Thomas stated that "[u]nlike the confession in *Street*, statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose" because "to use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true." Justice Kagan in her opinion essentially repeats Justice Thomas's analysis and agrees with his distinction between legitimate and illegitimate use of the "not-for-truth" argument. Both Justices Kagan and Thomas agree with the Court's statement in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible*.

It follows that the cases under this "not-for-truth" headnote are probably unaffected by *Williams*, as they largely permit admission of testimonial statements as offered "not-for-truth" only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not*.

Statements by informant to police officers, offered implausibly to prove the "background" of the police investigation, probably violate *Crawford*, but admission is not plain error: *United States v. Maher*, 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the informant's statements were not admitted for their truth, but to explain the background of the police investigation:

The government's articulated justification --- that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* --- is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he

had acted upon “information received,” or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant’s statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony “was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs.”

Accomplice statements purportedly offered for “background” were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera*, 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted for the purpose of explaining the police investigation. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice’s confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford*.

Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams*. The prosecution was not offering the accusations for any *legitimate* not-for-truth purpose.

Statements offered to provide context for the defendant’s part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks*, 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend’s statements in the telephone call violated *Crawford*. But the court found that the girlfriend’s part of the conversation was not hearsay and therefore did not violate the defendant’s right to confrontation. The court reasoned that the girlfriend’s statements were admissible not for their truth but to provide the context for understanding the defendant’s incriminating statements. The court noted that the girlfriend’s statements were “little more than brief responses to Hicks’s much more detailed statements.” *See also United States v. Occhiuto*, 784 F.3d 862 (1st Cir. 2015) (statements by undercover informant made to defendant during a drug deal were properly admitted; they were offered not for their truth but to provide context for the defendant’s own statements, and so they did not violate the Confrontation Clause).

Accomplice’s confession, when offered in rebuttal to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Cruz-Diaz*, 550 F.3d 169 (1st Cir. 2008): In a bank robbery

prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified “eleven missed opportunities” for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant’s co-defendant had given a detailed confession. The defendant argued that introducing the cohort’s confession violated his right to confrontation, because it was testimonial under *Crawford*. But the court found the confession to be not hearsay --- as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly, admission of the statement did not violate *Crawford*.

The defendant argued that the government’s true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that “if the government merely wanted to explain why the FBI and police failed to conduct a more thorough investigation it could have had the agent testify in a manner that entirely avoided referencing Cruz’s confession” --- for example, by stating that the police chose to truncate the investigation “because of information the agent had.” But the court held that this kind of sanitizing of the evidence was not required, because it “would have come at an unjustified cost to the government.” Such generalized testimony, without any context, “would not have sufficiently rebutted Ayala’s line of questioning” because it would have looked like one more cover-up. The court concluded that “[w]hile there can be circumstances under which Clause concerns prevent the admission of the substance of a declarant’s out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case.”

See also United States v. Diaz, 670 F.3d 332 (1st Cir. 2012) (testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: “The government offered Perez’s out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.”).

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: *United States v. Logan*, 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted.” The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant’s own account that the accomplices planned to use the alibi. Thus “the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan.”

Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant's statements: *United States v. Paulino*, 445 F.3d 211 (2nd Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

Note: This typical use of "context" is not in question after *Williams*, because the focus is on the defendant's statements and not on the truth of the declarant's statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant's statements. See, e.g., *United States v. Powers* from the Sixth Circuit, *infra*.

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart*, 433 F.3d 273 (2nd Cir. 2006): In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford*, even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective.

Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams*. That is, to the extent some members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.

Accomplice statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala*, 386 F.3d 536 (3rd Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact, the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore*, 430 F.3d 190 (3rd Cir. 2005)** (relying on *Trala*, the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie*, 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically, the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users identified by the administrator confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Accomplice’s testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel*, 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant’s confession on a number of details. The court found no error in the admission of the accomplices’ confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson’s guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.

Note: The use of the cohort’s confessions to show differences from the defendant’s confession is precisely the situation reviewed by the Court in *Tennessee v. Street*. As noted above, while some Justices in *Williams* rejected the “not-for-truth” analysis as applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street*.

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes*, 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk’s office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk’s testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk’s statement “is not the run-of-the-mill co-conspirator’s statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator’s statement that is derived from a formalized testimonial source --- recorded and sworn civil deposition testimony.” Ultimately the court found it unnecessary to determine whether the deposition testimony was “testimonial” within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony “to establish its *falsity* through independent evidence.” *See also United States v. 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).

Informant’s accusation, purportedly offered to explain the police investigation, was hearsay and violated the Confrontation Clause: *United States v. Kizzee*, 877 F.3d 650 (5th Cir. 2017): In a drug and firearm prosecution, an officer testified (implicitly) that he received information from an arrestee that the arrestee had purchased drugs from the defendant, and he used that information (as well as other observations of the residence) to obtain a warrant. The government argued that the testimony did not violate the hearsay rule (and so could not violate the Confrontation Clause) because it was offered at trial only to explain the background of the police investigation. But the court disagreed and reversed the conviction. The court stated that the information from the arrestee “was not necessary to explain Detective Schulz’s actions” because “there was minimal need for Detective Schulz to explain the details forming the basis of the search warrant” and his own observations “would have been sufficient to explain his investigatory actions and provide background information.”

Informant’s accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: *United States v. Deitz*, 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz’s drug activity. The court found that the informant’s statement was testimonial --- because it was an accusation made to a police officer --- but it was not hearsay and therefore its admission did not violate Deitz’s right to confrontation. The court found that admitting the testimony “explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor’s case.” The court also observed that “had defense counsel objected to the testimony at trial, the court could have easily restricted its scope.” *See also United States v. Al-Maliki*, 787 F.3d 784 (6th Cir. 2015) (in a prosecution for child sex abuse, the trial court admitted the defendant’s wife’s statement to police accusing the defendant of sexual abuse; the court found no error because it was offered for the limited purpose of explaining why an official investigation began: “Two conclusions follow: It is not hearsay, * * * and the government did not violate the Confrontation Clause”); *United States v. Doxey*, 833 F.3d 692 (6th Cir. 2016) (informant’s tip leading to search of the defendant’s vehicle was not hearsay as it was offered “merely by way of background”); *United States v. Davis*, 577 F.3d 660 (6th Cir. 2009): A woman’s statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay ---and so even though testimonial did not violate the defendant’s right to confrontation --- because it was offered only to explain the police investigation that led to the defendant and the defendant’s conduct when he learned the police were looking for him. *Accord United States v. Napier*, 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government offered a document from Time Warner

cable, obtained pursuant to a government subpoena, showing that an email address was accessed at the defendant's home and that the defendant was the subscriber to the account. The court found no confrontation violation because the document was offered not for its truth, but rather "to demonstrate how the Cincinnati office of the FBI located Napier." The court noted that the trial court gave the jury a limiting instruction that the document could be considered only to prove the course of the investigation.

Undercover statements offered to show representations about money-laundering, in a sting operation, were not offered for truth and so admitting them did not violate the Confrontation Clause: *United States v. King*, 865 F.3d 848 (6th Cir. 2017) (Sutton, J.): The defendant was the target of a sting operation. The undercover informant represented in several conversations with the defendant that he had drug money to launder, and the defendant responded with the details of how he would launder the money. The defendant argued that the undercover informant's part of the conversation was testimonial because it was primarily motivated for use in a criminal prosecution. But the court noted that the threshold requirement for violating the Confrontation Clause is that the out-of-court statement is admitted for its truth. That was not the case here. They were not offered to prove, for example, that the informant had drug money and wanted to clean it. Rather, the prosecution used the statements to prove that the informant made representations about having drug money and the defendant believed him.

Statement offered to prove the defendant's knowledge of a crime was non-hearsay and so did not violate the accused's confrontation rights: *United States v. Boyd*, 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had told police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson's statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: "Davidson's statements to Boyd were offered to prove Boyd's knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted."

Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams*, 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was "minimal at best"; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

Informant’s statements were not properly offered for “context,” so their admission violated *Crawford*: *United States v. Powers*, 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant’s prior criminal activity from a confidential informant. The government argued on appeal that even though the informant’s statements were testimonial, they did not violate the Confrontation Clause, because they were offered “to show why the police conducted a sting operation” against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that “details about Defendant’s alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation.” *See also United States v. Hearn*, 500 F.3d 479 (6th Cir.2007) (confidential informant’s accusation was not properly admitted for background where the witness testified with unnecessary detail and “[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments”).

Admitting informant’s statement to police officer for purposes of “background” did not violate the Confrontation Clause: *United States v. Gibbs*, 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, “because the testimony did not bear on Gibbs’s alleged possession of the .380 Llama pistol with which he was charged.” Rather, it was admitted “solely as background evidence to show why Gibbs’s bedroom was searched.” *See also United States v. Macias-Farias*, 706 F.3d 775 (6th Cir. 2013) (officer’s testimony that he had received information from someone was offered not for its truth but to explain the officer’s conduct, thus no confrontation violation).

Admission of the defendant’s conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant’s part of the conversation is offered only for “context”: *United States v. Nettles*, 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government had an undercover informant contact him and ostensibly offer to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant’s part of the conversation was not barred by the Confrontation Clause, and the informant’s part of the conversation was admitted only to place the defendant’s part in “context.” Because the informant’s statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the “context” doctrine, stating: “We note that there is a concern that the government may, in future cases, seek to submit based on ‘context’ statements that are, in fact, being offered for their truth.” But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to

better explain himself; and 2) the informant did not “put words in Nettles’s mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit.” *See also United States v. Tolliver*, 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator’s statements: “*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case . . . Shye’s statements were admissible to put Dunklin’s admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused.”); *United States v. Bermea-Boone*, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant’s side of the conversation was a statement of a party-opponent, and the accomplice’s side was properly admitted to provide context for the defendant’s statements: “Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused.”; *United States v. York*, 572 F.3d 415 (7th Cir. 2009) (informant’s recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: “we see no indication that Mitchell tried to put words in York’s mouth”); *United States v. Hicks*, 635 F.3d 1063 (7th Cir. 2011): (undercover informant’s part of conversations were not hearsay, as they were offered to place the defendant’s statements in context; because they were not offered for truth their admission did not violate the defendant’s right to confrontation); *United States v. Gaytan*, 649 F.3d 573 (7th Cir. 2011) (undercover informant’s statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: “Gaytan’s responses [‘what you need?’ and ‘where the loot at?’] would have been unintelligible without the context provided by Worthen’s statements about his or his brother’s interest in ‘rock’”; the court noted that there was no indication that the informant was “putting words in Gaytan’s mouth”); *United States v. Foster*, 701 F.3d 1142 (7th Cir. 2012) (“Here, the CI’s statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant’s acts and make his statements intelligible. The defendant’s statement to ‘give me sixteen fifty’ (because the original price was 17) would not have made sense without reference to the CI’s comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation.”); *United States v. Faruki*, 803 F.3d 847 (7th Cir. 2015) (no confrontation violation where out-of-court statements were offered to place the defendant’s own statements in context).

For more on “context” see *United States v. Wright*, 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant’s statement to a confidential informant that he was “stocked up” would have been unintelligible without providing the context of the informant’s statements inquiring about drugs, “and a jury would not have any sense of why the conversation was even happening.” The court also noted that “most of the CI’s statements were inquiries and not factual assertions.” The court expressed concern, however, that the district court’s limiting instruction on “context” was boilerplate, and that the jury “could have been told that the CI’s half of the conversation was being played only so that it could understand what Wright was responding to,

and that the CI's statements standing alone were not to be considered as evidence of Wright's guilt."

In *United States v. Smith*, 816 F.3d 479 (7th Cir. 2016), a public corruption case, the court rejected the use of "context" where placing the defendant's statement in "context" only worked if the informant's statement to the defendant were true. In *Smith*, the court gave an example of an informant saying to the defendant "Last week I paid you \$7000 for a letter that my client will use to seek a grant. Do you remember?" And the defendant says "Yes." The court noted that the informant's statement puts the defendant's answer in context, but only if the informant was speaking the truth. In that situation, the informant's statement would be hearsay and potentially triggered the right to confrontation --- but that right was not violated in this case because the informant's statements were not offered for truth but rather were verbal acts establishing a corrupt agreement. *See also United States v. Amaya*, 828 F.3d 518 (7th Cir. 2016), where an informant's statement "that was a big ass pistol" was offered to put the defendant's statement "Hell yea" in context. But the court found that context was unworkable because the informant's statement was only relevant to context if it were true --- only if a gun was present would the "Hell yea" mean anything pertinent to the case. Yet the informant's statement was found not testimonial, because it was simply blurted out, and so was not made with the primary motive that it would be used in a criminal prosecution.

Note: The concerns expressed in *Nettles* and the other 7th Circuit cases discussed above --- about possible abuse of the "context" usage --- are along the same lines as those expressed by Justices Thomas and Kagan in *Williams*, when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If context is a pretext and the statement is in fact offered for the truth, then the statement is not being offered for a legitimate not-for-truth purpose.

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price*, 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert" identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted." *See also United States v. Ambrose*, 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation).

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds*, 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because “the problem that *Crawford* addresses is the admission of hearsay” and the witness’s statement was not hearsay. It was not admitted for its truth --- that the witness saw the man he described pointing a gun at people --- but rather “to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given.” The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. *See also United States v. Taylor*, 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers’ actions in the course of their investigation: “for example, why they looked across the street * * * and why they handcuffed Taylor when he approached.” The court noted that absent “complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem.” The court found no “complicating circumstances” in this case.

Note: The Court’s reference in *Taylor* to the possibility of exploiting a not-for-truth purpose runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams*.

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford*: *United States v. Adams*, 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant’s car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to buy crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant’s statement not for the truth of the assertion but as “foundation for what the officer did.” The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant’s statements “were not necessary to provide any foundation for the officer’s subsequent actions.” It explained as follows:

The CI’s statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI’s accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context --- even if the CI’s statements were excluded, the jury would have fully understood that the officer searched

Adams and the relevance of the items recovered in that search to the charged crime.

See also United States v. Walker, 673 F.3d 649 (7th Cir. 2012) (confidential informant's statements to the police --- that he got guns from the defendant --- were not properly offered for context but rather were testimonial hearsay: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that 'the informant said he got this gun from X' as proof that X supplied the gun."); *Jones v. Basinger*, 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

Note: *Adams*, *Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams*.

Statements by a confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: *United States v. Holmes*, 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent --- after defense counsel had questioned the connection of the defendant to the residence --- the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and did not dispute the propriety of the investigation. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh." *Compare United States v. Brooks*, 645 F.3d 971 (8th Cir. 2011) ("In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted --- that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes*. In *Holmes*, it was undisputed that officers had a valid warrant. Accordingly, less explanation was necessary. Here, the CI's information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the

Confrontation Clause is not implicated here.”). *See also United States v. Shores*, 700 F.3d 366 (8th Cir. 2012) (confidential informant’s accusation made to police officer was properly offered to prove the propriety of the investigation: “From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting.”); *United States v. Wright*, 739 F.3d 1160 (8th Cir. 2014) (Officer’s statement to another officer, “come into the room, I’ve found something” was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel’s argument that the officer entered the room in response to a loud noise: “If the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant’s Sixth Amendment rights.”).

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford*: *United States v. Brown*, 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named “Clean” who was accompanied by a man named Charmar. The officer who took this statement testified that he entered “Charmar” into a database to help identify “Clean” and the database search led him to the defendant. The court found no error in admitting the victim’s statement, stating that “it is not hearsay when offered to explain why an officer conducted an investigation in a certain way.” The defendant argued that the purported nonhearsay purpose for admitting the evidence “was only a subterfuge to get Williams’ statement about Brown before the jury.” But the court responded that the defendant “did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value.” The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, “it does not implicate the confrontation clause.”

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford*: *United States v. Spears*, 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government’s good-faith basis was the confession of the defendant’s associate to having taken part in the prior robberies. The defendant argued that the associate’s statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate’s statements were not admitted for their truth --- indeed they were not admitted at all. The court noted that there was “no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause.”

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer*, 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no

error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding*, 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause: *United States v. Young*, 753 F.3d 757 (8th Cir. 2014): Young was accused of conspiring with Mock to murder Young's husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The statement was remarkably consistent in all details with the alibi that Young had independently provided, and many of the assertions were false. The government offered Mock's statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock's statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock's statement was not offered for its truth but rather "to show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock's statements to Deputy Salsberry are valuable to the government because they are false."

Statement offered for impeachment was not hearsay and therefore admission did not violate the defendant's right to confrontation: *United States v. Cotton*, 823 F.3d 430 (8th Cir. 2016): "Cotton first argued that admission of Frazier's post-arrest statement violated his rights under the Confrontation Clause. Because the statement was offered for impeachment [as a prior inconsistent statement of a hearsay declarant] and not to prove the truth of the matter asserted, there was no Confrontation Clause violation in this case."

Informant's part of a conversation with a coconspirator was properly admitted for context and not for truth: *United States v. Barragan*, 871 F.3d 689 (9th Cir. 2017): In a prosecution for racketeering and drug crimes, the trial court admitted a taped conversation between a defendant's coconspirator and an undercover informant. The defendant conceded that the coconspirator's statement was admissible under Rule 802(d)(2)(E), but contended that admitting the informant's part of the conversation violated his right to confrontation. But the court found no error, because the informant's statements were offered only to place the coconspirator's statements in context, and the jury was instructed to that effect. The court stated that the informant's

statements “were not admitted for their truth, and the admission of such context evidence does not offend the Confrontation Clause.”

Accusation offered to rebut the defendant’s charge of a sloppy investigation were legitimately offered for a non-hearsay purpose and so admission did not violate the right to confrontation: *United States v. Johnson*, 875 F.3d 1265 (9th Cir. 2017): The defendant was charged with felon-firearm possession. He claimed that the gun belonged to Jakith Martin and argued at trial that the police investigation was sloppy. The government countered with testimony from an officer that the defendant’s girlfriend told him that the gun was the defendant’s. The girlfriend’s statement was definitely testimonial. But the court found no error, because the Confrontation Clause does not apply to a statement that is not hearsay. In this case, the statement was offered not to prove that the defendant possessed the gun, but rather to show that the police investigation was proper (and not sloppy) when it focused on the defendant. The court noted that “Courts must exercise caution to ensure that out-of-court testimonial statements, ostensibly offered to explain the course of a police investigation, are not used as an end-around *Crawford* and hearsay rules, particularly when those statements directly inculcate the defendant.” But in this case, the statements were “relevant to rebutting Johnson’s theory of the case: that the police were sloppy and had no reason to investigate Johnson’s property rather than investigate Jakith Martin’s.” The court emphasized that the trial court “properly and contemporaneously instructed the jury that the statements were to be considered only for nonhearsay purposes” and that the jury “was again reminded of this admonition in the final jury instructions.”

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner*, 439 F.3d 1221 (10th Cir. 2006): The court stated that “it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement.” *See also United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather “as a basis” for the officer’s action, and therefore its admission did not violate the Confrontation Clause); *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) (In a prosecution for sex trafficking, statements made to an undercover police officer that set up a meeting for sex were properly admitted as not hearsay and so their admission did not violate the Confrontation Clause: “The prosecution did not present the out-of-court statements to prove the truth of the statements about the location, price, or lack of a condom. Rather, the prosecution offered these statements to explain why Officer Osterdyk went to Room 123, how he knew the price, and why he agreed to pay for oral sex.”; the court also found that the statements were not testimonial anyway because the declarant did not know she was talking to a police officer.); *United States v. Ibarra-Diaz*, 805 F.3d 908 (10th Cir. 2015) (confidential informant’s statements to a police officer about the defendant’s interest in doing a drug deal were testimonial, but the right to confrontation was not violated because the statements were offered to “explain why the officer did not put a body wire on the CI for this significant drug transaction --- i.e., because, unlike situations where the detective is in control of the informant from the outset and * * * of the circumstances of the informant’s dealings with a potential target, in this instance the CI just called the detective ‘out of the blue’ about the possible drug transaction”; other statements from

accomplices were properly admitted because they were not offered for their truth but to explain the conduct of the detective who heard the statements).

Accomplice’s confession, offered to explain a police officer’s subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez*, 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice’s confession in the defendant’s drug conspiracy trial. The police officer who had taken the accomplice’s confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer’s credibility and to suggest that he was lying about the circumstances of the interviews and about the defendant’s confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice’s confession was properly admitted to explain the officer’s motivations, and not for its truth. Accordingly, its admission did not violate the Confrontation Clause, even though the statement was testimonial.

Note: The court assumed that the accomplice’s confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, “that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton’s testimony” because “there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence.”

See also United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant’s statements “were not offered for the truth of the matters asserted, but rather to provide context for [the defendant’s] own statements”).

Present Sense Impression

911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction --- together with the bystander’s answers to questions from the 911 operators --- was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander’s statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency --- rather the caller was simply recording that a crime was taking place across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is

relevant but not dispositive of whether statements about a crime are testimonial. Ultimately the court found that the caller's statements were not testimonial, reasoning as follows:

[A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. * * * The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession.

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford*, 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford*, but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial: *United States v. Solorio*, 669 F.3d 943 (9th Cir. 2012): Appealing from a conviction arising from a "buy-bust" operation, the defendant argued that hearsay statements of DEA agents at the scene --- which were admitted as present sense impressions --- were testimonial and so should have been excluded under *Crawford*. The court disagreed. It concluded that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, "by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly." Thus, the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation "was a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs" and also that the defendant was visibly wary of the situation.

Records, Certificates, Etc.

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009): In a drug case, the trial court admitted three “certificates of analysis” showing the results of the forensic tests performed on the seized substances. The certificates stated that “the substance was found to contain: Cocaine.” The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were “testimonial” under *Crawford* and therefore admitting them without a live witness violated the defendant’s right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of “testimonial” statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that “[w]e can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose --- as stated in the relevant state-law provision --- was reprinted on the affidavits themselves.”

The implications of *Melendez-Diaz* --- beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation --- are found in the parts of the majority opinion that address the dissent’s arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that “documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.” Apparently, these are more like traditional business records than records prepared primarily for litigation, though the question is close --- the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not “accusatory” witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment “contemplates two classes of witnesses: those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.” This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford*. These cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the *ex parte* affidavits in the Raleigh case were the paradigmatic confrontation concern, “the paradigmatic case identifies the core of the right to confrontation, not its limits. The

right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh’s Case.”

4. The majority noted that cross-examining a forensic analyst may be necessary because “[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination.” This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all because a machine can’t make a “statement,” and have also held that a machine’s output is not “testimony” within the meaning of the Confrontation Clause. This case law appears to survive the Court’s analysis in *Melendez-Diaz* and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford*. For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(A)(ii) and (A)(iii).

6. In response to an argument of the dissent, the majority states that certificates that merely authenticate proffered documents are not testimonial. As seen below, this probably means that certificates of authenticity prepared under Rules 902(11), (13) and (14) may be admitted without violating the Confrontation Clause.

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record:

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk’s statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk’s certificate would qualify as an official record under respondent’s definition --- it was prepared by a public officer in the regular course of his official duties --- and although the clerk was certainly not a “conventional witness” under the dissent’s approach, the clerk was nonetheless subject to confrontation. See *People v. Bromwich*, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of a certificate of absence of a public record in a criminal case is prohibited. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and became effective December 1, 2013.

It should be noted that the continuing viability of *Melendez-Diaz* has been placed into some doubt by the death of Justice Scalia, who wrote the majority opinion.

Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz*: *Bullcoming v. New Mexico*, 564 U.S. 647 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Justice Ginsburg, writing for the Court, declared as follows:

The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification --- made for the purpose of proving a particular fact --- through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti*, 519 F.3d 319 (D.C. Cir. 2007): The court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate's signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause." In this case, the Rule 902(11) certificates were used only to admit

documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Warrant of deportation is not testimonial: *United States v. Garcia*, 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held “that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation” because such officers have no motivation to do anything other than “mechanically register an unambiguous factual matter.”

Note: Other circuits before *Melendez-Diaz* reached the same result on warrants of deportation. See, e.g., *United States v. Valdez-Matos*, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because “the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter”); *United States v. Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation “are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions.”); *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial “because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter.”); *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation “is recorded routinely and not in preparation for a criminal trial”).

Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition that crime has not been committed at the time the certificate is prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. See also *United States v. Lopez*, 747 F.3d 1141 (9th Cir. 2014) (adhering to pre-*Melendez-Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco*, 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants’ confrontation argument in the following passage:

The Court in *Crawford* plainly characterizes business records as “statements that by their nature [are] not testimonial.” 541 U.S. at

56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz*, as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.

Business records are not testimonial: *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." *See also United States v. Baker*, 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz*, because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.

Post office box records are not testimonial: *United States v. Vasilakos*, 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz*.

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* --- despite the fact that both records were prepared with the knowledge that they would be used in a prosecution. As to the medical reports, the *Ellis* court concluded as follows:

While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. * * * They were employees simply recording observations which, because they were made in the ordinary course of business, are “statements that by their nature were not testimonial.” *Crawford*, 541 U.S. at 56.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are somewhat similar to those in *Melendez-Diaz*. That said, toxicology tests conducted by *private* organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz*, the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility. Primary motive for use in a prosecution is obviously less likely to be found if the tester is a private organization.

Note that the Seventh Circuit, in a case after *Melendez-Diaz*, adhered fully to its ruling in *Ellis* that business records are not testimonial. *United States v. Brown*, 822 F.3d 966 (7th Cir. 2016) (relying on *Ellis* to find that Western Union records of wire transfers were not testimonial: “Logically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.”).

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about *Ellis*, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the “principal evil at which the Confrontation Clause was directed” to be considered testimonial.

Note: Three circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz*, and that 902(11) certificates are not testimonial. See *United States v. Yeley-Davis*, 632 F.3d 673 (10th Cir. 2011), *United States v. Johnson*, 688 F.3d 494 (8th Cir. 2012), and *United States v. Anekwu*, 695 F.3d 967 (9th Cir. 2012) all infra. See also *Washington v. Griffin*, 876 F.3d 395 (2nd Cir. 2017) (noting that a certification of a business record “does not transform the underlying notations of the lab analysts into formalized testimonial materials” and relying on the passage from *Melendez-Diaz* which stated that a clerk’s authenticating affidavit authenticating an otherwise admissible record does not violate the Confrontation Clause).

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford*. He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation --- the crime had not occurred at the time the records were prepared.

Tax returns are business records and so not testimonial: *United States v. Garth*, 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, “as is expected of testimonial evidence.”

Note: this result is unaffected by *Melendez-Diaz*.

Certificate of a record of a conviction found not testimonial: *United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: “Not only are such certifications a ‘routine cataloging of an unambiguous factual matter,’ but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly.”

Note: The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz*. Nonetheless, certificates of conviction are quite probably non-testimonial, because the *Melendez-Diaz* majority states that a certificate is not testimonial if it does nothing more than authenticate another document --- and specifically uses as an example a certificate of conviction.

In *United States v. Albino-Loe*, 747 F.3d 1206 (9th Cir. 2014), the court adhered to its ruling in *Weiland*, declaring that a routine certification of authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they “did not accomplish anything other than authenticating the A-file documents to which they were attached.”

Absence of records in database is not testimonial; and drug ledger is not testimonial: *United States v. Mendez*, 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is “a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization.” The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records “are not prepared for litigation or prosecution, but rather administrative and regulatory purposes.” The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford*, “the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial.”

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford*. The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a “tool of the trade.” As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because “[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry.” (emphasis the court’s). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise “any piece of evidence which aids the prosecution would be testimonial.”

Note: Both holdings in the above case survive *Melendez-Diaz*. The first holding is about the absence of public records, where the records themselves were not prepared in testimonial circumstances. If that absence had been proved by a *certificate*, then the Confrontation Clause, after *Melendez-Diaz*, would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial. Drug ledgers in particular are absolutely not prepared for purposes of litigation.

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz*: *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that “it appears from an examination of the files in this office” that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation --- they “respond[ed] to a prosecutor’s question with an answer.”

Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz*. The clerk’s letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.

Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz*: *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

The Office of the Medical Examiner is required by D.C.Code 5-1405(b)(11) to investigate “[d]eaths for which the Metropolitan Police Department [“MPD”], or other law enforcement agency, or the United States Attorney’s Office requests, or a court orders investigation.” The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: “Mobile crime diagram (not [Medical Examiner] --- use for info only).” Still another report included a “Supervisor’s Review Record” from the MPD Criminal Investigations Division commenting: “Should have indictment re John Raynor for this murder.” Law enforcement officers thus not only observed the autopsies, a fact that would have

signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled “reports.” These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are “circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Melendez-Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent.

Finally, the court rejected the government’s argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence. *See also United States v. McGill*, 815 F.3d 846 (D.C.Cir. 2016) (relying on *Moore* to find a Confrontation violation where drug analysis reports and autopsy reports were admitted through testimony from witnesses other than the reports’ authors).

State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial: *Nardi v. Pepe*, 662 F.3d 107 (1st Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. The court reasoned as follows:

Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez-Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir.2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with “clearly established” law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is

uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

Immigration interview form was not testimonial: *United States v. Phoeun Lang*, 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses. Thus, the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But the court found no error. The court concluded that the form was not “primarily to be used in court proceedings.” Rather it was a record prepared as “a matter of administrative routine, for the primary purpose of determining Lang’s eligibility for naturalization.” For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between “documents produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii).” The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

Note: This case was decided before *Williams*, but it would appear to satisfy both the Alito and the Kagan version of the “primary motive” test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification --- the statement is testimonial only if it was made to be used in the *defendant’s* criminal prosecution. In *Phoeun Lang* the first premise was not met --- the statements were made for administrative purposes, and not primarily for use in *any* criminal prosecution.

Expert’s reliance on standard samples for comparison does not violate the Confrontation Clause because any communications regarding the preparation of those samples was not testimonial: *United States v. Razo*, 782 F.3d 31 (1st Cir. 2015). A chemist testified about the lab analysis she performed on a substance seized from the defendant’s coconspirator. The crime lab used a “known standard” methamphetamine sample to create a reference point for comparison with seized evidence. That sample was received from a chemical company. The chemist testified that in comparing the seized sample with the known standard sample, she relied on the manufacturer’s assurance that the known standard sample was 100% pure. The court found no confrontation violation because the known standard sample --- and the manufacturer’s assurance about it --- were not testimonial. Any statements regarding the known standard sample were not made with the primary motivation that they would be used at a criminal trial, because the sample was prepared for general use by the laboratory. The court noted that the chemist’s conclusions about the *seized* sample would raise confrontation questions, but the government produced the chemist to be cross-examined about those conclusions. As to the

standard sample, it was prepared “prior to and without regard to any particular investigation, let alone any particular prosecution.”

Note: In reaching its result, the *Razo* court provided a good interpretation of *Williams*. The court saw support in the fact that the Alito plurality would find any communications regarding the known standard sample to be non-testimonial because that sample was “not prepared for the primary purpose of accusing a targeted individual.” And the fifth vote of support would come from Justice Thomas, because nothing about the known standard sample was in the nature of a formalized statement.

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that admission of certain records about suspicious internet activity violated the defendant’s right to Confrontation Clause. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report --- called a “CP Report” --- to the National Center for Missing and Exploited Children (NCMEC), listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant’s computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. But the court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because the primary purpose for the reports was to record past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a “suspect” screen name, email address, and IP address --- and Yahoo did not treat its customers as “suspects” in the ordinary course of its business; 2) before a CP Report is created, someone in the legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users’ IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that “[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible.”

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams*. Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had “no way of knowing whether it will turn out to be incriminating or exonerating.” In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: “Yahoo’s employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody*.”

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user’s account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

Note: *Cameron* cannot be read to hold that business records admissible under Rule 803(6) can be testimonial under *Crawford*. The court notes that under *Palmer v. Hoffman*, 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz*. The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman*: they were not made for business purposes, but rather for purposes of litigation. Thus according to the court, the Yahoo reports were probably not admissible as business records anyway.

Airline records of passengers on a plane are not testimonial: *Tran v. Roden*, 847 F.3d 44 (1st Cir. 2017): On habeas review of a murder conviction, the court reviewed whether the admission of a manifest prepared by United Airlines violated the defendants’ right to confrontation. The manifest showed that two people with the same names as the defendants were on a flight out of the country. This was evidence of consciousness of guilt. The court found that the manifest was a business record prepared by United, outside the context of litigation, and therefore it was not testimonial. The defendants argued that the record was testimonial because it was *delivered* by United to the prosecution. But the court found this irrelevant, because the question under the Confrontation Clause is whether a document was *prepared* with the primary motive of use in a criminal prosecution. The defendants relied on *Cameron*, immediately above, but the court distinguished *Cameron* by noting that the Yahoo records in that case were *prepared* by Yahoo with the intent to send them to the government in order to investigate and prosecute child pornography.

Telephone records are not testimonial: *United States v. Burgos-Montes*, 786 F.3d 92 (1st Cir. 2015): The government introduced phone records of a conspirator. They were accompanied by a certification made under Rule 902(11). The defendant argued that the phone

records were testimonial but the court disagreed. The defendant argued that the records were produced by the phone company in response to a demand from the government, but the court found this irrelevant. The records were gathered and maintained by the phone company in the routine course of business. “The fact that the print-out of this data in this particular format was requested for litigation does not turn the data contained in the print-out into information created for litigation.”

Routine autopsy report was not testimonial: *United States v. James*, 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law --- stating that autopsy reports were not testimonial --- was still valid. The court adhered to its view that “routine” autopsy reports were not testimonial because they are not prepared with the primary motivation that they will be used in a criminal trial. Applying the test of “routine” to the facts presented, the court found as follows:

Somaipersaud’s autopsy was nothing other than routine --- there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner’s report would be used at a criminal trial. [A government expert] testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report itself refers to the cause of death as “undetermined” and attributes it both to “acute mixed intoxication with alcohol and chlorpromazine” combined with “hypertensive and arteriosclerotic cardiovascular disease.”

The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud’s death had begun. [N]either the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud’s death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that “something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations.” It distinguished the 11th Circuit’s opinion --- discussed below --- which found an autopsy report to be testimonial, noting that “the decision was based in part on the fact that the Florida Medical Examiner’s Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office.” Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit’s view.

Note: In considering the effect of *Williams*, the court found that in fact there was no lesson at all to be derived from *Williams*, as there was no rationale on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only cases exactly like it.

Business records are not testimonial: *United States v. Bansal*, 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that “the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury.”

Admission of credit card company’s records identifying customer accounts that had been compromised did not violate the right to confrontation: *United States v. Keita*, 742 F.3d 184 (4th Cir. 2014): In a prosecution for credit card fraud, the trial court admitted “common point of purchase” records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that “business records are generally admissible absent confrontation.” The court concluded that the records were primarily prepared for the administration of Amex’s regularly conducted business.

Admission of purported drug ledgers violated the defendant’s confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson*, 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant’s participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a “qualified witness” under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant’s accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement --- and because the accomplice was not produced to testify --- admission of the ledger against the defendant violated his right to confrontation under *Crawford*.

Note: The *Jackson* court does not hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to authenticate the business record --- the cohort’s production of the records at a proffer session --- was testimonial.

Pseudoephedrine logs are not testimonial: *United States v. Towns*, 718 F.3d 404 (5th Cir. 2013): In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies of pseudoephedrine purchases. The court found that the logs --- and the certifications to the logs provided by the pharmacies --- were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that “the regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage.” As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) ---the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver’s license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

Court rejects the “targeted individual” test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera*, 737 F.3d 988 (5th Cir. 2013): The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant’s grandmother, prepared 40 years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant’s parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant’s mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was not targeted toward the defendant, as he

was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used “at a later trial.” Finally, the court contended that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be confronted with the “*witnesses against him.*” In this case, the grandmother, by way of affidavit, was a witness against the defendant.

Reporter’s Note: The court’s construction of the Confrontation Clause could come out the other way. The reference to “witnesses against him” in the Sixth Amendment could be interpreted as *at the time the statement was made*, it was being directed at the defendant. The *Duron-Caldera* court reads “witnesses” as of the time the statement is being introduced. But at that time, the witness is not there. All the “witnessing” is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying “against him.”

Another note from *Duron-Caldera*: The court notes that there is no rule to be taken from *Williams* under the *Marks* test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In *Williams*, there is nothing on which the plurality and Justice Thomas agreed.

Pseudoephedrine purchase records are not testimonial: *United States v. Collins*, 799 F.3d 554 (6th Cir. 2015): Relying on the Fifth Circuit’s decision in *United States v. Towns*, *supra*, the court held that pharmaceutical records of pseudoephedrine purchases were not testimonial. The court noted that while law enforcement officers use the records to track purchases, the “system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions” and accordingly was not primarily motivated to generate evidence for a prosecution.

Pseudoephedrine logs are not testimonial: *United States v. Lynn*, 851 F.3d 786 (7th Cir. 2017): Affirming convictions for methamphetamine manufacturing and related offenses, the court found no error in admitting logs of pseudoephedrine purchases prepared by pharmacies. These logs indicated that the defendant and associates had purchased pseudoephedrine, a necessary ingredient of methamphetamine. The defendant argued that introducing the logs violated his right to confrontation because they were prepared in anticipation of a prosecution and so were testimonial. But the court disagreed. It stated that “regulatory bodies may have legitimate interests in maintaining these records that far exceed their evidentiary value in a given case. For example, requiring identification for each pseudoephedrine purchase may deter misuse or pseudoephedrine-related drug offenses.” The logs were therefore not testimonial.

Preparing an exhibit for trial is not testimonial: *United States v. Vitrano*, 747 F.3d 922 (7th Cir. 2014): In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because

the technician who prepared the phone calls as an exhibit did not testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that “[p]reparing an exhibit for trial is not itself testimonial.”

Records of wire transfers are not testimonial: *United States v. Brown*, 822 F.3d 966 (7th Cir. 2016): In a drug prosecution, the government offered records of Western Union wire transfers. The court found that the records were not testimonial, noting that “[l]ogically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.” It concluded that the records were “routine and prepared in the ordinary course of business, not in anticipation of prosecution.”

Note: The Western Union records in *Brown* were proven up by way of certificates offered under Rule 902(11). The court did not even mention any possible concern that those certifications would themselves be testimonial. It focused only on the testimoniality of the underlying records.

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz*: *United States v. Mashek*, 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz*, but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, “*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; see *Melendez-Diaz*, 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial).” **Accord, *United States v. Ali***, 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as “*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business.”); ***United States v. Wells***, 706 F.3d 908 (8th Cir. 2013) (*Melendez-Diaz* did not preclude the admission of pseudoephedrine logs, because they constitute non-testimonial business records under Federal Rule of Evidence 803(6)).

Rule 902(11) authentication was not testimonial: *United States v. Thompson*, 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson’s social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit, the court stated that “[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson’s Confrontation Clause rights.” The court

emphasized that “[b]oth the majority and dissenting opinions in *Melendez-Diaz* noted that a clerk’s certificate authenticating a record --- or a copy thereof --- for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial.” It concluded that “[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument.” *See also United States v. Johnson*, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

GPS tracking reports were properly admitted as non-testimonial business records: *United States v. Brooks*, 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant’s argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit --- not for use at trial. The court stated that “[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union’s security company for the purpose of locating a robber and recovering stolen money.”

Certificates attesting to Indian blood are not testimonial: *United States v. Rainbow*, 813 F.3d 1097 (8th Cir. 2016): To prove a jurisdictional element of a charge that the defendants committed an assault within Indian Country, the government offered certificates of degree of Indian blood. The certificates certified that the respective defendants possessed the requisite degree of Indian blood. The defendants argued that, because the certificates were formalized and prepared for litigation, they were testimonial and so admitting them violated their right to confrontation. The certificates were prepared by a clerk of an officer of the BIA, and introduced at trial by the assistant supervisor of that office. The certificates reflected information about what was in records regularly kept by the BIA. The court found that the certificates were not testimonial. It explained as follows:

Although Archambault [the assistant supervisor] testified that he had these particular certificates prepared for his testimony, BIA officials regularly certify blood quantum for the purpose of establishing eligibility for federal programs available only to Indians. Archambault explained that his office maintained the records of tribal enrollment and of each member’s blood quantum. He could look up an individual’s enrollment status and blood quantum at any time—that information existed regardless of whether any crime was committed. Unlike the analysts in *Melendez*—

Diaz and *Bullcoming*, the enrollment clerk here did not complete forensic testing on evidence seized during a police investigation, but instead performed the ministerial duty of preparing certificates based on information that was kept in the ordinary course of business. An objective witness would not necessarily know that the certificates would be used at a later trial, because certificates of degree of Indian blood are regularly used in the administration of the BIA's affairs. Simply put, the enrollment clerk prepared certificates using records maintained in the ordinary course of business by the Standing Rock Agency, and the BIA routinely issues certificates in the administration of its affairs. Thus, the certificates were admissible as non-testimonial business records.

Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: *United States v. Causevic*, 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter --- specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

Note: The statements of facts underlying the prior conviction are testimonial under both versions of the primary motive test contested in *Williams*. They meet the Kagan test because they were obviously prepared for purpose of --- indeed as part of --- a criminal prosecution. And they meet the Alito proviso because they targeted the specific defendant against whom they were used at trial.

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante*, 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Philippines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines, and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records “created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial.” *Melendez-Diaz*, 129 S.Ct. at 2539-40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *Melendez-Diaz*, despite being labeled a copy of the certificate, Exhibit 1 is “quite plainly” an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante’s citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

Filed statement of registered car owner, made after impoundment, that he sold the car to the defendant, was testimonial: *United States v. Esparza*, 791 F.3d 1067 (9th Cir. 2015): The defendant was arrested entering the United States with marijuana hidden in the gas tank and dashboard; the fact in dispute was the defendant’s knowledge, and specifically whether he owned the car he was driving. At the time of arrest, the registered owner was Donna Hernandez. The government relied on two hearsay statements made in records filed with the DMV by Hernandez that she had sold the car to the defendant six days before the defendant’s arrest. But these records were filed *after* the defendant was arrested and Hernandez had received a notice indicating that the car had been seized because it was used to smuggle marijuana into the country. Under the circumstances, the court found that the post-hoc records filed by Hernandez with the DMV were testimonial. The court noted that Hernandez did not create the record “for the routine administration of the DMV’s affairs.” Nor was Hernandez merely “a private citizen who, in the course of a routine sale, simply notified the DMV of the transfer of her car. Instead, her car had already been seized for serious criminal violations, and she sent the transfer form to the DMV only after receiving a notice of seizure from [Customs and Border Protection].”

Note: This is an interesting case in which a statement was found testimonial in the absence of significant law enforcement involvement in the generation of the statement. As the Court has noted in *Bryant* and *Clark*, law enforcement involvement is critical to finding a statement testimonial, because a statement not made to or with law enforcement is unlikely to be sufficiently formal, and unlikely to be primarily motivated for use in a criminal trial. But at least it can be said that there is formality here --- Hernandez filed formal statements claiming that the ownership was transferred. And there was involvement of the state both in spurring her interest in filing (by sending her the notice) and in receiving her filing.

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood*, 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz*. (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz*. On appeal, the government conceded that introducing the CNR violated the defendant’s right to confrontation because under *Melendez-Diaz* that record is testimonial. The court in a footnote agreed with the government’s concession, stating that its previous cases holding that CNRs were not testimonial were “clearly inconsistent with *Melendez-Diaz*” because like the certificates in that case, a CNR is prepared solely for purposes of litigation, after the crime has been committed. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz*. The court reasoned that “neither a warrant of removal’s sole purpose nor even its primary purpose is use at trial.” It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a “small fraction of these warrants are used in immigration prosecutions.” The court concluded that “*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal --- or, for that matter, any business or public record --- could be used in a later criminal prosecution renders it testimonial under *Crawford*.” The court found that the error in admitting the CNR was harmless and affirmed the conviction. *See also United States v. Rojas-Pedroza*, 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant’s argument that it had been undermined by *Bullcoming* and *Bryant*; holding that a Notice of Intent in the defendant’s A-File --- which apprises the alien of the determination that he is removable --- was non-testimonial because its “primary purpose is to effect removals, not to prove facts at a criminal trial.”); *United States v. Lopez*, 762 F.3d 852 (9th Cir. 2014) (verification of removal, recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal “is that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the removal of aliens following a hearing before an immigration judge”; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the Rule’s apparent exclusion of law enforcement reports); *United States v. Albino-Loe*, 747 F.3d 1206 (9th Cir. 2014) (statements concerning the defendant’s alienage in a notice of removal --- which is the charging document for deportation --- are not testimonial in an illegal entry case; the primary purpose of a notice of removal “is simply to effect removals, not to prove facts at a criminal trial”); *United States v. Torralba-Mendia*, 784 F.3d 652 (9th Cir. 2015) (I-213 Forms, offered to show that passengers detained during an

investigation were deported, were admissible under the public records hearsay exception and were not testimonial: “The admitted record of a deportable alien contains the same information as a verification of removal: The alien’s name, photograph, fingerprints, as well as the date, port and method of departure [T]he admitted forms are a ministerial, objective observation [and] Agents complete I-213 forms regardless of whether the government decides to prosecute anyone criminally.”).

Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez*, 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents a --- Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge --- were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

Forms prepared by border patrol agents interdicting aliens found not testimonial: *United States v. Morales*, 720 F.3d 1194 (9th Cir. 2013): In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien’s possession, and basic biographical data about the alien, and also provides the alien options, including the making of a concession that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant’s argument that these forms were testimonial. It stated that “a Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of ‘testimonial.’” The court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error. (The court appears wrong about the hearsay rule because statements coming from the alien would be admissible as party-opponent statements in a public record.)

Return of Service, offered to prove that the Defendant had been provided with notice of a hearing on a domestic violence protection order, was not testimonial: *United States v. Fryberg*, 854 F.3d 1126 (9th Cir. 2017): The defendant was convicted for possession of a firearm by a prohibited person. The prohibition was that he was subject to a domestic violence protection order. Critical to the validity of that order was that the defendant was served with notice of a hearing on a permanent protection order. As proof of that the defendant was served with that notice, the government offered the return of service by a law enforcement officer, completed on the day that service was purportedly made. The court held that the return of service was admissible over a

hearsay exception as a public record; it was not barred by the law enforcement prohibition of Rule 803(8) because it was a ministerial, non-adversarial record, proving only that service was made. The court further held that the return of service was admissible over a confrontation objection, because it was not testimonial. The court likened the return of service to the certificate of deportation upheld in *Orozco-Acosta, supra*. The court stated that the primary purpose for preparing the return of service was not to have it used as evidence in a prosecution but rather to inform the court “that the defendant had been served with notice of the hearing on the protection order, which enabled the hearing to proceed.” At the time the notice was filed, no crime had yet occurred and so the return of service was not primarily prepared for the purpose of a criminal prosecution.

Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant’s conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8), and also that its admission violated his right to confrontation. The court disagreed, reasoning that “a SSA interviewer completes the application as part of a routine administrative process” and such a record is prepared for each and every request for benefits. “No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose.” The court quoted *Melendez-Diaz* for the proposition that “[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because --- having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial --- they are not testimonial.” The court concluded as follows:

[N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavit seeking to amend a birth certificate, prepared by border patrol agents for use at trial, was testimonial: *United States v. Macias*, 789 F.3d 1011 (9th Cir. 2015): The defendant was arrested for illegal reentry but claimed that he had a California birth certificate and was a U.S. citizen. He was charged with illegal reentry and making a false claim of citizenship. During his trial he introduced a “delayed registration of birth” document issued by the State of

California, and the jury deadlocked. After the trial, border patrol agents conducted an investigation into the defendant's place of birth, interviewing family members and reviewing family documents, and determined that he had been born in Mexico. They then attempted to correct the birthplace on the California document; pursuant to California law, they submitted sworn affidavits in an application to amend the California document. At the second trial, the government introduced the delayed registration as well as the amending affidavit. On appeal, the defendant argued that the amending affidavit was testimonial and its admission violated his right to confrontation. The court reviewed this claim for plain error because at trial the defendant's objection was on hearsay grounds only. The court found that the amending affidavit was clearly testimonial, as its sole purpose was to create evidence for the defendant's second trial. However, the court found that the plain error did not affect the defendant's substantial rights, because the government at trial introduced the defendant's Mexican birth certificate, as well as testimony from family members that the defendant was born in Mexico.

Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu*, 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C. § 3505 for foreign records in criminal cases. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit's decision in *Yeley-Davis*, immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate other records are not testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis*, 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis*, *supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis*. * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence

against a defendant.” Id. at 2539. In addition, Justice Scalia rejected the dissent’s concern that the majority’s holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 (“Contrary to the dissent’s suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution’s case.”); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court’s ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

The court found *Yeley-Davis* “dispositive” in *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014), in which the court admitted a certificate of authenticity of credit card records. The court again distinguished *Melendez-Diaz* as a case concerned with affidavits showing the results of a forensic analysis --- whereas the certificate of authenticity “does not contain any ‘analysis’ that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial statement of authenticity.” *See also United States v. Keck*, 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they “were created for the administration of Moneygram’s affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian’s actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation.”

Notation on a fax attaching documents sent to law enforcement was not testimonial: *United States v. Stegman*, 873 F.3d 1215 (10th Cir. 2017): In a tax fraud prosecution, the government introduced the defendant’s records, as sent by the defendant’s accountant. The defendant objected that the fax cover sheet transmitting the document contained a notation made by the accountant that was potentially incriminating. The court found that the notation was not testimonial. It explained that the accountant’s notation was “cooperative and informal in nature and there is no indication that [the accountant] would have reasonably expected the notation to be used prosecutorially.”

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo*, 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admissible. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records --- the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien

entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz*. The court distinguished *Melendez-Diaz* in the following passage:

Like a Warrant of Deportation * * * (and unlike the certificates of analysis in *Melendez-Diaz*), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the United States without proper immigration papers.*** Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *

The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. The district court properly ruled that the primary purpose of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

Summary charts of admitted business records is not testimonial: *United States v. Naranjo*, 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and “[b]usiness records are not testimonial.” And “[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial.”

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz*: *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz*. The court relied heavily on the fact that the autopsy reports were filed by an arm of law enforcement. The court reasoned as follows:

We think the autopsy records presented in this case were prepared “for use at trial.” Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. *Id.* The medical examiner for each district “shall determine the cause of death” in a variety of circumstances and “shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney.” Fla. Stat. 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section 406.11 has a duty to report the death to the medical examiner. Failure to do so is a first degree misdemeanor.

* * *

In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

Note: The Court’s test for testimoniality is broader than that used by the Supreme Court. The Supreme Court finds statements to be testimonial only when they are *primarily motivated* to be used in a criminal prosecution. The 11th Circuit’s “reasonable anticipation” test would cover many more statements, and accordingly the court’s decision in *Ignasiak* is subject to question.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton’s accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian’s statements were not “testimonial” within the meaning of *Crawford*. The court explained that the statements “were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such

as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial.”

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta*, 475 F.3d 677 (5th Cir. 2007): The defendant’s accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant’s direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice’s statements made to qualify for a safety valve sentence reduction --- those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice’s previous statements implicating the defendant, the court noted that “Acosta could have probed either of these subjects on cross-examination.” The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause. *See also, United States v. Smith*, 822 F.3d 755 (5th Cir. 2016) (defendant’s accomplice gave testimonial statements to a police officer, but admission of those statements did not violate the right to confrontation because the accomplice testified at trial subject to cross-examination).

Crawford inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell*, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford*. But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant’s complaint was that his cross-examination would have been more effective if the victims had been older. “Under *Owens*, however, that is not enough to establish a Confrontation Clause violation.”

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial --- even though the declarant did not recall making the statements: *Cookson v. Schwartz*, 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim’s hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted into evidence. The court found no error in admitting the victim’s testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory about the statements. But the court found this argument was foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case “could remember the underlying events described in the hearsay statements.” *See also United States v. Al-Alawi*, 873 F.3d 592 (7th Cir. 2017) (admission of the victim’s videotaped statement to police, accusing the defendant of sexual abuse, did not violate the Confrontation Clause, because the victim testified at trial: “When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”).

Witness’s reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau*, 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that “*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person.”

Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant’s statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. “He may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections.”

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen*, 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. *See also United States v. Lindsey*, 634 F.3d 541 (9th Cir. 2011) (“Although Gibson’s statements to Agent Arbuthnot

qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey’s counsel.”).

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed *arguendo* that the accusation was testimonial --- even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant’s confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant’s “failure to seize this opportunity demolishes his Sixth Amendment claim.” The court observed that the defendant had a better opportunity to confront the victim “than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation.”

Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial --- as is necessary to qualify a record under Rule 803(5) --- and was subject to unrestricted cross-examination.

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”).

SUPPLEMENTAL MATERIALS PROVIDED AT MEETING

APRIL 26-27, 2018

Supplementary Memo to the Evidence Rules Committee

From: Dan Capra

Date: April 20, 2018

Re: Proposed Amendment to Rule 807

Yesterday, the Chair of the Committee and the Reporter had a meeting in which we reviewed all the proposed changes to Rule 807 as it was issued for public comment. The working draft of changes that we reviewed can be found at the end of the Rule 807 memo in the agenda book --- specifically, the working draft can be found starting on page 29 of the memo, page 131 of the agenda book.

What follows are the suggestions we have of changes that should be made and those that should not be implemented. We think it would be a good idea if we start the Committee discussion with the draft below. This is not in any way intended to predetermine the result or to forestall the discussion of any and all suggestions for change to Rule 807. But we think it might be a good idea to start with the draft below. Footnotes are added to explain our suggestions:

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay, even if the statement is ~~not specifically covered by~~ not admissible under¹ a hearsay exception in Rule 803 or 804:²

~~(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804;~~

~~(2)~~ **(1)** the court determines that³ it 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; and

~~(3)~~ **(2)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

¹ This is the near-miss language change discussed in the Reporter's memo. We think the "near-miss" issue should be discussed in text and Committee Note.

² The provision about Rule 803 and 804 is moved up to the preface of the rule and would not be an admissibility requirement. This is in response to Judge Furman's concerns about a court having to make a finding that the proffered hearsay does not fit under a standard exception.

³ This is AAJ's style suggestion, accepted by the Style Subcommittee.

(b) **Notice.** The statement is admissible only if the proponent gives an adverse party reasonable notice of an intent to offer the statement – including its substance and the declarant’s name -- so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing -- or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note with changes from the Note issued for public comment

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The “equivalence” standard has not served to ~~limit~~ guide⁴ a court’s discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. See Rule 104(a).⁵ As with any hearsay statement, the judge’s threshold finding to this effect merely means that the jury may consider the statement (provided the other conditions for admissibility have been satisfied) and not that it must assume the statement is true.⁶

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

⁴ Judge Livingston thought “guide” to be a better word as it goes both to limiting and allowing. I agree.

⁵ This cuts out the explanation about Rule 104(a), which is discussed in the Reporter’s memo, and addresses the relevance of Rule 104(a) simply by citing it. We are concerned that there will be confusion with extensive discussion in the note about a finding by a preponderance of the evidence that there are sufficient guarantees of trustworthiness.

⁶ This sentence is added to clarify that deciding trustworthiness under Rule 104(a) nonetheless leaves it to the jury to determine the weight of the evidence.

statement is accurate should be admissible under this exception. ⁷Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

The change to the trustworthiness clause does not at all mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. ~~Indeed Rule 807(a)(1) now requires the proponent to show that the proffered hearsay is a statement that “is not specifically covered by admissible under a hearsay exception in Rule 803 or 804.” This does not mean that a court is required to make a finding that no other exception is applicable. But it does mean that the proponent cannot seek admission of hearsay under Rule 807 if it is apparent that the hearsay could be admitted under another exception. Thus~~⁸ Rule 807 remains an exception to be invoked only when necessary.

The original rule applied to hearsay “not specifically covered” by a Rule 803 or 804 exception. The amendment makes the rule applicable to hearsay “not admissible under” those exceptions. This change makes clear that a court may determine that a statement supported by sufficient guarantees of trustworthiness is admissible under this exception when it is a “near-miss” of one of the Rule 803 or 804 exceptions. If the court employs a “near-miss” analysis it should take into account 1) how far the hearsay misses the admissibility requirements of the standard exception; and 2) the importance of the admissibility requirement that the statement fails to meet.⁹

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

⁷ This change implements the suggestion from Judge Livingston, discussed in the Reporter’s memo, that the term “accurate” should be changed.

⁸ This language needs to be cut from the Note as issued for public comment, because inadmissibility under Rule 803 and 804 is no longer an admissibility requirement under this working draft. It is moved back to its original place, in the preface to the rule.

⁹ This is the near-miss comment, currently in the memo, which we changed only slightly.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case. ¹⁰

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules (*see*, Rules 102, 401).

The notice provision has been amended to make ~~three~~ four¹¹ changes in the operation of the rule:

- First, the rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. See Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). ~~Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the Rule as amended. The term “substance” is intentionally taken from the requirement for a sufficient offer of proof under Rule 103(a)(2) — that is, the proponent must provide enough information about the statement to allow the opponent to craft an argument and to allow the court to make a ruling. Any more specific description in the text of the rule risks being over- and under-inclusive.~~ ¹²
- Second, the prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.
- Second Third, the Rule now requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

¹⁰ This is in the memo as adopting a suggestion from a Standing Committee member, and we did not change it.

¹¹ As explained in the Reporter’s memo, I thought the notice changes were best discussed as four separate changes rather than three.

¹² AAJ expressed concerns as discussed in the Reporter’s memo, that the term “substance” is too vague. On reflection, we think it sufficient to state that the language is designed to provide a fair opportunity, and cite the rule from which the term is taken --- Rule 103. We agree with AAJ that the language in the Note issued for public comment regarding the current term “particulars” was not very helpful. So we propose that it be deleted.

- Finally, the pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided for in the original rule, while some courts have read the original rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay. But given the opponent's need to have time to prepare for evidence that fits no standard exception, the good cause exception should be limited to clear cases in which the proponent employed all reasonable efforts to provide timely pretrial notice. In assessing good cause, the court should of course take into account the proponent's resources and the importance of the evidence, especially to a defendant in a criminal case.¹³

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

¹³ The first sentence that is deleted was intended to address Judge St. Eve's comment that good cause should be hard to find. The second sentence was intended to address NACDL's comment that good cause should be easy to find for criminal defendants. On reflection we think it might be best to leave good cause to the courts. Almost all of them apply a good cause exception currently, even though it is not in the existing rule. There is no intent to affect the case law of courts that already apply a good cause exception.

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August 30, 2017

Hon. William K. Sessions, III
Chair, Advisory Committee on the Rules of Evidence
United States District Court
Federal Building
11 Elmwood Avenue, 5th Floor
Burlington, VT 05401

Re: Invitation for Comment on a Possible Amendment to Fed.R.Evid. 801(d)(1)(A)

Dear Judge Sessions:

The American Association for Justice (“AAJ”), formerly known as the Association of Trial Lawyers of America (“ATLA”), hereby submits these comments in response to Invitation for Comment on Possible Amendment to Fed.R.Evid. 801(d)(1)(A) (hereinafter “Invitation for Comment”) posted by the Advisory Committee on the Rules of Evidence (hereinafter “Advisory Committee”). AAJ, with members in the United States, Canada and abroad, works to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs receive their Constitutional right to their day in court under fair, just and reasonable rules of evidence.

The Advisory Committee is considering a rule amendment that would allow the introduction of prior inconsistent statements made in audiovisual recordings for substantive purposes. AAJ believes that this rule change would ultimately prove important in very few civil cases, and would have more significant impact on criminal cases. While AAJ is still considering the proposed impact this amendment would have on civil litigation, it does wish to acknowledge the implication of this rulemaking could have on the ever-increasing importance of cell phone recordings and social media recordings as evidence. AAJ does not believe that the rule change itself would lead to an increase in recordings.

AAJ is hard pressed to find a single civil case in which an audiovisual recording of a prior inconsistent statement would have proven important in the disposition of a case if admitted for substantive reasons, not just impeachment. However, it is not hard to imagine such a case. For instance, a cell-phone recording taken immediately after a car accident where, inconsistent with testimony at trial, a defendant in the case makes a statement admitting fault in the video. While this recording could currently be introduced to impeach the witness, under the proposed rule change, this cell phone recording could now also be admitted as substantive evidence.

Cell phone recordings, which will certainly qualify as “audiovisual” recordings under this proposed rule change, will only become more prevalent, and as such are more likely to become important evidence in civil cases. The same is equally true of videos posted on social media outlets, such as Facebook and Instagram. These recordings likewise could potentially become evidence, which under the proposed rule could be admitted for substantive reasons if inconsistent with a person’s testimony at trial. Cell phone recordings seem ubiquitous for all events occurring in public spaces or those involving the police or other authorities, which may be why this proposed rule change has a limited

application. Live-streaming and other tools make video available instantly so the purpose of this rule may be of limited application as the video will be subject to viewing long before the declarant witness testifies.

Ultimately, the rules regarding hearsay are intended to preserve reliability of evidence. While the implications of this rule may grow as cell-phone recordings and social media recordings become more prevalent, changes in technology would not inherently affect the reliability of a recording that captures both the audio and visual aspects of a statement. Such a recorded statement provides context, is reliable and subject to proper cross-examination. As such, AAJ does not foresee this draft amendment impacting many civil cases.

However, given the everchanging audio visual landscape AAJ suggests that the Advisory Committee be mindful of the types of evidence that this rule change may implicate as technology evolves. More specifically, AAJ recommends that the Committee consider expanding the committee note to acknowledge that it is the intent of the Committee that “audiovisual recording” be deemed to apply to changes in technology, not just traditional videotaped recordings. Currently, the note does not specifically define “audiovisual”, but perhaps it would be useful to give examples of technology that are included in the proposed amendment, including the use of cell phone recordings and social media with an audiovisual component.

AAJ appreciates this opportunity to submit comments regarding Federal Rule of Evidence 801(d)(1)(A). If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel, American Association for Justice, at (202) 944-2885.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen L. Natri". The signature is written in a cursive style with a large initial "K" and a long, sweeping underline.

Kathleen L. Natri
President
American Association for Justice

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To: The Advisory Committee on the Federal Rules of Evidence
 From: M. Chris Fabricant, Director, Strategic Litigation, The Innocence Project
 Date: September 1, 2017
 Re: Organizational Statement Against the Proposed Amendment to Federal Rule of Evidence 801(d)(1)(A) on Prior Inconsistent Statements by a Witness

On behalf of the Innocence Project, I would like to thank the Advisory Committee for soliciting our input on the proposed amendment to Federal Rule of Evidence 801(d)(1)(A) (“proposed Rule”). After discussing the amendment internally and consulting with our sister organizations in the Innocence Network, we oppose the proposed Rule for its potential adverse impacts on individuals charged with or convicted of crimes they did not commit. While the proposed amendment is limited to the Federal Rules of Evidence, at least 38 states have adopted these rules and frequently amend their own rules when the Federal Rules are amended.¹ Because the overwhelming majority of criminal cases are litigated in state court, and the overwhelming majority of criminal prosecutions are resolved through plea bargaining, our opposition to the proposed Rule is focused primarily on its potential threat to the fair administration of justice in the plea context in state court criminal prosecutions, although we have similar concerns about the proposed Rule in the federal context.²

The Need for Data Prior to Adopting the Proposed Rule

As a threshold matter, the potential impact of the proposed Rule requires more research before an informed decision can be made. Although six states have already adopted a provision similar to the amendment before this Committee, the specific concerns about the proposed Rule discussed below are heightened by the dearth of data from those jurisdictions on the effects of the rule changes. While the research provided to the Committee from those states is useful anecdotal information, these data relate only to felony trials resulting in a guilty verdict, which were subsequently appealed, at least in part, on this specific issue. This provides no information related to cases resolved through plea bargaining, nor any data concerning the influence the proposed Rule will have in misdemeanor prosecutions. Put differently, there are no data concerning how the proposed Rule would influence the vast majority of criminal prosecutions. Consequently, the Innocence Project respectfully recommends that the Committee not move forward with the proposal unless and until more data are available in order to examine the impacts of analogous rule changes at the state level.

¹ See <https://www.law.cornell.edu/uniform/evidence>.

² Although precise figures are not available, approximately 95% of state prosecutions are resolved through guilty pleas. Jed S. Rakoff, *Why Innocent People Plead Guilty*, NY TIMES REVIEW OF BOOKS, available at <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>. The numbers are similar in the federal system. As the Supreme Court has noted, at both the state and federal levels, the American Criminal Justice System is “for the most part a system of pleas, not a system of trials.” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

In order to make an accurate, evidence-based assessment of the potential impact of the proposal, the Committee should commission a pilot study in the applicable jurisdictions to determine, inter alia, the prevalence of recorded witness statements, the types of cases in which such recordings are made or introduced, and how those recordings have impacted plea bargaining and trial practices. Such a study should analyze the effect of the introduction of the proposed Rule in a single jurisdiction and also compare two similar jurisdictions, one with and one without the proposed Rule, which would give the Committee some empirical basis from which to make a judgment.

The Potential to Exacerbate the Problem of Innocent People Pleading Guilty

The Innocence Project has long advocated for law enforcement agents to record and disclose all witness statements made during the course of an investigation. However, the proposed Rule includes neither standards for when law enforcement agents would be required to record witness statements, nor a reliability inquiry for determining the admissibility of such statements. In the absence of such necessary guidance (or, in the alternative, a mandate that all witness statements be recorded), the Innocence Project is concerned that the proposed Rule would be invoked selectively, and particularly in cases primarily reliant on an inculpatory witness statement, where the risk of wrongful conviction is heightened. While the proposed Rule reflects a concern about so-called “wobblers”—i.e., witnesses whose initial, truthful statements change by the time of trial—it fails to account for cases in which a witness’s initial statement is false. Because the proposed Rule facilitates the introduction of such false accusations, not just as impeachment evidence, but as direct evidence of guilt, the Innocence Project is concerned that the proposed Rule could be used to induce pleas in weak cases where there would otherwise be insufficient evidence of guilt, because a complaining witness at some point in time gave an inculpatory, unsworn statement.³ Indeed, under the proposed Rule, a successful prosecution could be mounted where the only sworn trial testimony actually *exculpates* the defendant, simply because the complainant—some time prior to trial and pursuant to no rules or regulations to ensure reliability—implicated the defendant, and that statement is credited by the trier of fact over the testimony at trial. Under such a regime, an innocent defendant may make a rational decision to plead guilty, rather than risk trial. Indeed, 38 of the 351 people exonerated by post-conviction DNA exonerations pled guilty to crimes they did not commit.⁴ Moreover, false witness statements or allegations contributed to over 50% of wrongful convictions nationwide.⁵

Moreover, the proposed Rule has the potential to delay and/or prevent justice even after a wrongful conviction has occurred. That is because a single, unsworn statement could provide the basis for upholding a conviction on appeal when a sufficiency of the evidence challenge is raised, or denying a defendant a new trial on post-conviction review, even where the complaining witness has recanted. The wrongful conviction of Gary Dotson, the very first individual exonerated through post-conviction DNA, is illustrative. Mr. Dotson was arrested after a woman reported being kidnapped and brutally raped as she walked home from work. At his 1979 trial in Illinois, Mr. Dotson was found guilty, based largely on the complaining

³ Misdemeanor prosecution of domestic violence cases seems particularly likely to involve such a fact pattern.

⁴ The phenomenon of innocent defendants pleading guilty is well documented: the Innocence Project has identified 38 individuals who were exonerated through post-conviction DNA testing after entering a guilty plea to a crime they did not commit. See The Innocence Project, *DNA Exonerations in the United States* (documenting 38 cases, or 11%, of the 351 DNA exonerations to date in which the exoneree pled guilty), available at <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last checked August 22, 2017).

⁵ See <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>.

witness’s testimony and identification of Mr. Dotson as her assailant. However, that witness recanted her allegation six years later, explaining that she fabricated the rape to obscure a consensual sexual encounter with her boyfriend. Though Mr. Dotson received a gubernatorial commutation after six years of wrongful incarceration and was eventually cleared by DNA evidence, a post-conviction court initially denied his petition for a new trial because it found the complaining witness more credible in her initial testimony than in her recantation.⁶ Finally, even if Dotson had received a new trial, the complaining witness’s initial statement, which turned out to be false, would have been admissible at that re-trial – even if it had been unsworn – had Illinois adopted the proposed Rule at the time of Mr. Dotson’s post-conviction proceedings. Due to our concern that the proposed Rule 801 would be applied selectively—and particularly in cases, like Mr. Dotson’s, that rely heavily on a witness’s inculpatory statement to compensate for a lack of other, reliable evidence—we believe the proposal creates a heightened risk of wrongful conviction.

Conclusion

In the face of such wide-ranging implications, the Innocence Project believes more data are necessary from the several states that currently allow the introduction of recorded prior inconsistent statements as substantive evidence of guilt. Additionally, in the absence of mandatory guidelines ensuring that witness statements are not selectively recorded, too much discretion is left to individual actors, which can incentivize recording of statements for use as substantive evidence in the weakest cases. This presents too great a threat of wrongful conviction for the Innocence Project to endorse the proposed Rule, particularly in the absence of data concerning the likely impact of the proposal.

⁶ Nat’l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 51-52 (1996).

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17-EV-D



Norman L. Reimer
Executive Director

October 12, 2017

The following position was approved by the Executive Committee of the National Association of Criminal Defense Lawyers on October 11, 2017

NACDL COMMENT ON PROPOSED RULE 801(d)(1)(A)

The National Association of Criminal Defense Lawyers opposes the proposed amendment to Fed. R. Evid. 801(d)(1)(A). The amendment would permit the substantive use of unsworn and presumptively unreliable out-of-court statements. The amendment would thus mark a sharp break with other exceptions to the hearsay rule, which generally require circumstantial assurances of reliability. There is no identified need that would justify such a striking impingement on the trial's truth-seeking function.

The draft committee note to the proposed amendment asserts that the requirement in the current rule that the prior inconsistent statement be made subject to penalty of perjury "stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate--because it may be difficult to cross-examine a declarant about a prior statement that the declarant plausibly denies making." But the "penalty of perjury" requirement serves a second critical function as well: it provides

"Liberty's Last Champion"

some assurance that the prior statement is reliable. NACDL opposes removing this important check on the substantive admissibility of unreliable out-of-court statements.

When Rule 801(d)(1)(A) was first adopted, some argued that the "penalty of perjury" requirement was unnecessary, because the opportunity to cross-examine the witness on the stand provides sufficient assurance that false prior statements will be exposed. *See* Fed. R. Evid. 801, Advisory Committee Note. Congress rejected this view and included the "penalty of perjury" requirement in the rule. The proposed amendment presumably rests on the same argument that Congress found unpersuasive when it adopted the current rule. For two related reasons, that argument should again be rejected.

First, the opportunity to cross-examine the declarant at trial does not take account of the witness who purports to have forgotten the event about which he is being questioned. Most courts hold such testimony to be inconsistent with a prior statement in which the witness remembered the event, at least where the district court finds the memory loss to be feigned. *See, e.g., United States v. Owens*, 484 U.S. 554, 563 (1988) (dicta); *United States v. Mornan*, 413 F.3d 372, 379 (3d Cir. 2005); *United States v. Knox*, 124 F.3d 1360, 1364 (10th Cir. 1997).¹ In such a circumstance, these courts would allow the prior unsworn statement for its truth under the proposed rule, as long as it was recorded audiovisually (proposed Rule 801(d)(2)(A)(ii)) or the witness acknowledged making the statement (proposed Rule 801(d)(2)(A)(iii)). Given the witness' professed lack of memory of the event, however, meaningful cross-examination would be impossible. Courts are willing to countenance this lack of adversarial testing where the prior inconsistent statement was given under penalty of perjury, as required under current Rule

¹ Although beyond the scope of the proposed amendment, NACDL generally favors the admissibility of prior inconsistent statements for impeachment purposes when the witness professes a lack of memory of the event, regardless of whether the memory loss is feigned.

801(d)(1)(A). *See, e.g., Knox*, 124 F.3d at 1364 (sworn change of plea statements); *United States v. Di Caro*, 772 F.2d 1314, 1321-22 (7th Cir. 1985) (grand jury testimony); *United States v. Murphy*, 696 F.2d 282, 283-84 (4th Cir. 1982) (same). But extending the rule to unsworn statements would invite conviction on the basis of unreliable statements that cannot be subjected to meaningful cross-examination.

Second, allowing the substantive use of unsworn prior inconsistent statements would invite manipulation, particularly in cases involving witnesses who have agreed to cooperate with the prosecution in return for immunity, reduced charges, or other consideration. It is no secret that such witnesses often require many sessions with prosecutors and agents before their version of events aligns with the government's. Sometimes this is the result of a slowly refreshed recollection or a gradual overcoming of a reluctance to tell the truth about a former colleague's misconduct. Sometimes, however, such an evolution reflects an unscrupulous cooperator's increasingly precise understanding of what the government wants to hear. The proposed rule invites prosecutors and agents to refrain from any audiovisual recording while this process plays out. The camera will come on only when the cooperator's story meshes fully with the prosecution's theory. Then, if the cooperator varies from that story in his trial testimony, the prosecution can introduce the recorded statement for its truth. The risk of manipulation would be reduced if there were a requirement that *all* of a cooperating witness' interviews were recorded audiovisually--but there is no such federal requirement, and thus the proposed rule invites abuse.

In a similar vein, the proposed rule would effectively overrule a line of cases that prohibits prosecutors from calling a witness solely for the purpose of impeaching him with otherwise inadmissible prior inconsistent statements. *See, e.g., United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985); *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984); *United*

States v. Morlang, 531 F.2d 183, 191 (4th Cir. 1975). These cases rest on the notion that it would be unfair for the prosecution "to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence--or, if it didn't miss it, would ignore it." *Webster*, 734 F.2d at 1192; *see Morlang*, 531 F.2d at 191. Under the proposed rule, however, the out-of-court statements would be admissible as substantive evidence if recorded audiovisually or acknowledged by the witness. For such statements, there would be no danger of the jury missing the "subtle distinction" between impeaching and substantive evidence. Thus, the prosecution apparently would act permissibly in calling a witness who it knew would provide no useful evidence solely for the purpose of introducing the prior inconsistent statement. In this respect as well, the proposed rule invites manipulation.

By permitting the introduction of unsworn out-of-court statements merely because they are inconsistent with a witness' trial testimony, the proposed rule would mark a sharp break with the theory underlying other hearsay exceptions.² Those exceptions generally require some circumstantial assurance of reliability. Exceptions that do not require such assurances typically rest on considerations peculiar to the adversarial process. For example, prior consistent statements may be admissible as substantive evidence regardless of reliability, but only if the opponent of the evidence opens the door by attacking the declarant's credibility as a witness. Fed. R. Evid. 801(d)(1)(B).³ Similarly, admissions of a party opponent may be admissible as substantive evidence under Fed. R. Evid. 801(d)(2) regardless of reliability "on the theory that

² Although Rule 801(d) is technically a definition of nonhearsay, we refer to it as an "exception" for the sake of convenience.

³ Statements of prior identification may be introduced as substantive evidence. Fed. R. Evid. 801(d)(1)(C). Although the rule itself imposes no requirement of reliability, a substantial body of law requires that such identifications not be unduly suggestive and be otherwise reliable. *See, e.g., United States v. Kaquatosh*, 242 F. Supp. 2d 562, 564 (E.D. Wis. 2003).

their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." Fed. R. Evid. 801, Advisory Committee Note.

No such considerations justify the proposed revision to Rule 801(d)(1)(A). Unlike the hearsay exceptions in Fed. R. Evid. 803 and 804, unsworn prior inconsistent statements have no inherent assurance of reliability. Indeed, such statements by cooperators seeking to curry favor with the government are often intensely unreliable. And unlike prior consistent statements and admissions of a party opponent, no considerations peculiar to the adversary system justify the admission of unsworn prior inconsistent statements despite their lack of reliability. The proposed amendment would undermine the trial's truth-seeking function for no apparent purpose.

For these reasons, NACDL opposes the proposed amendment to Rule 801(d)(1)(A).

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Advisory Committee on Rules of Evidence
Washington, D.C., April 26–27, 2018
Drafting Alternatives for Rule 404(b)

A. **The “Inextricably Intertwined” Approach [Capra, p. 39]**

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act – offered as indirect evidence of a matter in dispute – is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

A Committee Note excerpt might look like this: The amendment provides that Rule 404(b) does not apply to direct evidence of the matter in dispute. For example, in a prosecution for bank robbery, Rule 404(b) does not apply to testimony from an eyewitness that he saw the defendant rob the bank. Rule 404(b) has no application because there can be no argument that by presenting that evidence the government is trying to raise the inference that the defendant has a propensity; rather it is just proving the crime charged. On the other hand, evidence that the defendant threatened an eyewitness a week after the crime is indirect evidence of the bank robbery, and should be evaluated under Rule 404(b). Many courts, in determining the coverage of Rule 404(b), have held that evidence of acts “inextricably intertwined” with the charged crime, or “intrinsic” to it, are outside the rule’s coverage. But those and other like iterations have led to confusion and conflicting results in the courts. The Committee believes that a “direct/indirect” distinction is easier to apply and will provide the proper scope of coverage for Rule 404(b).

B. **The “Link in the Chain” Approach [Capra, p. 31–34]**

Alternative 1: Adding a simple statement to the substantive provision.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Other Uses; ~~Notice in a Criminal Case.~~* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. But the probative value for the other purpose may not depend on a propensity inference.

(3) Notice in a Criminal Case. On request by a defendant in a criminal case, the prosecutor must:

- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Alternative 2: A more elaborate statement requiring a chain of reasoning without a propensity inference.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Other Uses; Notice in a Criminal Case.* ~~This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.~~ The court may admit this evidence for another purpose only upon making the following findings:

- (A) The evidence is relevant to a specific purpose other than the person's character or propensity to behave in a certain way;
- (B) the specific purpose is established through a chain of reasoning that does not rely on the inference that the person has a certain character and acted in accordance with that character on the occasion in dispute in the case; and
- (C) the probative value of the other act evidence is not substantially outweighed by the risk of unfair prejudice, after taking account of the extent to which the non-propensity fact for which the evidence is offered is disputed.

(3) Notice in a Criminal Case. On request by a defendant in a criminal case, the prosecutor must:

- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Alternative 3: Adding to the notice provision.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~ In a criminal case, the prosecutor must:

- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; ~~and~~
- (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice;
- (C) articulate in the notice the non-propensity purpose for which the prosecution intends to offer the evidence; and
- (D) articulate the chain of reasoning supporting the purpose for offering the evidence.

C. The “Balancing” Approach [Capra, p. 47–48]

(b) Other Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a any other crime, wrong, or ~~other~~ act – when offered as indirect evidence of a matter in dispute – is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Other Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. If the evidence is offered against a defendant in a criminal case, its probative value must outweigh its prejudicial effect to that defendant. In all other cases, admissibility is subject to Rule 403. ~~On request by a defendant in a criminal case, the prosecutor~~

(3) Notice. The proponent must:

- (A) provide reasonable, written notice of the ~~general nature of~~ [the substance of] any such evidence that the ~~prosecutor~~ proponent intends to offer at trial; ~~and~~
- (B) articulate in the notice the purpose for which the proponent intends to offer the evidence;
- (C) articulate the chain of reasoning supporting the purpose for offering the evidence; and
- ~~(B D)~~ do so at least 14 days before trial — or ~~during trial~~ at a later date if the court, for good cause, excuses this requirement ~~lack of pretrial notice.~~

D. The “Notice” Approach [Capra, p. 45–46]

Alternative #1:

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity,

absence of mistake, or lack of accident. ~~On request by a defendant in~~ In a criminal case, the prosecutor must:

- (A) provide reasonable, written notice of the ~~general nature~~ substance of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so at least 14 days before trial — or at a later date ~~during trial~~ if the court, for good cause, excuses ~~lack of pretrial notice~~ this requirement.

Alternative #2:

(3) Notice in a Criminal Case. ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

- (A) provide reasonable, written notice of the ~~general nature~~ substance of any such evidence that the ~~prosecutor~~ proponent intends to offer at trial; ~~and~~
- (B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence;
- (C) articulate the chain of reasoning supporting the purpose for offering the evidence; and
- ~~(B D)~~ do so at least 14 days before trial — or during trial at a later date if the court, for good cause, excuses ~~lack of pretrial notice~~ this requirement.

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U.S. Department of Justice

Washington, DC 20530

Memorandum

To: Daniel J. Capra, Reporter,
Advisory Committee on Evidence Rules
From: Elizabeth J. Shapiro, U.S. Department of Justice
Re: Consideration of Possible Changes to Rule 404(b)
Date: April 4, 2017

We write to provide you with the Department's initial views in response to your memorandum setting forth a number of possible amendments to Federal Rule of Evidence 404(b). At the outset, we thank you for the tremendous work you have done thinking through the issues and presenting the committee with a thoughtful and comprehensive work product. We hope that adding our perspective will assist the committee's forthcoming deliberations.

Before addressing specific proposals, there are several general points to keep in mind in considering whether and how to amend FRE 404(b), some of which you have already noted in your memorandum. First, FRE 404(b) is likely the most heavily litigated of all the evidence rules. Accordingly, any significant amendment has the potential to upset decades of precedent and be more disruptive to courts and practitioners than the changes are beneficial. Second, the 404(b) analysis as applied is extremely fact intensive and case specific. Whether prior-act evidence is admissible turns on a host of considerations, including the purpose for which the evidence is admitted, the relevance of the evidence to that purpose (which may depend on such factors as the similarity of the prior act to the charged offense and its proximity in time), the probative value of the evidence, and the danger of unfair prejudice. To effectively engage in this balance courts require discretion and flexibility.

Finally, the legislative history of 404(b) suggests that significant amendments to 404(b) will attract congressional attention. As the Supreme Court has noted, Congress, in adopting FRE 404(b), was not primarily concerned with keeping out other-act evidence. To the contrary, it was concerned that such evidence be admitted, subject to Rule 403. See *Huddleston v. United States*, 485 U.S. 681, 688–89 (1988) (“Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence”), citing S. Rep. No. 93-1277 at 24 (1974) (“It is anticipated that with respect to permissible uses for such evidence the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of time.”); H.R. Rep. No. 93-650, p. 7 (1973). As we discuss below, some of the proposed amendments likely would be perceived as putting a thumb on the scale in favor of non-admissibility. If Congress perceives the amendments in that way, we may unwittingly encourage Congress to more actively engage in the rulemaking process in ways that ultimately undermine the Rules Enabling Act.

I. Proposal A: Requiring a Showing that the Non-Character Purpose Does Not Proceed through a Propensity Inference.

This proposal derives from the premise that the courts of appeal are divided in the way they approach 404(b) evidence and the analytical framework they apply. Your memorandum notes as examples the Seventh Circuit's opinion in *Gomez* and the Third Circuit's opinion in *Caldwell*. The Department has formally taken the position in the Supreme Court that these decisions do not constitute a circuit split, nor is the Court's intervention necessary to settle what it means to be a "rule of inclusion." In a case arising in the Eighth Circuit, for example, appellees argued in a petition for certiorari that a general circuit split existed with respect to whether Rule 404(b) permits the use of propensity inferences to support the relevance of the prior-act evidence for a non-propensity purpose. In opposing the petition, the Solicitor General acknowledged the *Gomez/Caldwell* decisions, but argued that those decisions neither changed 404(b) nor created a circuit split:

"Some courts of appeals recently have emphasized that the proponent of the evidence should specify how the other-act evidence is relevant to an issue in the case without relying on a prohibited propensity inference. *See, e.g., United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014) (en banc) ("[T]he district court should not just ask whether the proposed other-act evidence is relevant to a non-propensity purpose but how exactly the evidence is relevant to that purpose -- or more specifically, how the evidence is relevant without relying on a propensity inference."); *Caldwell*, 760 F.3d at 276-277 ("In proffering such evidence, the government must explain how it fits into a chain of inferences -- a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference.") (Citation omitted). **That approach ensures that the proffered evidence is offered for a permissible purpose. . . . But no disagreement exists on the underlying principle that the relevance of the prior-act evidence cannot be based on a propensity inference**, and this Court's intervention is not needed to emphasize that already-established point."

Curtis Adams v. United States, 2016 WL 4540212 (SGBRIEFS), *cert denied* 136 S. Ct. 2449 (2016) (emphasis added) (court of appeals held the admission of prior gun possession convictions to be error, but harmless in light of the other evidence).

We believe, therefore, that the rule itself is clear and regularly applied by courts without any resulting unfairness. It is true that some circuits have noted the need for courts to remain vigilant in applying the rule and holding the government to its burden to demonstrate a non-propensity purpose. But even these circuits understand that the application of facts to the rule can be nuanced. The Third Circuit, for example, recognizes that there are cases where properly admitted 404(b) evidence could also be said to show propensity. *See, e.g., United States v. Green*, 617 F.3d 233, 244 (3d Cir. 2010). But that alone does not make the evidence inadmissible. Take the example of the classic 404(b) purpose of intent: The defendant is charged with filing a false tax return that omitted \$100,000 in gambling winnings. His defense is that he simply forgot about the income, and had no intent to endorse a false return. The government presents evidence that two years earlier, the defendant did the same thing, and at the time, told the complicit accountant who

prepared the return, “I never report my gambling winnings because there is no paper trail of these winnings and the government has no way to prove I received the money.” That is obviously proof of intent. Yet, the same evidence could also be used to show propensity – he did it before, and he did it again. The evidence, however, is admissible. In *Green*, Judge Smith made this clear, explaining that Rule 404(b) provides that “evidence of other wrongful acts was admissible so long as it was not introduced *solely* to prove criminal propensity.” *United States v. Green*, 617 F.3d at 244 (emphasis in original). Any resulting concern is ameliorated by Rule 403 balancing and a proper jury instruction, advising the jury of the limited purpose for which the evidence is relevant, and directing the jury not to draw and rely on an inference of propensity. The key is that, while some evidence may have dual purposes, the government must be able to articulate the non-propensity purpose, an analysis that already occurs under the existing rule.

Although not the stated intent, the proposed amendments could easily change the substance of the law, leading to the exclusion of evidence that should be admitted. For example, by adding the phrase “the probative value may not depend on a propensity inference” into the section of the rule that identifies proper purposes, a court will be left to wonder how that phrase differs from what the rule currently requires and what exactly it means. Subsection (1) prohibiting propensity use already says that other-act evidence is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. Thus, the new language is either entirely redundant, or it must mean something more: that the evidence must never be susceptible to a propensity use even if the actual purpose for which it is being offered is for a proper purpose. That is clearly not the law.

Take another example of how the proposed amendment could be used to deny otherwise admissible evidence: The defendant is charged with distributing cocaine, but claims that he did not know that the substance he was carrying was cocaine. The prosecution wants to introduce a prior incident where the defendant had knowingly engaged in cocaine distribution. The evidence is probative of the defendant’s knowledge of what cocaine is, and that on the occasion charged in the indictment, he knew it was cocaine because he had prior experiences dealing with cocaine. That evidence, however, could also be used to show propensity. But because the government is *not* using it to show propensity, but for a proper purpose, *i.e.*, knowledge, the evidence should come in, subject to Rule 403 balancing and an appropriate instruction.

If the proposed amendment is not intended to put a thumb on the scale, but simply as a reminder to courts to correctly apply the rule, then it is redundant and unnecessary, and susceptible to misinterpretation. In legislating of any kind, words are assumed to have meaning – otherwise, why add them. The likely impact of the amendment will be for courts to exclude evidence that should be admitted. These decisions, moreover, will rarely if ever be subject to review, given that the government cannot appeal from an acquittal. If the intent of the amendment is in fact to exclude more evidence, then that would be a significant public policy decision – arguably one contrary to the original intent of the rule -- that should be subjected to substantially more study and debate.

As some courts have pointed out, *see, e.g., Leon v. FedEx Ground Package Sys., Inc.*, 313 F.R.D. 615, 625 (D.N.M. 2016), the tests that circuit courts employ for analyzing 404(b)

evidence may differ slightly, but they are all constrained by the analytical framework set forth by the Supreme Court. *See Huddleston v. United States*, 485 U.S. 681 (1988). In *Huddleston*, the Supreme Court outlined a rules-based approach to ensuring fairness with respect to other-act evidence:

“We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.”

Huddleston, 485 U.S. at 691–92.

We believe district courts are well equipped to correctly apply *Huddleston*, that they get it right most of the time, and when they do not, appellate courts do not hesitate to find error. Moreover, to the extent the overriding concern is to make uniform the approach embraced by the Seventh and Third Circuits, courts on their own are examining those decisions. The Eighth Circuit, for example, has determined that, at least in drug possession cases, the district courts should probe specifically into the non-propensity purpose for which the evidence is offered. Before admitting prior act evidence, “the district court should ask why the government seeks to admit it” and how the evidence is relevant to show knowledge and intent. “Simply asserting” that the evidence is relevant to knowledge or intent “is not enough.” Rather, a court must “ask why the government seeks to admit it” and “if the only answer to these questions is that [the] prior conviction (*i.e.*, wrongdoing) shows [that the defendant] intended to commit another wrongdoing[,] . . . then the evidence shows nothing more than criminal propensity and under Rule 404(b)(1) is inadmissible.” *United States v. Turner*, 781 F.3d 374, 390-91 (8th Cir.), cert denied 136 S. Ct. 208, 136 S. Ct. 280, 136 S. Ct. 493 (2015); *see also See United States v. Scott*, 677 F.3d 72, 79 (2d Cir. 2012) (cautioning against “propensity evidence in sheep’s clothing”).

Defense lawyers are also keenly aware of the *Gomez* and *Caldwell* decisions, and are arguing for their analysis to be applied in other circuits. *See, e.g., United States v. Burnett*, 827 F.3d 1109 (D.C. Cir. 2016) (acknowledging but not needing to address defense argument that *Gomez/Caldwell* analysis should apply). Rather than amend the rule, the committee should wait to see whether other circuits adopt the *Gomez/Caldwell* approach. Given that defense motions and cert petitions are already framing the issue, it is quite likely we will see additional decisions. Indeed, in the time it would take to adopt an amendment, many more circuits may examine and opine on their analytical approaches to prior-act evidence.

In addition to continuing to follow the trend in the courts, there are other ways to ensure rigor in enforcing the rules other than a rule change primarily designed to tell judges to follow

the rule. Judicial education, for example, including for new judges, can instruct courts on the analytical steps they should employ when considering the admission of 404(b) evidence. Amending the rule, however, will only engender confusion and lead to unintended consequences, in addition to throwing decades of case law into question.

II. Proposal B: Conditioning Admissibility of Other Act Evidence on the Defendant Actively Contesting the Purpose for Which the Evidence is Offered, Beyond Pleading Not Guilty.

Your memorandum suggests that courts are split as to whether 404(b) evidence can be admitted when the defendant has not actively contested the issue on which the evidence is offered (i.e., there is a stipulation). The memorandum proposes for the committee's consideration an amendment that would limit 404(b) evidence to situations where the proffered purpose has been actively contested by the opponent of the evidence.

As a practical matter, we believe such a proposal is unworkable, and, as your memorandum notes, it conflicts with the Supreme Court's language in *Old Chief v. United States*, 519 U.S. 172 (1997). With respect to the practical application, we should keep in mind the obvious but important point that in a criminal case, the government bears the burden of proof. Criminal defendants frequently formulate their defense as the trial progresses. The government cannot wait until the defendant formally challenges an element to the offense before deciding to introduce 404(b) evidence. In addition, an "active contest" requirement would be difficult to police, add unnecessary disputes to trials, and provide opportunities for gamesmanship. Defense counsel, for example, could wait and argue (or subtly allude to lack of evidence on) the elements of the crime in closing argument when it is too late for the government to admit the 404(b) evidence. Where the government has non-propensity 404(b) evidence probative of an element of the offense, it should be permitted to introduce such evidence, absent a Rule 403 analysis showing that the evidence is more prejudicial than probative.

The proposed amendment, moreover, would apply to all cases, including specific intent crimes. Even the Seventh Circuit has "repeatedly rejected a similar rule for specific-intent crimes because in this class of cases 'intent is automatically at issue.'" *Gomez*, 763 F.3d at 858-59. In tax cases, for example, where the defendant rarely contests solely the *actus reus*, the proposed change would work particular havoc, as defense attorneys would routinely seek to use the rule to preclude the admission of evidence (i.e., past compliance or non-compliance with tax requirements to show knowledge and intent) that all courts have recognized is central to this type of prosecution.

The Supreme Court, in *Old Chief*, stressed that the government must be free to prove its case by way of evidence. Thus, "if there were a justification for receiving evidence of the nature of prior acts on some issue other than status (i.e., to prove 'motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident,' Fed. Rule Evid. 404(b)), **Rule 404(b) guarantees the opportunity to seek its admission.**" *Old Chief*, 519 U.S. at 190. *See also Huddleston*, 485 U.S. at 689 (emphasis added). Although one can argue that

this language is dictum, it suggests at a minimum that the Court would not approve of limiting the government's ability to offer relevant evidence with respect to the charged offense, subject to ordinary Rule 403 balancing.

The main concern animating an "active contest" amendment seems to be that the admission of other-act evidence as to a purportedly uncontested fact would be unduly prejudicial to the defendant. But the concern for undue prejudice is exactly what Rule 403 is designed to address. There is no reason to amend Rule 404(b) to inject a new term – "actively contested" – that is itself vague, undefined and likely to engender litigation. That is especially true given the government's burden of proof, the case-by-case, factual nature of the inquiry, and the fact that the Rules are already fully equipped to handle issues of alleged undue prejudice.

III. Proposal C: Limiting the "Inextricably Intertwined" Doctrine

This proposal arises from the concern that courts do not uniformly apply the "inextricably intertwined" doctrine, such that other acts are found to be part of the charged crime when they arguably should come within 404(b). Your memorandum recognizes, correctly, that there will always be line-drawing in this area, and that to the extent a problem exists, it is not likely to be solved through rule-making.

We believe, moreover, that there is not a serious problem applying this doctrine. Notwithstanding decisions in the D.C., Third and Seventh Circuits, there remains a well-established, existing body of case law on the "inextricably intertwined" doctrine that is routinely applied without confusion. *See, e.g., United States v. Gobbi*, 471 F.3d 302, 311 (1st Cir. 2006) (citing *United States v. Epstein*, 426 F.3d 431, 438-39 (1st Cir. 2005)); *United States v. Kaiser*, 609 F.3d 556, 570 (2d Cir. 2010); *United States v. Lighty*, 616 F.3d 321, 352 (4th Cir. 2010); *United States v. Randall*, 887 F.2d 1262, 1268 (5th Cir. 1989); *United States v. Rice*, 607 F.3d 133, 141 (5th Cir. 2010); *United States v. Roberts*, 933 F.2d 517, 520 (7th Cir. 1991); *United States v. Nguyen*, 608 F.3d 368, 377 (8th Cir. 2010); *United States v. Ford*, 613 F.3d 1263, 1267 (10th Cir. 2010); *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007); *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000). *But see United States v. Allen*, 960 F.2d 1055, 1058 (D.C. Cir. 1992); *United States v. Glover*, 736 F.3d 509, 517 (D.C. Cir. 2013); *United States v. Green*, 617 F.3d 233, 249-50 (3d Cir. 2010); *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010).

The proposed amendment is unlikely to improve the existing rule, and will inject more confusion with respect to decades of precedent applying the doctrine. Given that the application of the doctrine is entirely dependent on the particular facts of any given case, uniformity will never be achieved regardless of how the doctrine is defined. There will always be line-drawing, and courts will still apply Rule 403 to avoid undue prejudice. In addition, from a practical perspective, prosecutors typically err on the side of providing 404(b) notice for evidence that falls under this doctrine. No prosecutor wants to risk evidence not being admitted for failure to provide notice if the court finds the proffered evidence not to be inextricably intertwined with the charged crime. Accordingly, we believe this proposed amendment is unnecessary.

IV. Proposal D: Amendments to the Notice Requirement

Your memorandum makes a number of suggestions with respect to the advance notice courts should require to permit a fair opportunity to contest the admission of 404(b) evidence. As we have already noted, the government must satisfy all elements of the charged crime, and often knows only a limited amount about what the defense will be. As a result, it can be difficult to know in advance how the defense will respond to the government's case, which can necessitate last minute changes and additions. The current reasonableness standard affords courts the necessary flexibility to respond to case specific needs.

The memorandum notes that the notice provisions would run both directions, and thus defense lawyers seeking to introduce 404(b) evidence would be similarly bound by the additional requirements. Realistically, however, criminal defendants rarely offer 404(b) evidence. And, in any event, courts do not often punish criminal defendants for their counsel's violation of the rules.

A. More Specificity of the Evidence to be Proffered

It was suggested at the committee's last meeting that the rule's requirement to provide notice of the "general nature" of the evidence did not always give defense lawyers important information, such as the name of the witness and the facts and circumstances of the proposed testimony. The argument is that this information is needed in advance in order to know whether the government is relying on a propensity inference.

We do not believe, however, that there is a demonstrated need to change the rule from "general nature" to something more specific. The cases cited in the memorandum do not demonstrate that there exists any systemic problem, that courts are struggling to apply the "general nature" provision, or that injustice has resulted due to the generality of the notice being provided. Rather, we read the cases to demonstrate the need for flexibility to adapt to the factual circumstances presented in each case.

Take for example, *United States v. Watson*, 409 F.3d 458 (D.C. Cir. 2005), *as amended on reh'g* (Sept. 14, 2005). In that case, the appellant complained about the timing of the government's notice (the morning of voir dire), and its lack of specificity with respect to the name of the witness. But the reason for the late notice with respect to the name was because, due to security concerns for a cooperating witness, the prosecutor could not disclose the witness' identity until the day of trial. With respect to the timing, the court found that, even if inadequate, there was no prejudice, and therefore no need to determine whether the timing equated to a failure of notice. With respect to the witness' name, the court found that defense counsel had "specifically declared at trial that introduction of the evidence at such a late time did not impede the defense" *United States v. Watson*, 409 F.3d at 466. Rather than demonstrate a problem with the rule, this case shows the case specific and fact specific analysis that judges employ to ensure fairness, which might include not providing a witness' name prior to trial in order to protect that witness' safety.

United States v. Kern, 12 F.3d 122 (8th Cir. 1993), similarly does not support the notion that courts are overly-lenient with respect to the content of 404(b) notices. In *Kern*, the government explained fourteen days before trial that it may present prior evidence of local robberies, but that it did not yet have the information from the local government. On the same day that the government obtained the state reports on the prior robberies, a week before trial, it provided the reports to the defense, with all its particulars. Thus, the court in that case did not hold that the government's statement that it "might use evidence from some local robberies" alone satisfied 404(b)'s general notice requirement. Rather, the court held that the earlier notice, coupled with production of the state reports a week before trial when the government received the reports, satisfied the government's obligation. *See Kern*, 12 F.3d at 124.

United States v. Schoeneman, 893 F. Supp. 820, 823 (N.D. Ill. 1995), similarly is not indicative of a notice problem. The court in that case was faced with a routine discovery motion from the defense that demanded a number of items, including with respect to 404(b) evidence, "the dates, times, places and persons involved in such acts; the statements of each participant; any documents that contain evidence of such other crimes or acts; and a statement of the issue or issues to which the government believes such other crimes or acts of evidence may relate." The government in response stated that it would give appropriate notice of 404(b) evidence, but it objected to the detail requested. The court correctly concluded that the defendant's demand was more expansive than the rule required. The court did not, however, hold that "dates, times, places and persons" need not be provided as part of the general nature of 404(b) evidence. It held simply that the much more expansive demand of the defendant went beyond what the rule required. *See Schoeneman*, 893 F. Supp. at 823.

In the absence of a demonstrated problem, we see no need to upset current case law, and, on the flip side, we see substantial merit to allowing district courts to retain the flexibility to make case-by-case determinations without adding another layer of litigation.

B. Specifying the Time by Which 404(b) Notice Must Be Provided

For reasons similar to those warranting the retention of the general notice provision, we do not see a need to specify a time certain for 404(b) notice, such as fourteen days. We have not seen evidence that courts are failing to respond to the defendants' need for advance notice of 404(b) evidence, or that courts are otherwise failing to apply the current reasonableness standard in a just way. The rule uses a reasonableness standard in order to ensure flexibility to account for the very fact specific circumstances that come before district judges. *See, e.g., United States v. White*, 816 F.3d 976, 983 (11th Cir. 2016) (Rule 404(b)'s notice standard is flexible because "[w]hat constitutes a reasonable ... disclosure will depend largely on the circumstances of each case.") (*citing United States v. Green*, 275 F.3d 694, 701 (8th Cir. 2001)).

While the proposed amendment allows courts to excuse the fourteen day requirement for good cause, building a default requirement into the rule ignores the realities of case development and trial preparation, both of which can be fluid. This change would inevitably lead to additional, and unnecessary, litigation concerning whether the government has shown sufficient good cause in the event that additional evidence comes to light less than fourteen days prior to

trial or the government slightly alters its theory of the case. Without a concrete demonstration that the “reasonableness” standard is resulting in injustice, this rule change is unwarranted.

The change is also unnecessary for the additional reason that courts can and do issue their own pre-trial orders setting deadlines, including requirements to provide 404(b) notice within a time certain before trial. Whether the circumstances require in any particular case that the court deviate from that time frame is an issue best left for the trial court in individual cases.

C. Extending 404(b) Notice Requirements to Civil Cases

The Department opposes the extension of 404(b) evidence to civil cases, where no problem or need has ever been demonstrated. Such an extension would be something entirely new in civil practice, for no compelling reason. Discovery in civil cases ensures that the parties are on notice of potential 404(b) evidence well in advance of trial, and admission of 404(b) evidence is virtually always addressed in pre-trial conferences and litigated via early motions *in limine*.

D. Deletion of the Demand Requirement

In 2015, the committee unanimously agreed to eliminate the words “On request by a defendant” from Rule 404(b)(2)’s notice provision. We continue to support this change to the notice provision.

V. Proposal E: Deletion of the Proper Purposes Language in Rule 404(b)(2)

As your memorandum notes, the proper purpose language is cited in literally thousands of cases, and deleting it will be perceived by courts as affecting a substantial and substantive change in the rule. That will inevitably engender confusion and result in courts rejecting probative evidence that should be admitted.

The Department has agreed with the Third Circuit in *Caldwell* that “the term “inclusionary” refers to the Rule’s non-exclusive list of non-propensity purposes of other-act evidence. 760 F.3d at 275-276 (“By introducing the list of permissible purposes with the words ‘such as,’ the drafters [of Rule 404(b)] made clear that the list was not exclusive or otherwise limited to a strictly defined class.”) *Curtis Adams v. United States, supra*. We do not agree, however, that the term “inclusionary” means that courts are considering other-act evidence as presumptively admissible under Rule 404(b) without weighing its relevance to a non-propensity purpose. *See, e.g., United States v. Basham*, 561 F.3d 302, 326 (4th Cir. 2009); *United States v. Mosquere-Murillo*, 153 F. Supp. 3d 130, 177-78 (D.D.C. 2015). Indeed, relevant evidence that is not offered for a propensity purpose and which is not unduly prejudicial *is* presumptively admissible. Accordingly, we do not support what would be a very dramatic change to this oft-cited part of the rule.

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U.S. Department of Justice

Washington, DC 20530

April 24, 2018

Daniel J. Capra, Reporter
Advisory Committee on Evidence Rules
Fordham University College of Law
Lincoln Center, 150 West 62nd Street
New York, NY 10023-7485

Re: FRE 404(b), 609(a)(1) and 106

Dear Dan,

I write to provide you with the Department's views and suggestions for the forthcoming committee meeting. As you know, I will not be able to attend the meeting on Friday, but the Department will be well represented and prepared to cast votes on all pending action items. I have not attempted to provide written views on the entire agenda, but have instead limited these comments to your memoranda setting forth possible amendments to Federal Rules of Evidence 404(b), 609(a) and 106.

FRE 404(b). We addressed 404(b) at length in prior correspondence, which I attach again here. As we explained there, we believe that trial courts are best equipped to do the fact-specific analysis that is required under 404(b), and do in fact carefully analyze whether the probative value of bad act evidence outweighs undue prejudice, even if the decisional law does not on its face reflect the depth and care of the analysis below.

In our view, a rule that requires that "every link in the chain" to be free of propensity is not workable. Cases in which the bad act is being used to show lack of coincidence, for example, could also be read as proceeding through propensity. *See, e.g., United States v. Henthorn*, 864 F.3d 1241 (10th Cir. 2017) (prior incidents in which defendant's wife was killed or injured in circumstances similar to charged incident in which wife fell on a remote hiking trail were admissible under 404(b) to show intent, motive, plan, or lack of accident). But that alone does not make the evidence inadmissible. In such a case, where evidence is adduced for a non-propensity purpose (showing lack of accident), one could argue that a "link in the chain" depends in some way on propensity. In *Henthorn*, where the government could properly show lack of accident through evidence of prior incidents in which the defendant's wife died under similar circumstances, one could also argue that such evidence demonstrates that the defendant has a propensity to kill his wives.

Take another example. If one throws a baseball through a car window on three occasions, and is charged with the third, the prior incidents demonstrate absence of mistake, but

they also may show a propensity to throw baseballs through car windows. The past incidents are highly relevant to disproving the defendant's errant-throw defense, however, and not in an unfair way. It is not possible for the prosecution to establish that no link in that chain proceeds through propensity; it is not even clear what exactly such an exercise would mean.

We also believe it unnecessary to amend the rule to address the "inextricably intertwined" doctrine by adding a "direct" or "indirect" dichotomy. Determining if an incident is part of the charged crime or a prior bad act is a fact-dependent judgment that the courts are performing now, and substituting the terminology will make no difference. Line-drawing will still be required. And we would oppose upsetting current practice by applying 404(b) to civil cases, where civil discovery provides ample advance notice and no problem has been identified.

We similarly cannot agree to the suggestion that the Rule employ a reverse balancing test. A reverse balancing test would undo the policy choice that Congress made and replace it with a standard that will result in the rejection of more relevant evidence. Such a contravention of Congress's policy choice risks triggering a reaction from that body.

We can agree, however, to some change in the notice provision that may assuage concerns about the court and opposing party having sufficient information regarding the government's justification for seeking introduction of the prior bad act evidence. We propose the following variant on the notice amendment presented in the agenda materials:

(3) Notice in a Criminal Case. ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

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

(B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence and the reasoning supporting the purpose; and

(C) do so in writing before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

The differences between this version and the agenda book's proposal are that it: (1) rejects application of the notice provision to civil cases; (2) combines subsections B and C and deletes the word "chain" for the reasons discussed above; and (3) accepts the requirement for a writing but rejects the rigidity of the requirement of notice 14 days prior to trial. Trial courts regularly set their own schedules in a pre-trial order, and there is no need for an arbitrary time frame that inevitably will be adjusted to the needs of each particular case. In addition, this proposal retains the "reasonable" notice standard. We are not persuaded that there is a demonstrated need to change the rule from "general nature" to something more specific, and the current memorandum arguing for such a change relies on cases that we previously distinguished. *See, e.g., United States v. Watson*, 409 F.3d 458 (D.C. Cir. 2005), *as amended on reh'g* (Sept. 14, 2005); *United States v. Kern*, 12 F.3d 122 (8th Cir. 1993); *United States v. Schoeneman*, 893 F. Supp. 820, 823 (N.D. Ill. 1995). Instead, we support a flexible standard to account for the fact

specific circumstances that come before district judges. *See, e.g., United States v. White*, 816 F.3d 976, 983 (11th Cir. 2016) (Rule 404(b)'s notice standard is flexible because "[w]hat constitutes a reasonable ... disclosure will depend largely on the circumstances of each case.") (citing *United States v. Green*, 275 F.3d 694, 701 (8th Cir. 2001)).

FRE 609(a)(1). The Committee determined at the last meeting that three principles would govern the discussion of this proposal going forward:

- any amendment would not be on account of restorative justice, but because of an identified problem with the rule or a conflict that needs resolution;
- consideration of any amendment should take into account the hard-fought compromise in Congress that resulted in FRE 609(a)(1); and
- any amendment must be justified by a showing that the current balancing test was not being applied fairly or in a manner intended by Congress.

We do not believe that these criteria have been satisfied. In addition, 609(a)(1) is clearly important to retain. Whereas Rule 609(a)(2) mandates the admission of convictions that the "court can readily determine that establishing the elements of the crime required proving – or the witness admitting – a dishonest act or false statement," Rule 609(a)(1) authorizes judicial discretion to admit certain convictions that bear on a witness's veracity but do not otherwise clearly satisfy Rule 609(a)(2). In so doing, the current form of Rule 609(a)(1) requires a judge to weigh the evidence's probative value for truthfulness against the risk of prejudice, tipping the balance in favor of exclusion when the witness is a criminal defendant.

The flexibility afforded to judges to engage in the Rule 609(a)(1) analysis is essential because convictions that are probative of trustworthiness are not limited to those that are automatically admissible pursuant to Rule 609(a)(2). For example, in *United States v. Bidegary*, a tax fraud prosecution, the court affirmed the admission of defendant's prior conviction for the sale of a security without a permit under Rule 609(a)(1) because it was "indicative of dishonesty and deception." 39 F. App'x 506, 2002 WL 530545, at *3 (9th Cir. 2002). Likewise, in *United States v. Gongora*, another tax fraud prosecution, the government attempted to impeach the defendant with evidence of a prior grand theft arising out of his presentation of a forged bank check. 2013 WL 12219169, at *2 (C.D. Cal. 2013). While this crime was not automatically admissible under Rule 609(a)(2), the court admitted the prior conviction under Rule 609(a)(1), because "its probative value as impeachment evidence" outweighed its prejudicial effect. *Id.*; see also *United States v. Glenn*, 2014 WL 4095842 (M.D. Tenn. 2014) (noting that prior state convictions of defrauding the government and embezzlement potentially qualified for automatic admission under Rule 609(a)(2) but could not order them admitted on that basis because it lacked sufficient information about the underlying state offenses).

If the proposed changes to Rule 609(a)(1) were adopted, judges would be deprived of the discretion Congress deemed necessary for them to exercise in the examples cited above. Moreover, because many convictions which bear on trustworthiness do not "readily" satisfy 609(a)(2), the proposed changes to Rule 609(a)(1) would result in the unwarranted categorical under-inclusion of pertinent evidence. And, perversely, the proposed amendments would force

judges either to automatically admit the evidence under Rule 609(a)(2) without regard to its prejudicial effect or exclude evidence without regard to its probative value to the witness's credibility. If the goal is to permit the jury to consider, in appropriate circumstances, evidence that bears on a witness's character for truthfulness, Rule 609(a)(1) is a crucial means to that end. If the goal is instead to eliminate such evidence in order to affect a philosophical change against admitting prior convictions bearing on truthfulness, we would reject such a change given both the decision not to rely on a restorative justice rationale to amend the rule, and given the extensive debate and policy choices made by Congress.

FRE 106. The materials currently propose the addition of both oral statements to Rule 106's coverage, and additional language establishing a degree of admissibility for completing statements that would otherwise be inadmissible hearsay. We do not support the inclusion of oral statements. The case law does not establish that injustice is occurring as a result of oral statements not being covered, and the advisory committee previously rejected the inclusion of oral statements for "practical reasons." Those practical reasons are as sound today as they were at the time the issue was last considered. Unlike a written or recorded statement, there is no way for a court to know whether a purported oral statement was ever made, or whether it was part of the same conversation, or whether the statement was made but is unreliable. How does the court avoid having to excuse the jury for a mini-trial to determine whether the alleged statement has sufficient indicia of reliability? We believe that the inclusion of oral statements would create unnecessary chaos and is inadvisable.

With respect to the proposal to add an express hearsay exception, we think the question could use further study. It is not entirely clear that a real need exists to make a change. In some of the examples cited in support of a rule change, the courts did not rest on the inadmissibility of the completing statement, but rather on the fact that initial statement did not meet the requirements for Rule 106 in the first place. *See, e.g., United States v. Mitchell*, 502 F.3d 931, 965 (9th Cir. 2007) (denying admission of completing statements because "[t]he inculpatory statements elicited on direct examination of Agents Kirk and Duncan were not taken out of context or otherwise distorted" and noting in dicta that in any event Rule 106 does not render admissible otherwise inadmissible hearsay).

In *United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014), the statement at issue was a video that the defendant posted with inculpatory statements and uploaded to a website. After users of the website posted comments critical of the defendant, the defendant responded with explanatory remarks about his beliefs. The defendant sought to introduce his otherwise inadmissible exculpatory comments based on the contention that the video itself was misleading without the inclusion of his follow-up comments. The Fourth Circuit affirmed the district court's denial of the defendant's Rule 106 motion, on the grounds that the comments were inadmissible hearsay. That result was entirely correct because the comments were not part of the initial video. They were instead added at a later time to the electronic platform. Accordingly, the video itself was not misleading, Rule 106 did not apply, and the court properly excluded the comments as inadmissible hearsay.

Should the committee decide to add an express reference to a hearsay exception, we would offer a proposal to ensure that the amendment does not encourage abuse, and that rule

remains applicable only in circumstances where a statement is found to be misleading. As Judge Grimm points out in his *Bailey* opinion, “Rule 106 should never come into play unless misleading evidence has been introduced that requires clarification or explanation—otherwise there is no unfairness that needs correction.” *See also* Reporter’s Rule 106 Memo at 2 (“the trigger of completeness [must be] met – meaning that the statement offered by the government is misleading, and the completing portion would provide a more accurate indication of what the defendant said.”); *id.* at 6 (“These cases show that Rule 106 is a narrow rule.”).

The word “misleading,” however, does not appear in Rule 106, and courts may not necessarily limit application of Rule 106 to cases where a statement is found to be misleading. *See, e.g., United States v. Coplan*, 703 F.3d 46, 84–85 (2d Cir. 2012) (“The so-called ‘rule of completeness’ provides that ‘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” (internal quotation marks and citation omitted)).

An amendment to ensure that Rule 106 is applied only in cases where the statement offered is determined to be misleading might look something like this:

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement **that [the court determines] is misleading**¹, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement by the same person — that in fairness ought to be considered at the same time, [even if it would otherwise be inadmissible under the rule against hearsay].

Thank you for your consideration of our views, and we look forward to continuing the conversation with respect to this and the other proposals on the agenda.

Sincerely yours,



Elizabeth J. Shapiro

cc: Hon. Debra Livingston

¹ Stylists may decide that the words “the court determines” are unnecessary, and they are therefore bracketed in the text.